

## **Forensic Hypnosis**

### **ADMISSIBILITY OF SCIENTIFIC EVIDENCE (DAUBERT REPLACES FRYE)**

Those courts excluding hypnotically refreshed testimony as "inherently unreliable" invoked the rule announced in *Frye v. United States*, 293 F.1013(D.C.Cir.1923), which rejected the admissibility of evidence derived from a systolic blood pressure deception test, a crude precursor to the polygraph. The Frye Rule required the court to find, before testimony regarding a new scientific technique could be admitted into evidence, that the reliability of the scientific technique had received general acceptance in the relevant scientific community. Since the mental health experts could not agree on the reliability of hypnosis for restoring memory, the result adopted by several courts, including the California Supreme Court in *People v. Shirley*, 641 P.2d 775(1982), was the per se rule of inadmissibility of post-hypnosis witness testimony advocated by Dr. Bernard Diamond.

The Frye Rule continued to be cited and relied upon by the courts as a basis to limit or exclude post-hypnosis witness testimony prior to June 28, 1993, when the U.S. Supreme Court announced its opinion in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S.579(1993). *Daubert* involved a suit for money damages for serious birth defects allegedly caused by the mother's prenatal ingestion of a prescription drug. The trial court granted summary judgment in favor of the drug manufacturer under the Frye Rule, based upon the affidavit of a medical expert that the drug had not been shown to be a risk factor for human birth defects, notwithstanding the contrary testimony of experts presented by the plaintiffs. The U.S. Court of Appeals for the Ninth Circuit affirmed the decision of the trial court, and a writ of certiorari was filed in the U.S. Supreme Court. In its landmark decision, the U.S. Supreme Court vacated and remanded the case to the trial court after rejecting the Frye Rule's "general acceptance" test regarding the admissibility of scientific evidence as having been superseded by the Federal Rules of Evidence, which provide the standard for admissibility of expert scientific testimony in federal trials.

Rule 702 of the Federal Rules of Evidence, which governs expert witness testimony, provides: "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 requirement of Rule 702 that the testimony "assist the trier of fact to understand the evidence or to determine a fact in issue" requires that such testimony be relevant. Under the Federal rules of Evidence, all relevant evidence is admissible unless specifically excluded by law. For example, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. Since the test of

Rule 702 does not require "general acceptance" as an absolute prerequisite to admissibility of expert testimony, the Frye Rule was held to be too rigid and contrary to the more liberal relevancy test of Rule 702 which relaxed the traditional barriers to opinion testimony. Under the Daubert standard, the trial judge is the "gatekeeper" who determines whether an expert may testify to relevant scientific knowledge that will assist the trier of fact.

In discharging its "gatekeeping" duties, the trial court should not allow the fact-finding process to become distorted by so-called "junk science" and must: (1) determine whether the witness is sufficiently qualified by "knowledge, skill, experience, training, or education" before being permitted to provide expert testimony; and (2) "ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." In determining the validity and reliability of scientific testimony, the trial court should consider several factors including: (1) testing and validation of the scientific principle or methodology; (2) peer review and publication; (3) known or potential rate of error; and (4) "general acceptance" of the scientific theory or technique.

Although Daubert did not address expert testimony relating to hypnosis, its holding may logically be extended to include such testimony when appropriate, and any proposed expert testimony on this subject may be subject to challenge under the Daubert standards. Moreover, while Daubert involved standards for the admissibility of expert testimony in federal trials, its application may be extended to cases in state jurisdictions, including Texas, which have adopted model rules of evidence identical or similar to the Federal Rules of Evidence. (See, E.G., Rule 702, Texas Rules of Evidence, the test of which is identical to Rule 702, Federal Rules of Evidence.)