Appraisals and the standards of admissibility in Washington courts

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One of the areas causing confusion among appraisers is the issue of admissibility of an appraisal in those relatively rare instances where a case actually goes to trial. Since the majority of our states along with the federal courts have adopted what is known as the Daubert test, most attention in our Appraisal Institute course material understandably focuses on this standard and its four-part inquiry. Washington state, however, is among the minority of states that still uses the Frye test, and the difference between Frye and Daubert can lead to some confusion by appraisers in trying to determine the applicability of rules governing their report as admissible evidence. This brief article will discuss the distinction between the two standards, and attempt to clarify the applicable rule of evidence in Washington.

In most of the litigation-related courses taught through the Appraisal Institute the topic of evidence and its admissibility is part of the material. The course material usually distinguishes between the two different court-established standards that, coupled with Evidence Rule 702, form the basis of admissibility in all state and federal courts. The two cases are Frye v. United States, 293 F.1013 (D.C. Cir. 1923) and Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 570 (1993). A third case, Kumho Tire Co. v. Carmichael 526 U.S. 137 (1999) expands on Daubert and clarifies whether or not non-scientific evidence merits a different standard. General Electric Co. v. Joiner 522 U.S. 136 (1997) held that a district court judge may exclude expert testimony when there are gaps between the evidence relied on by an expert and that person's conclusion, and that an abuse-of-discretion standard of review is the proper standard for appellate courts to use in reviewing a trial court's decision of whether it should admit expert testimony. Where challenges to evidence are made based on prior court rulings, an appellate court will examine the challenge *de novo,* or anew, whereas challenge to an evidence rule is conducted under the abuse of discretion standard, thus requiring a detailing of what the trial court did that constitutes the abuse if indeed it exists.

First the Rule of Evidence

In 2011, Rule 702 was amended to make the language clearer. The rule now reads:

FEDERAL RULE 702. TESTIMONY BY EXPERT WITNESSES

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

(a) The expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

(b) The testimony is based on sufficient facts or data;

(c) The testimony is the product of reliable principles and methods; and

(d) The expert has reliably applied the principles and methods to the facts of the case.

Washington's rule is a little more straightforward and says: "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 .

The key provisions of the Rules governing admission of expert testimony in court are *scientific knowledge*, meaning that the testimony must be scientific in nature and must be grounded in "knowledge." Second, the scientific knowledge must *assist the trier of fact* in understanding the evidence or determining a fact in issue in the case. To be helpful to the trier of fact, there must be a "valid scientific connection to the pertinent inquiry as a prerequisite to admissibility." Third, the

testimony must be the product of reliable principles and methods, and finally the expert has reliably applied the principles and methods to the facts of the case. Rules expressly provide that the judge will make the threshold determination regarding whether certain scientific knowledge would indeed assist the trier of fact in the manner contemplated by Rule 702.

On to case law application

In March the Washington Supreme Court issued an opinion in L.M. v. Hamilton, 193 Wn.2d 113 | 436 P.3d 803 where the distinctions between Frye and Daubert were articulated. In this decision the Frye standard was described in detail as to its mechanics and application. Justice Gordon-McCloud wrote for the majority in affirming that under Frye the trial court must exclude evidence that is not based on generally accepted science, and under ER 702, the trial court must exclude testimony from unqualified experts and testimony that is unhelpful to the jury. Testimony is unhelpful to the jury if it is unreliable or lacks an adequate foundation.

The Frye test provides that evidence could be admitted in court only if "the thing from which the deduction is made" is "sufficiently established to have gained general acceptance in the particular field in which it belongs." By contrast, Daubert established a four-part test that held that the Federal Rules of Evidence superseded Frye as the standard for admissibility of expert evidence in federal and most state courts. Those four parts turn on whether something has been tested, whether an idea has been subjected to scientific peer review or published in scientific journals, the rate of error involved in the technique, and even general acceptance, among other things. It focuses on methodology and principles, not the ultimate conclusions generated. In cases that apply either standard, the court acts in a gatekeeping function in keeping out "unreliable, untested, or junk science." Anderson v. Akzo Nobel Coatings, Inc., 172 Wn.2d 593, 603, 260 P.3d 857 (2011) citing Karl B. Tegland, Washington Practice: Evidence Law & Practice § 702.18, at 81 (5th ed. 2007). Anderson dealt with a case of birth defects that were alleged to have been caused by exposure to certain solvents in the paint present where the fetus was during pregnancy. In Anderson the Court held that trial courts should admit evidence under Frye if the scientific community generally accepts the science underlying an expert's conclusion; the scientific community does not also have to generally accept the expert's theories.

Frye requires experts to base their conclusions on generally accepted science. The relevant scientific community must generally accept both "the underlying theory" and the "techniques, experiments, or studies" applying that theory. State v. Gregory, 158 Wn.2d 759, 830, 147 P.3d 1201 (2006) quoting State v. Riker, 123 Wn.2d 351, 359, 869 P.2d 43 (1994). The techniques, experiments, or studies must be "capable of producing reliable results." Id. The scientific community does not have to be unanimous and the court should exclude the expert's opinion only if there is a significant dispute among qualified scientists. It is important to note that Frye does not require every deduction drawn from generally accepted theories to be generally accepted, and the application of accepted techniques to reach novel conclusions does not raise Frye concerns. Other evidentiary requirements provide additional protections from deductions that are mere speculation. But "(o)nce a methodology is accepted in the scientific community, then application of the science to a particular case is a matter of weight and admissibility under ER 702" quoting Gregory, 158 Wn.2d at 829-30 (citing ER 702).

Is appraising a science such that scientific inquiry as to methods and techniques apply?

Lively debate has gone on as to whether appraising is a science or an art, and the question relative to this article is best left for another day. However, a widely held opinion worth considering is that real estate appraisal is an art that often uses methods and techniques that have ties to scientific foundation.

If calculus and other forms of mathematics can be defined as science, then the use of various methods and techniques of financial modeling along with other areas of valuation that applies the six functions of a dollar, may have its origins in the scientific analysis. But practitioners have refined their full range of skill sets to a form of art, and thus appraising can be most closely related to an art practiced in times at a scientific level. Indeed, in taking up the case in Kumho, the Supreme Court observed that the line between 'scientific' and 'technical' knowledge is not always clear. Kumho Tire offered a departure from Daubert's connection to science but the Court did not take up that offer, instead concluding that the difference between scientific and technical knowledge is beyond the grasp of the average juror, and therefore the four-part test in Daubert is applicable to all expert testimony proffered under Rule 702.

Conclusion

In the courtroom, the glare of scrutiny and level of exactitude often serve to illuminate opaque reasoning, and acceptance of established standards come forth in order for the analyst to have their opinions and reasoning survive the tests of both the court-established standards and ER 702. In Washington state, that standard was recently explained and clarified and remains rooted in the original Frye test.

Frye's application to appraisal theory and methodology may, but not necessarily does, relate to dissection of various areas of analysis. The court has held that requiring "general acceptance' of each discrete and ever more specific part of an expert opinion" would place "virtually all opinions based upon scientific data into "some part of the twilight zone." Other rules do bar deductions that are too speculative. Hamilton explains the Frye test that applies in Washington state, and reading Rule 702 conflates court-determined standards with legislative intention in providing some level of clarification for appraisers.