A FIFTY-STATE SURVEY CONCERNING THE ADMISSIBILITY OF EXPERT TESTIMONY

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, "there is no uniformity among the states concerning the admissibility of expert testimony." The following survey provides an overview of the standards adopted by each of the states concerning the admissibility of expert testimony.


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


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.


Florida: Marsh v. Varon, 797 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. Vlier, 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: Warnshiki v. JSB Const. & Consulting Co., 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 Kahn v. Sandrae 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. Kuras 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.


Minnesota: State v. Barrylla, 775 N.W.2d 6 (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).


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.


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.


North Carolina: Howerton v. Anni 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 confluence notes that the state's Rule 702 is identical to FRE 702 and that the Bar is "adrift" between Frye, Daubert, and 702.


Oregon: Enos 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.


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.


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.


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. Rinnmacht, 775 P.2d 388 (Utah 1989), requires a finding of inherent reliability prior to admissibility.


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


West Virginia: Sal Francisco v. Wendyt'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. Burch, 443 S.E.2d 196 (W.V. 1993).


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