

A Fifty-State Survey Concerning the Admissibility of Expert Testimony

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With its opinion in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), the United States Supreme Court sought to provide guidance to trial judges with respect to whether and under what circumstances scientific evidence should be deemed admissible. In the fifteen years since *Daubert*, state court judges have issued numerous opinions concerning *Daubert* and its progeny, but one thing remains clear: There is no uniformity among the states or even within states. As one North Dakota judge noted in a concurring opinion, local lawyers are "adrift" among the many different amalgamations of admissibility standards. Some states, such as Tennessee, have held that the standard for admissibility is more strict than that set out in *Daubert*, while others, like Wisconsin, have adhered to a much less restrictive standard. Some apply one standard to criminal cases and another to civil cases, as in New Jersey, while still other states (Illinois and Kansas, for example) do not apply any standard at all when the "expert" testifying is the treating physician — even if the witness is testifying as to causation. At least one state, Oregon, holds that any *Daubert* type challenge is waived if not preserved during the expert's deposition. The following survey provides an overview of the standards adopted by each of the states concerning the admissibility of expert testimony.

Alabama: *Slay v. Keller Indus., Inc.*, 823 So. 2d 623 (Ala. 2001). Applying *Frye*; refusing to adopt *Daubert*.

Alaska: *Alaska v. Coon*, 974 P.2d 386 (Alaska 1999). Adopting *Daubert* but see *Macron v. Stromata*, 123 P.3d 992 (Alaska 2005). Rejecting the application of *Daubert* to non-scientific expert testimony; explicit rejection of *Kumho Tire*.

Arizona: *Logerquist v. McVey*, 1 P.3d 113 (Ariz. 2000). Rejecting *Daubert* and *Kumho Tire* as placing the judge in a position of ruling on weight or credibility as opposed to admissibility; retaining *Frye* and Rule 702 alone.

Arkansas: *Farm Bureau Mut. Ins. Co. of Ark., Inc., v. Foote*, 14 S.W. 3d 512 (Ark. 2000). Adopting *Daubert*.

California: *People v. Leahy*, 882 P.2d 321 (Cal. 1994). Refusing *Daubert* and retaining the *Kelly-Frye* test — *People v. Kelly*, 549 P.2d 1240 (Cal. 1976).

Colorado: *People v. Shreck*, 22 P.3d 68 (Colo. 2001). Noting the judge may consider *Daubert*, but must issue specific findings on the record as to the helpfulness and reliability factors. CRE 702/evidence rule is the appropriate admissibility standard, not *Frye*.

Connecticut: *State v. Porter*, 241 Conn. 57 (Conn. 1997). Adopting *Daubert* in lieu of *Frye*.

Delaware: *M.G. Bancorporation, Inc., v. Le Beau*, 737 A.2d 513 (Del. 1999). Adopting the analysis of *Daubert* and *Kumho Tire*.

Florida: *Marsh v. Valyou*, 977 So. 2d 543 (Fla. 2007). Adhering to the *Frye* test, but only where the expert opinion is based on new or novel scientific techniques; noting most expert opinion testimony is not subject to *Frye*, such as an opinion based only on the expert's experience and training.

Georgia: *Spacht v. Troyer*, 655 S.E. 2d 656 (Ga. App. 2007). Holding that the relevant statute, OCGA § 24-9-67.1, governs expert testimony; subsection (f) allows consideration of *Daubert*.

Hawaii: *State v. Vliet*, 19 P.3d 42 (Hi. 2001). Noting that the touchstones of admissibility for expert testimony are the relevance and reliability factors under Rule 702.

Idaho: *State v. Merwin*, 962 P.2d 1026 (Id. 1998). Noting that Idaho has not expressly adopted *Daubert*, but applying its factors. See also *Weeks v. Eastern Idaho Health Servs.*, 153 P.3d 1180 (Id. 2007). Holding that *Daubert* has not been adopted, but the judge may consider certain factors such as whether the expert's theory has been or may be tested and whether the theory has been subjected to a peer reviewed publication; declining to consider whether the theory is commonly agreed upon or has been generally accepted in the relevant scientific community.

Illinois: *Warstalski v. JSB Const. & Consulting Co.*, 892 N.E. 2d 122 (Ill. App. 2008). Holding that *Frye* applies generally, but it does not apply to medical testi-

mony; noting a treating physician's testimony as to causation is not subject to *Frye*.

Indiana: *Kempf Contracting & Design, Inc., v. Holland-Tucker*, 892 N.E. 2d 672 (Ind. App. 2008). Noting that consideration of the *Daubert* factors is proper, but the judge is not bound by them.

Iowa: *State v. Garcia-Miranda*, 735 N.W. 2d 203 (Iowa App. 2007). Noting that Iowa courts are not required to follow *Daubert* when applying the Iowa Rules of Evidence; judges are encouraged to use *Daubert* only when the expert evidence is novel or complex.

Kansas: *State v. McHenry*, 136 P.3d 964 (Kan. App. 2006). Noting that *Frye* is to be used only when the judge considers the admissibility of opinions based on new or experimental scientific techniques. See also *Kuhn v. Sandoz Pharmaceuticals Corp.*, 14 P.3d 1170 (Kan. 2000). Holding that the *Frye* test is not applicable to an expert's "pure opinion" based on that expert's own experience, research, observation.

Kentucky: *Burton v. CSX Transp., Inc.*, 2008 WL 4691059 (Ky. 2008). Holding that *Daubert* applies under the relevant Kentucky Rule of Evidence that is similar to FRE 702.

Louisiana: *Cheairs v. State Dept. of Trans. & Development*, 861 So. 2d 536, 542 (La. 2003). Noting that the standards set forth in *Daubert* are controlling.

Maine: *Hall v. Kurz Enterprises*, 2006 WL 1669656 (Me. Super. 2006). Noting that the controlling law is embodied in *State v. Williams*, 388 A.2d 500 (Me. 1978), and is relatively indistinguishable from *Daubert*. See *Searles v. Fleetwood Homes of Penn., Inc.*, 878 A.2d 509 (Me. 2005). Noting the same, but specifically declining to adopt *Daubert*.

Maryland: *State v. Baby*, 946 A.2d 463 (Md. 2008). Holding that the admissibility of expert testimony is subject to the application of the *Frye-Reed* test for general acceptance in scientific community. See *Reed v. State*, 391 A.2d 364 (1978).

Massachusetts: *Com v. Powell*, 877 N.E. 2d 589 (Mass. 2007). Noting *Daubert* is adopted, but that a showing of general acceptance in relevant community is sufficient for admissibility regardless of any other *Daubert* factors.

Michigan: *People v. Unger*, 749 N.W. 2d 272 (Mich. App. 2008). Noting that Michigan evidentiary law incorporates *Daubert*.

Minnesota: *State v. Bartylla*, 755 N.W.2d 8 (Minn. 2008). Using the *Frye-Mack* standard of general acceptance for admissibility of novel or emerging scientific evidence, but specifying that the expert's technique must be based on a foundation that is scientifically reliable. *State v. Mack*, 292 N.W. 2d 764 (Minn. 1980).

Mississippi: *Watts v. Radiator Specialty Co.*, 990 So. 2d 143 (Miss. 2005). Applying *Daubert*.

Missouri: *State v. Daniels*, 179 S.W. 3d 273 (Mo. App. 2005). Noting that the criminal courts still follow *Frye*. See *Hawthorne v. Lester E. Cox Medical Centers*, 165 S.W. 3d 587 (Mo. App. 2005). Noting that admissibility of expert opinions in civil cases is governed by statute, § 490.065.

Montana: *State v. Price*, 171 P. 3d 293 (Mont. 2007). Applying *Daubert*, but noting that its application is proper only where introduction of novel scientific evidence is sought.

Nebraska: *State v. Schereiner*, 754 N.W. 2d 742 (Neb. 2008). Applying *Daubert* and noting that the trial court acts as a gatekeeper. See *Schafersman v. Agland Coop.*, 631 N.W. 2d 862 (Neb. 2001).

Nevada: *Hallman v. Eldridge*, 189 P.3d 646 (Nev. 2008). Noting that the statute that governs admissibility is NRS 50.275, which tracks FRE 702; holding Nevada has not adopted *Daubert* yet and wide discretion is vested in the trial court.

New Hampshire: *Baxter v. Temple*, 949 A.2d 167 (N.H. 2008). Holding that *Daubert* applies and that its factors have been incorporated into statute, RSA 516:29-a.

New Jersey: *State v. Groen*, 2008 WL 3067920 (N.J. Super. 2008). Limiting the application of *Frye* to criminal matters. See *Thornton v. Camden County Prosecutor's Office*, 2006 WL 2361816 (N.J. Super 2006). Applying *Daubert* in civil cases.

New Mexico: *State v. Downey*, 2008 WL 4925022 (N.M. 2008). Noting that *Daubert* applies. See *State v. Albesico*, 861 P.2d 192 (N.M. 1993).

New York: *O'Brien v. Citizens, Ins. Co.*, 2008 WL 4754103 (N.Y. Sup. 2008). Holding that *Frye* applies to novel scientific theories or techniques.

North Carolina: *Howerton v. Arai Helmet, Ltd.*, 597 S.E. 2d 674 (N.C. 2004). Holding that North Carolina does not adhere to the *Daubert* standard, but trial judge must instead ask three questions: 1) Is the expert's method of proof sufficiently reliable; 2) Is the witness qualified; and 3) Is the testimony relevant?

North Dakota: *State v. Hernandez*, 707 N.W. 2d 449 (N.D. 2005). Noting that North Dakota never has explicitly adopted *Daubert* or *Kumho Tire*; expert admissibility instead is governed by North Dakota Rule of Evidence 702. The concurrence notes that the state's Rule 702 is identical to FRE 702 and that the Bar is "adrift" between *Frye*, *Daubert*, and 702.

Ohio: *Miller v. Bike Athletic Co.*, 687 N.E. 2d 735 (Oh. 1998). Adopting *Daubert*.

Oklahoma: *Christian v. Gray*, 65 P.3d 591 (Okla. 2003). Holding that *Daubert* applies to civil matters and to all expert testimony, — not just scientific or

technical evidence. *See Taylor v. State*, 889 P.2d 319 (Okla. Crim. App. 1995). Adopting *Daubert*.

Oregon: *Evers v. Roder*, 103 P.3d 680 (Or. App. 2004). Noting that *Daubert* applies, but that any *Daubert* challenge to the expert opinion will be waived if it is not raised during the expert's deposition.

Pennsylvania: *Betz v. Eriee, Ins. Exchange*, 957 A.2d 1244 (Pa. Super 2008). Holding that *Frye* applies only when a party seeks to introduce novel scientific evidence; it is not implicated every time science comes into courtroom. *Com v. Puksar*, 951 A.2d 267 (Pa. 2008).

Rhode Island: *DePetrillo v. Dow Chemical Co.*, 729 A.2d 677, 686 (R.I. 1999). Noting courts may draw guidance from *Daubert* with respect to the admissibility of all expert testimony even though *Daubert* has not been expressly adopted.

South Carolina: *State v. Council*, 515 S.E.2d 508 (S.C. 1999). Noting that South Carolina has not adopted *Daubert*, but that the state's evidentiary rule is identical to FRE 702 and sets a "very similar" standard.

South Dakota: *Kostel v. Schwartz*, 756 N.W.2d 363 (S.D. 2008). Adopting the *Daubert* standard.

Tennessee: *McDaniel v. CSX Transp., Inc.*, 955 S.W.2d 257 (Tenn. 1997). Adopting factors similar to *Daubert*, but noting that the primary inquiry is whether an expert's opinion testimony will substantially assist the trier of fact and that this inquiry is somewhat stricter than the federal rule. The *Daubert* factors are useful, but Tennessee rules require that courts take a more active role when evaluating expert evidence.

Texas: *Bechtel Corp. v. Citgo Products Pipeline Co.*, 2008 WL 4482688 (Tex. App.)

2008). Applying *Daubert* factors. *See E. I. du Pont de Nemours and Co. v. Robinson*, 923 S.W.2d 549 (Tex. 1995). Finding *Daubert* persuasive.

Utah: *Haupt v. Heaps*, 131 P.3d 252 (Utah App. 2005). Noting that the state's Rule 702 applies to the admissibility question unless the expert testimony is novel and scientific. When the testimony concerns novel scientific methods or techniques, then *State v. Rinmasch*, 775 P.2d 388 (Utah 1989), requires a finding of inherent reliability prior to admissibility.

Vermont: *In re Appeal of Jam Golf, LLC*, 2008 WL 3877119 (Vt. 2008). Holding that *Daubert* applies.

Virginia: *Hasson v. Commonwealth*, 2006 WL 1387974 (Va. App. 2006). Noting that Virginia has not adopted *Frye* or *Daubert*, but that the *Daubert* factors are instructive.

Washington: *Lewis v. Simpson Timber Co.*, 2008 WL 1952125 (Wash. App. 2008). Holding that the *Frye*

test is utilized for novel scientific evidence. *See State v. Gregory*, 147 P.3d 1201 (Wash. 2006).

West Virginia: *San Francisco v. Wendy's International, Inc.*, 656 S.E. 2d 485 (W.Va. 2007). Noting that *Daubert* applies, but that when a judge excludes an expert as unreliable under *Daubert*, that decision is reviewed de novo. *See also Witt v. Burackes*, 443 S.E. 2d 196 (W.V. 1993).

Wisconsin: *State v. Swope*, 2008 WL 4923663 (Wis. App. 2008). Noting that Wisconsin employs a much less restrictive "relevancy test" for the admissibility of expert testimony — not *Frye* or *Daubert*.

Wyoming: *Dean v. State*, 194 P.3d 299 (Wyo. 2008). Noting that *Daubert* and its progeny had been adopted in *Bunting v. Jamison*, 984 P.2d 467 (Wyo. 1999).

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Table 1

A State-by-State Summary on Applying Daubert, Frye, or State Rules

<u>State</u>	<u>Governing Rule</u>	<u>Comment</u>
Alabama	Frye	Refusing to Adopt Daubert
Alaska	Daubert	Rejecting Daubert in non-science cases
Arizona	Frye/702	Rejecting Daubert
Arkansas	Daubert	
California	Kelly/Frye	Refusing Daubert
Colorado	CRE 702	May consider Daubert
Connecticut	Daubert	
Delaware	Daubert	
Florida	Frye	Based of scientific; most opinion based on expert's experience and training.
Georgia	State rules	Allows consideration of Daubert
Hawaii	702	
Idaho	State rules	Daubert factors of testing and peer review; not including general acceptance
Illinois	Frye	But not to medical testimony
Indiana	Daubert	But not bound by factors.
Iowa	State rules	Not required to follow Daubert
Kansas	Frye	Applies to science; not does apply to expert's pure opinion
Kentucky	Daubert	Similar to 792
Louisiana	Daubert	Controlling
Maine	State rules	Daubert/Not Daubert
Maryland	Frye	
Massachusetts	Daubert	Emphasis on general acceptance
Michigan	Daubert	
Minnesota	Frye	Foundation must be reliable
Missouri	Frye	Governed by State statute
Montana	Daubert	Applies to novel scientific evidence
Nebraska	Daubert	Trial court is gatekeeper
New Hampshire	Daubert	Incorporated into State statute
New Jersey	Frye/Daubert	Frye in criminal; Daubert in civil
New Mexico	Daubert	
New York	Frye	
North Carolina	Neither	Three questions: reliable, qualified, relevant
North Dakota	ND 702	Bar is adrift between Frye, Daubert and 702
Ohio	Daubert	
Oklahoma	Daubert	Applies to all testimony - scientific and technical
Oregon	Daubert	But will be waived if not raised during deposition
Pennsylvania	Frye	For novel scientific evidence
Rhode Island	Daubert	Not expressly adopted but applies to all testimony
South Carolina	State	Identical to FRE 702
Tennessee	State	Similar to Daubert rules, but court take a more active role in considering factors for admissibility
Texas	Daubert	
Utah	State 702	Emphasis on reliability
Vermont	Daubert	
Virginia	Neither	But Daubert factors are instructive
Washington	Frye	
West Virginia	Daubert	
Wisconsin	Neither	A much less restrictive "relevancy test"
Wyoming	Daubert	

Summarized from Sutherland (2009)