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# the legal investigator

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## 50 Shades of Gray

## Laws Governing Adoption Searches

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Using an investigative method that parallels Daubert and Frye standards, cases that courts use to determine whether an expert's testimony is scientifically valid, will elevate the value of the legal investigator's findings.

### CIVIL FOCUS | p.14

Find out what happens when an investigator is sued by the Pima County Attorney for making a public records request for the prosecutor's charging and sentencing data and why legal investigators need to push back.

### NALI RESOURCE | p.18

The National Institute of Justice, the Department of Commerce, OLES and NIST jointly published *The Biological Evidence Preservation Handbook: Best Practices for Evidence Handlers*, critical reading for any defense investigator.

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## ELEVATING INVESTIGATIONS USING

# DAUBERT AND FRYE STANDARDS



From trace evidence to timelines, and circumstantial evidence to witness statements, an 'Investigative Method' that parallels Daubert / Frye will elevate the value of the legal investigator's findings."

Daubert and Frye are the cases used by the courts to determine whether an expert's testimony is scientifically valid and based on accepted theories, reasoning and methodologies.

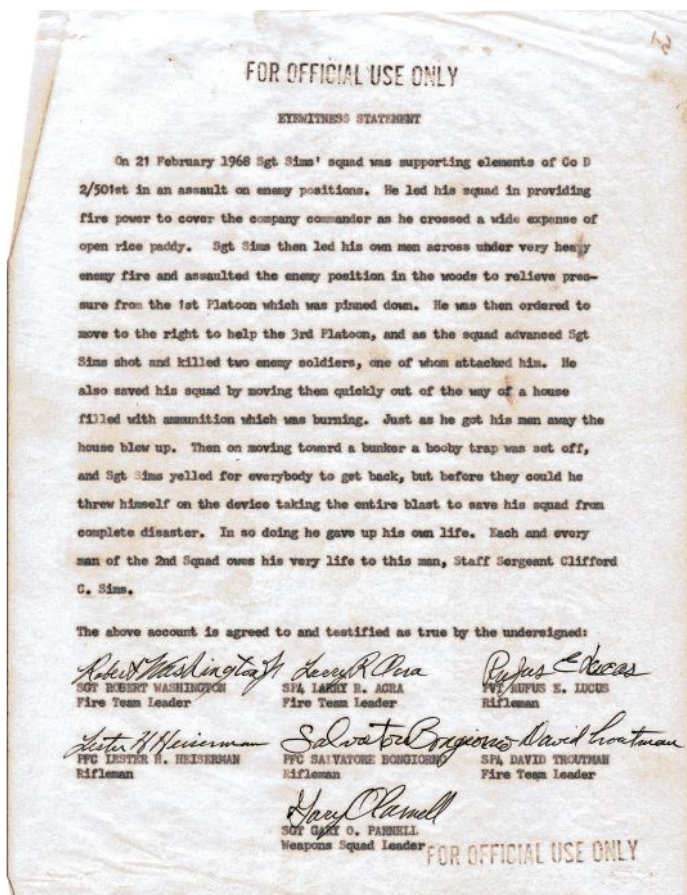
I propose that one way to increase the reliability and confidence of the work and testimony of non-expert legal investigators is to adapt the concepts of Daubert and Frye. Similar to applying Frye and Daubert to investigative reports and protocols, applying a form of the Scientific Method should also be a consideration. The Scientific Method is a step by step process from a theory to a proven or disproven conclusion.

### **Investigative and Report Methodology and Protocol**

Legal investigators — finders of fact — are tasked with having the knowledge to understand evidence, determine facts, have sufficient facts, use reliable investigative methods and rely on those investigative principles and methods to present the investigative conclusions — the facts of the case — to the client. This is, in essence, the process relied on for expert evidence and testimony.

An 'Investigative Method' (or non-scientific) could be adapted to read, "The principles





and empirical processes of discovery and demonstration considered characteristic of or necessary for legal investigation, generally involving the observation of information and facts, the formulation of a hypothesis concerning the information and facts, analysis to demonstrate the truth or falseness of the hypothesis, and a conclusion that validates or modifies the hypothesis." At any point that this method is inconclusive, the investigation would return to the point of discrepancy or invalidation. This methodology is also recommended when reviewing, and evaluating, the opposing party's discovery and disclosure.

Legal investigators have one task — to uncover the facts, whether good or bad. There are generally two areas this is done — a parallel investigation and independent investigation. The parallel investigation is a review and analysis of the opposing party's case and its foundation. Using each component against the tests and standards of Daubert / Frye, is the conclusion the same? There will be areas of concurrence, noted differences, and areas will be noted as contestable. The independent investigation may use the areas contested in the parallel investigation,

### Frye:

The Frye standard came from *Frye v. United States* (293 F. 1013, Circuit Court, District of Columbia, 1923) and the admissibility of polygraph examinations. In this decision, it was ruled that evidence introduced by expert testimony must be "sufficiently established to have gained general acceptance in the particular field in which it belongs." Frye has since been the 'general acceptance test'. This standard was used until the Daubert decision, in which the US Supreme Court ruled the Federal Rules of Evidence superseded Frye.

### Daubert:

In 1993 the US Supreme Court heard *Daubert v. Merrell Dow Pharmaceuticals* (509 U.S. 579). This was the first of three cases that would form the 'Daubert Trilogy'. This created the Daubert standard of a 'general reliability' test. Only after it was established whether the methods underlying the scientific expert testimony were reliable was the 'general acceptance' test of Frye applicable.

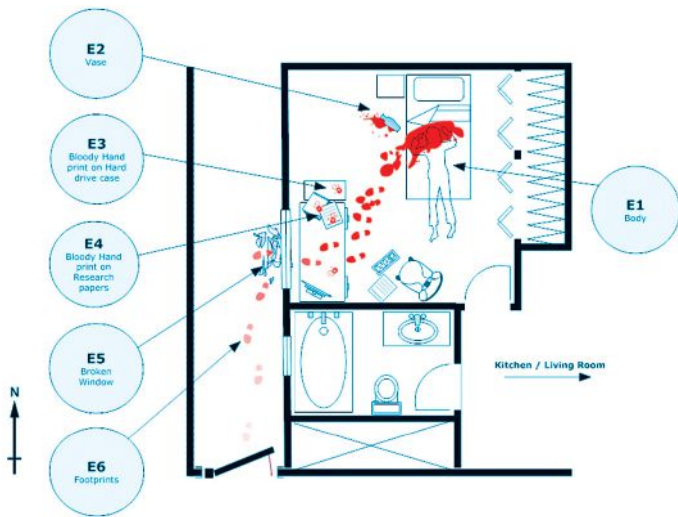
In 1997 the US Supreme Court heard the second of the 'Daubert Trilogy' in *General Electric v. Joiner* (526 US 137). This held that a trial judge may exclude expert testimony based on gaps between the evidence and conclusion of the expert. Moreover, an appellate court may use an 'abuse of discretion' standard in reviewing a lower court decision regarding the admission of expert testimony.

In 1999 the US Supreme Court heard the third of the 'Daubert Trilogy' in *Kumho Tire Co. v. Carmichael* (526 US 137). This held that a trial judge may apply the Daubert criteria to non-expert evidence and testimony. Specifically, Daubert originally ruled as to 'scientific' evidence and testimony. However, Federal Rules of Evidence, Rule 702, also included 'technical' or 'other specialized' knowledge as a criteria for expert testimony, and therefore Daubert also applied to non-scientific evidence and testimony.

Federal Rules of Evidence (Rule 702 – Testimony by Experts):

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.



investigation and report should include these 'expert' standards:

- Discovery and demonstration;
- Observation of information and facts;
- Formulation of hypothesis;
- Analysis of information and facts to hypothesis; and
- Conclusion.

From trace evidence to timelines, and circumstantial evidence to witness statements, an 'Investigative Method' that parallels Daubert / Frye will elevate the value of the legal investigator's findings. This will also elevate the work product and investigation to expert quality.

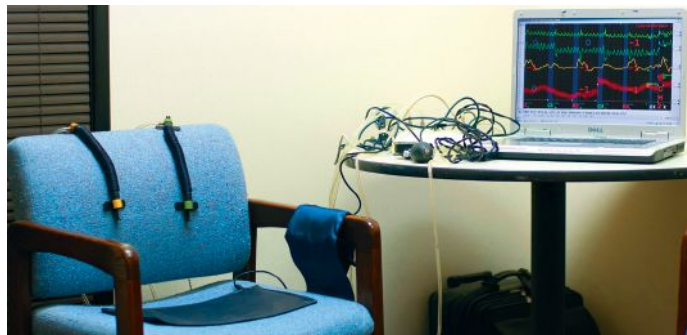
### See also:

Dean Beers, CLI, CCDI, Legal Investigators as Consultants and Experts, The Legal Investigator, Spring 2012, at 8-9. (<http://www.bluetoad.com/publication/?i=114430>)

as well as newly discovered information and facts, for which to present as evidentiary in the final report. Any contested and new evidence that is evaluated against Daubert / Frye will result in stronger weight to both the client and trier of fact.

An expert investigative protocol also becomes the foundation for a concise investigative report. The investigation, and report, should still answer the Who, What, When, Where, Why and How of the case and included assignments. Following the criteria of Daubert / Frye, a concise report that details the investigation and conclusions will not only impress the client, but further their case – the ultimate role of the legal investigator. Similar to Daubert / Frye as a foundation for detailed investigations and concise reports, the same principles apply to both the presenter and trier of fact.

Evidence must have a foundation and relevancy for admissibility. So, too, should any information and facts in the final report. The trier of fact and all other parties may review the final report in a similar manner. Using the standards of Daubert / Frye will reveal the evidentiary facts of the investigation through the report. The



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