# THE STATUS OF *DAUBERT* IN STATE COURTS

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## STATES ADOPTING *DAUBERT* OR
## DEEMING IT CONSISTENT WITH STATE LAW (30)

**Alaska**

Part (a) of Alaska's Rule of Evidence 702 is identical to Fed. R. Evid. 702 prior to its amendment as of December 1, 2000. Part (b) of Alaska's rule defines "independent expert witness" and lists the number of such witnesses that may testify for each party. *See* Alaska R. Evid. 702.

In *State v. Coon*, 974 P.2d 386 (Alaska 1999), the Alaska Supreme Court adopted *Daubert*, holding that the Alaska Rules of Evidence supersede the *Frye* test and overruling its earlier decision in *Contreras v. State*, in which the court affirmed its adherence to the *Frye* standard despite the state's argument that the *Frye* test was superseded by the enactment of the Federal Rules of Evidence.

Since *State v. Coon*, 974 P.2d 386 (Alaska 1999) it has been clear that the *Daubert* standard is applicable to criminal matters. However, some confusion persisted over the reception of the test within Alaska's civil jurisdiction. In *Marron v. Stromstad*,123 P.3d 992 (Alaska, 2005) the Supreme Court of Alaska applied the *Daubert* test in a civil case thereby crystallizing that the *Daubert* test as good law for the civil and criminal jurisdictions.

The Supreme Court of Alaska appears also to have introduced some limits to the *Daubert* test. In *Marron v. Stromstad*, the Court declined to adopt the *Kumho Tire Company v. Carmichael,* 526 U.S. 137 (1999) enlargements to *Daubert*, remarking at page 1004: "….we have never adopted Kumho Tire's extension of Daubert to all expert testimony, and we now explicitly decline to do so. Instead, we limit our application of Daubert to expert testimony based on scientific theory, as opposed to testimony based upon the expert's personal experience." [footnote omitted]

The standard for review of a trial court's admission of expert testimony is abuse of discretion. *See Marron v. Stromstad supra*.

**Arkansas**

Arkansas Rule of Evidence 702 is identical to Fed. R. Evid. 702 prior to its amendment as of December 1, 2000. *See* Ark. R. Evid. 702.

Prior to *Daubert*, the Arkansas Supreme Court stated that it had never adopted the *Frye* standard and adopted a "liberal standard . . . based upon the relevancy approach of the Uniform Rules of Evidence." *Prater v. State*, 820 S.W.2d 429, 431 (Ark. 1991). Subsequent to the *Daubert* ruling, the Arkansas Supreme Court revisited *Prater* and held that *Daubert's* reliability approach to Rule 702 is comparable to the relevancy approach of *Prater*. *Moore v. State*, 915 S.W.2d 284, 294 (Ark. 1996). In a civil action, the Arkansas Supreme Court specifically adopted the *Daubert* reliability standard, finding its approach "strikingly similar" to that applied in *Prater*. *Farm Bureau Mutual Insurance Co. v. Foote*, 14 S.W.3d 512 (Ark. 2000). The *Daubert* standard appears to have been applied most recently in *Miller Brewing Co. v. Ed Roleson, Jr., Inc.*, 2006 Ark. LEXIS 24 (Ark. 2006), *Turbyfill v. State*, ___ S.W.3d ___, 2005 WL 1525014 (Ark.App., 2005), thereby confirming the state's continuing use of the principle.

The Arkansas Supreme Court has specifically adopted the *Kumho Tire Co.* extension of *Daubert* as well. *See Coca-Cola Bottling Co. v. Gill*, 352 Ark. 240, 262 (Ark. 2003).

**Connecticut**

Connecticut Code of Evidence Sec. 7-2 concerning expert testimony is essentially the same as Fed. R. Evid. 702 as it existed prior to its amendment as of December 1, 2000. *See* West's Connecticut Rules of Court 1997; Federal Rules of Evidence with Connecticut Trial Lawyers' Guide to Evidence in Federal and State Courts; Article VII. Opinions and Expert Testimony.

*State v. Porter*, 698 A.2d 739, 746 (Conn. 1997) (examining and explicitly adopting *Daubert* by holding that the *Daubert* approach governs the admissibility of scientific evidence in Connecticut); *State v. Carlson*, 720 A.2d 886 (Conn. Super. Ct., 1998) (*Frye* test an "important factor" in trial judge's assessment under *Daubert*).

Although the Supreme Court of Connecticut adopted the *Daubert approach,* it has not dismissed the *Frye* test as irrelevant. The current position is that the *Frye* "general acceptance" test remains "an important factor in a trial judge's assessment [of the reliability of the evidence]." *State v. Porter, supra*, 241 Conn. at 84, 698 A.2d 739. Indeed, "if a trial court determines that a scientific methodology *has* gained general acceptance, then the *Daubert* inquiry will generally end and the conclusions derived from that methodology will generally be admissible." (Emphasis in original.) *Id.*, at 85, 698 A.2d 739. *See also Hayes v. Decker*, 263 Conn. 677, 687 (Conn. 2003).

In *Mulroy v. Becton Dickinson Company,* 712 A.2d 436 (Conn. App. Ct., 1998) the court held that *Daubert*, is inappropriate for workers compensation cases because formal pleadings are not required in cases of this kind; indeed proceedings must remain "in accordance with the rules of equity" and "… the ordinary common law or statutory rules of evidence or procedure" will not be determinative of procedural issues.

The Connecticut Supreme Court has not yet explicitly ruled whether to import the *Kumho* extension of *Daubert*. *See State v. Sorabella*, 277 Conn. 155 (Conn. 2006).

The standard of review for admission of expert testimony by a trial court is abuse of discretion. See State v. Perkins, 271 Conn. 218 (Conn. 2004).

*Daubert* has been applied only in criminal cases in Connecticut. *See Hayes v. Decker*, 263 Conn. 677, 685 (Conn. 2003) (rejecting applicability of *Porter* in a civil case on grounds unrelated to the civil nature of the case).

**Delaware**

Delaware Rule of Evidence 702 is identical to the current Fed. R. Evid. 702 as amended on December 1, 2000. *See* Del. R. Evid. 702.

Delaware examined and adopted *Daubert* in *Nelson v. State*, 628 A.2d 69 (Del. 1993). "In Delaware, scientific evidence, rather than being governed by *Frye*, must satisfy the pertinent Delaware Rules of Evidence concerning the admission of scientific testimony or evidence." *Id.* at

74. The applicable Delaware Rules of Evidence (Rules 401, 402, 403, 702 and 703) correspond to the Federal Rules on which *Daubert* relied. *Id.* In a 1995 civil case, a Delaware Superior Court held that *Daubert* should apply to all forms of expert testimony. *See Reynolds v. Blue Hen*, 1995 WL 465327 (Del. Super. Ct. 1995) (holding that "the teachings of *Daubert* are relevant not only to scientific expert testimony, but to all expert testimony offered under Rule 702.") The Delaware Supreme Court reaffirmed that *Daubert* applies to all expert testimony, thereby adopting the U.S. Supreme Court's *Kumho Tire* ruling, and that the U.S. Supreme Court's jurisprudence in the relevant cases provides the correct interpretation of Del. R. Evid. 702. *M.G. Bancorporation v. Le Beau*, 737 A.2d 513, 521, 1999 WL 293706 (Del. 1999). In February 2002, the Delaware Supreme Court held that, under *Daubert*, "[t]he expanded role of the trial judge as 'gatekeeper' also carries with it a heightened requirement of impartiality whenever the trial judge engages in direct questioning of an expert witness." *Price v. Blood Bank of Del.*, 790 A.2d 1203, 2002 WL 243283 (Del. 2002).

*Daubert* has been applied in civil and criminal cases in Delaware. This position appears unchanged by recent cases. *See, e.g.*, *Bolden v. Kraft Foods*, Slip Op., 2005 WL 3526324 (Table) (Del.Supr., 2005) at * 2 where the court observed: "The purpose of the *Daubert* standard is to fulfill a gatekeeping role; i.e., to prevent unreliable and irrelevant scientific evidence from being considered by the trier of fact."

**Georgia**

In February of 2005, the Georgia legislature enacted substantial changes to that state's Rules of Evidence.[3] The changes explicitly refer to *Daubert, Kumho Tire* and *General Electric v. Joiner*, 522 U.S. 136 (1997), as sources from which the state's judiciary may draw in interpreting and applying the statute. The statue now reads in relevant part:

> (a) The provisions of this Code section shall apply in all civil actions. The opinion of a witness qualified as an expert under this Code section may be given on the facts as proved by other witnesses. The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing or trial. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

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[3] The legislative changes were made in response to very permissive rule of evidence formerly in effect in Georgia, which allowed all expert testimony to be admitted. The question of what qualified as expert testimony was determined essentially by a general acceptance standard and thus a *Frye* test. *See Orkin Exterminating Co. v. McIntosh*, 452 S.E.2d 159, 165 (Ga. Ct. App. 1994), *cert. denied*, 1995 (where the court noted that "Because *Daubert* involved application of a federal evidentiary rule which has not been adopted in Georgia, *Daubert* has not been adopted in Georgia either. "Therefore, we do not apply Daubert here."); *Jordan v. Georgia Power Co.*, 446 S.E.2d 601, 605 (Ga. Ct. App. 1995) (stating that in Georgia, the trial court makes a determination whether a particular scientific procedure or technique in question has reached a scientific stage of verifiable certainty based upon evidence, expert testimony, treatises, or the rationale of decisions in other jurisdictions), *cert. granted* 1996, *cert. vacated* 1996. The Court of Appeals of Georgia affirmed its stance in *Orkin* in *Norfolk* S. *Ry. v. Baker*, 514 S.E. 2d 448, 451 (Ga. Ct. App. 1999).

(b) If scientific, technical, or other specialized knowledge will assist the trier of fact in any cause of action 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, if:

(1) The testimony is based upon sufficient facts or data which are or will be admitted into evidence at the hearing or trial;

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

(3) The witness has applied the principles and methods reliably to the facts of the case.

* * * [4]

(d) Upon motion of a party, the court may hold a pretrial hearing to determine whether the witness qualifies as an expert and whether the expert's testimony satisfies the requirements of subsections (a) and (b) of this Code section. Such hearing and ruling shall be completed no later than the final pretrial conference contemplated under Code Section 9-11-16

(e) An affiant must meet the requirements of this Code section in order to be deemed qualified to testify as an expert by means of the affidavit required under Code Section 9-11-9.1.

(f) It is the intent of the legislature that, in all civil cases, the courts of the State of Georgia not be viewed as open to expert evidence that would not be admissible in other states. Therefore, in interpreting and applying this Code section, the courts of this state may draw from the opinions of the United States Supreme Court in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993); General Electric Co. v. Joiner, 522 U.S. 136 (1997); Kumho Tire Co. Ltd. v. Carmichael, 526 U.S. 137 (1999); and other cases in federal courts applying the standards announced by the United States Supreme Court in these cases.

The new rule has been applied at least once since its enactment. In *Moran v. Kia Motors Am., Inc.*, 276 Ga. App. 96, 97 (Ga. Ct. App. 2005), the appeals court cited *Daubert* in it's analysis of the admission of testimony concerning the value of a vehicle saying, "*Daubert v. Merrell Dow Pharmaceuticals* provides guidance as to the admissibility of expert testimony…"

Based upon (a) of the statute, *Daubert* is applicable to civil cases. It is unclear whether it will be applied in criminal cases as well.

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4 Subsection (c) deals with medical malpractice suits and has been omitted.

## Idaho

Idaho Rule of Evidence 702 is identical to Fed. R. Evid. 702 prior to its December 1, 2000 amendment. *See* Idaho R. Evid. 702.

In *State v. Parkinson*, 909 P.2d 647, 652 (Idaho Sup. Ct. 1996), the court looked to *Daubert* for "guidance" when applying Idaho R. Evid. 702. The *Parkinson* decision has been applied by other courts in the State, recently by the Court of Appeals in *State v. Siegel*, 137 Idaho 538, 50 P.3d 1033 (Idaho App., 2002). The Court of Appeals in that case examined the *Daubert* factors that the Supreme Court had previously emphasized in *Parkinson* and remarked at page 1042: "These factors include whether the theory or technique in question can be tested, whether it has been subjected to peer review and publication, its known or potential error rate, the existence and maintenance of standards governing its use, and whether it has attracted widespread acceptance within a relevant scientific community."

*Daubert* has been applied only in criminal cases in Idaho. This position remains unchanged by recent cases.

## Indiana

Subsection (a) of Ind. R. Evid. 702 is identical to Fed. R. Evid. 702 prior to its amendment as of December 1, 2000.[5] Subsection (b) of Ind. R. Evid. 702 reads as follows: "(b) Expert scientific testimony is admissible only if the court is satisfied that the scientific principles upon which the expert testimony rests are reliable."

In *Steward v. State*, 652 N.E.2d 490, 498 (Ind. 1995), the Indiana Supreme Court stated that "concerns driving *Daubert* coincide with the express requirement of [IND. R. EVID. 702(b)] that the trial court be satisfied of the reliability of the scientific principles involved. Thus, although not binding upon the determination of state evidentiary law issues, the federal evidence law of *Daubert* and its progeny is helpful to the bench and bar in applying [IND. R. EVID. 702(b)]." Later Indiana cases seem to emphasize Ind. R. Evid. 702's requirement of reliability, finding that *Daubert* accords with Ind. R. Evid. 702 and is helpful in applying Ind. R. Evid. 702. *See, e.g., Hottinger v. Trugreen Corp.*, 665 N.E.2d 593 (Ind. App. 1996); *Weinberg v. Geary,* 686 N.E.2d 1298 (Ind. App. 1997). *But see*, *Malinski v. State*, 794 N.E.2d 1071, 1084 (Ind. 2003) ("we find *Daubert* helpful, but not controlling.")

The most recent jurisprudence applying *Daubert* in Indiana treats the test as a non-binding guide for examining expert evidence. In *Smith v. Yang* 829 N.E.2d 624, 626 (Ind.App. 2005) the Appeals Court set out the *Daubert* analysis as a most satisfactory though non-binding standard: "Our supreme court has declared that "there is no specific 'test' or 'set of prongs' which must be considered in order to satisfy Indiana Evidence Rule 702(b). "*West [v. State],* 805 N.E.2d at 913 (quoting *McGrew v. State,* 682 N.E.2d 1289, 1292 (Ind.1997)). Indiana courts may consider the five factors set out by the United States Supreme Court in *Daubert v. Merrell Dow Pharm., Inc.,* 509 U.S. 579, 593-94, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993):"

*Daubert* has been cited in civil and criminal cases in Indiana.

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[5] The adoption of Ind. R. Evid. 702(b) preceded *Daubert*.

## Iowa

Iowa Rule of Evidence 702 is identical to Fed. R. Evid. 702 prior to its December 1, 2000 amendment. *See* Iowa R. Evid. 702.

The Iowa Supreme Court has held that Rule 702 "codified Iowa's existing liberal rule on the admission of opinion testimony." *Hutchison v. American Family Mut. Ins. Co.*, 514 N.W.2d 882, 885 (Iowa 1994) (internal citations omitted). Subsequently, the Iowa Supreme Court held that *Daubert* is limited to evidence of a complex nature, by which the court meant scientific evidence as opposed to technical or other specialized knowledge. *Mensink v. American Grain and Related Indus.*, 564 N.W.2d 376, 379 (Iowa 1997). *See also Johnson v. Knoxville Community Sch. Dist.*, 570 N.W.2d 633, 639 (Iowa 1997) (holding that a psychiatrist's testimony is not controversial or novel scientific evidence to which *Daubert* is limited, but is technical or other specialized knowledge, to which a "conventional" rule 702 analysis is appropriate). According to the Iowa Supreme Court, references to *Daubert* merely reinforce Iowa's broad interpretation of Iowa R. Evid. 702, and application of the standard is encouraged, but not required. *Leaf v. Goodyear Tire & Rubber Company*, 591 N.W.2d 10 (Iowa 1999). This issue was examined by the Appeals Court of Iowa in *In re Detention of Rafferty*, 2002 WL 31113930 (Iowa App., 2002)[6] in which the court accepted the State's submission that "the Iowa Supreme Court, although not preventing the use of a "Daubert" analysis, does not require the court to do so…." *But see State v. Doornink*, 2002 Iowa App. LEXIS 1308, n.5 (Iowa Ct. App. 2002) ( "Iowa is not committed to the evidentiary "gatekeeping" rationale of *Daubert*….").

The *Daubert* factors have been applied in civil and criminal cases in Iowa.

## Kentucky

Kentucky Rule of Evidence 702 is identical to FED. R. EVID. 702 prior to its December 1, 2000 amendment. *See* Ky. R. Evid. 702.

Although the Kentucky Supreme Court acknowledged *Daubert* in *Cecil v. Commonwealth*, 888 S.W.2d 669 (Ky. 1994)), it expressly adopted the *Daubert* analysis and standard of review (abuse of discretion) in *Mitchell v. Commonwealth*, 908 S.W.2d 100, 102 (Ky. 1995). In 1997, the court held that a *Daubert* analysis was not triggered by the proposed testimony of a medical doctor because her testimony (concerning human anatomy) did not involve any novel scientific techniques or theories. *Collins v. Commonwealth*, 951 S.W.2d 569, 575 (Ky. 1997). The court determined that a *Daubert* analysis is triggered only when terms like expert scientific testimony, theory, technology, and methodology describe the proposed testimony. *Id.* According to the Kentucky Supreme Court, the appropriate time for a *Daubert* hearing on the admissibility of scientific test results is after the testing has been completed and the results are offered as evidence. *McKinney v. Venters*, 934 S.W.2d 241, 242 (Ky. 1996). *But see Fugate v. Commonwealth*, 993 S.W.2d 931, 934 (Ky. 1999) (holding that a *Daubert* pre-trial hearing is not necessary with respect to of DNA testing evidence). The Supreme Court of Kentucky appears to have enlarged the applicability of the *Daubert* principles by adopting Kumho Tire Company in *Goodyear Tire and Rubber Co. v. Thompson,* 11 S.W.3d 575,

[6] Apparently not reported in the N.W.2d Reporter.

577-78 (Ky.2000), and the *Daubert* principles may be applied to all expert evidence, not only to scientific evidence.

Moreover, in *Christian v. Commonwealth*, 2005 WL 3500806 (Ky.,2005)[7], the Kentucky Supreme Court examined the *Daubert* principles and stated that they were flexible, remarking at page *5 that "a court may consider one or more or all of the factors mentioned in *Daubert*, or even other relevant factors, in determining the admissibility of expert testimony. he test of reliability is flexible and the Daubert factors neither necessarily nor exclusively apply to all experts in every case."

*Daubert* has been applied freely in criminal cases in Kentucky. In civil cases courts have discussed *Daubert* as the appropriate standard, see, e.g., *Sandoz Pharmaceuticals Corp. v. Gunderson* ___ S.W.3d ___, 2005 WL 2694816 (Ky.App., 2005), and *Toyota Motor Corp. v. Gregory*, 136 S.W.3d 35, 39 (Ky. 2004), but none have explicitly adopted it as a precedent for civil cases. Nevertheless, it appears from the Supreme Court's treatment of *Daubert* in *Sandoz Pharmaceuticals* and *Toyota Motor Corp.* that it considers the *Daubert* analysis suitable for testing the reliability of evidence in civil cases.

**Louisiana**

Louisiana Rule of Evidence 702 is identical to Fed. R. Evid. 702 prior to its December 1, 2000 amendment. *See* La. C. E. art. 702.

Louisiana adopted *Daubert* in a criminal case in 1993 by stating that it was adopting *Daubert's* requirement that expert scientific testimony rise to a threshold level of reliability in order to be admissible, as well as *Daubert's* observations on the criteria to determine the threshold level of reliability. *State v. Foret*, 628 So. 2d 1116, 1123 (La. 1993). *See also Independent Fire Ins. Co. v. Sunbeam Corp.*, 755 So. 2d 226 (La. 2000). In 1996, a Louisiana appellate court held *Daubert* not determinative because the expert's opinion did not "constitute scientific expert testimony pertaining to new scientific knowledge." *Cross v. Cutter Biological*, 676 So. 2d 131, 146 (La. Ct. App. 1996). The court cited *State v. Foret* for the proposition that *Daubert* enumerates illustrative considerations to determine whether the reasoning or methodology underlying an expert's testimony is scientifically valid and can properly be applied to the facts at issue. *Id.* In Louisiana, *Daubert* is not applicable to expert testimony concerning hedonic damages involving loss of enjoyment of life or lifestyle. *Chustz v. J.B. Hunt Transp., Inc.*, 659 So. 2d 784, 785 (La. Ct. App. 1995). In addition, *Daubert* is not to be used to evaluate the expertise of a proffered expert witness. *State v. Lewis*, 654 So. 2d 761, 764 (La. Ct. App. 1995). A *Daubert* hearing allows the trial court to conduct a preliminary assessment of whether the reasoning or methodology underlying the proffered testimony is scientifically valid and whether it can be applied to the facts at issue. *McMahon v. Regional Transit Auth.*, 704 So. 2d 392, 394 (La. Ct. App. 1997).

Most recently in *Franklin v. Franklin*, ___ So.2d ____, 2005 WL 3489528 (La.App. 1 Cir., 2005) an appellate court considered the *Daubert* principles and noted, at page * 4, that "The *Daubert/Foret* guidelines are used as an aid in interpreting article 702 and ensure that scientific and technical expert testimony meets minimal standards of reliability and relevance."

*Daubert* has been applied in civil and criminal cases in Louisiana.

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[7] Not Reported in S.W.3d.

**Maine**

Maine Rule of Evidence 702 is identical to Fed. R. Evid. 702 prior to its December 1, 2000 amendment. *See* Me. R. Evid. 702.

Maine's standards for admissibility of expert evidence have been liberal since the adoption of the test in *State v. Williams,* 388 A.2d 500 (Me.,1978). In *Williams* expert evidence can be admitted only where it "is relevant and will assist the trier of fact to understand the evidence or to determine a fact in evidence." 388 A.2d at 504.

In 1996, Maine's highest court cited *Daubert* for the proposition that an expert's opinion, to be admissible, must be sufficiently tied to the facts of the case so as to aid a trier of fact in resolving a factual dispute. *Green v. Cessna Aircraft Co.*, 673 A.2d 216, 218 (Me., 1996). Subsequently, that court cited *Daubert* in a criminal case, stating that although an absence of published studies is not determinative of the validity of a scientific theory, it is a relevant consideration. *State v. MacDonald*, 718 A.2d 195 (Me, 1998).

The Supreme Court appears to maintain some reservations about the universal application of *Daubert* as the standard of first choice against which to test the reliability of expert testimony. In *Searles v. Fleetwood Homes of Pennsylvania, Inc.*, 878 A.2d 509 (Me., 2005) the court in footnote 2 declines explicitly to adopt the *Daubert* standard as governing the case and observesd that "the *Williams* [*State v. Williams,* 388 A.2d 500 (Me.,1978)] standard does not preclude the court from considering the question of general acceptance in undertaking its evaluation of challenged testimony. *Id.* at 504." 2004 Me. 152 (Me. 2004) ("Although 'general scientific acceptance' is not required to reach that threshold…it is often the case that 'the easiest way this burden can be met is to show the acceptance of the theory, method, etc. by the expert community to which it relates.'") (quoting Field & Murray, MAINE EVIDENCE § 702.4 at 361 (2000 ed. 1999). The standard of general acceptance is a standard most often characterized as one that derives from the *Frye* decision, though it also forms a nonexclusive element of the *Daubert* analysis. In *Searles* the Court declined the appellant's invitation to apply *Daubert*, indicating that the outcome for the appellant would be no different under *Daubert* than it would be under *Williams*. Indeed, while *Williams* remains the controlling law for expert evidence in Maine, the courts appear open to hearing the *Daubert* analysis where that would assist the court in testing the reliability of expert evidence. Moreover, as the Superior Court recently observed in *Naegel v. Progressive Cas. Ins. Co.*, 2003 WL 1663869, at *5 (Me. Super., 2003)[8] "this court sees very little - if any - daylight between the analyses in *Williams* and *Daubert.*"

*Daubert* has been cited in civil and criminal cases in Maine.

**Massachusetts**

Massachusetts has not codified its rules of evidence, and instead relies upon state common law to determine the admissibility of evidence. In 1982 a set of Proposed Rules was submitted to the Massachusetts Supreme Judicial Court, but was rejected. Rule 702 of these Massachusetts Proposed Rules of Evidence wss identical to Fed. R. Evid. 702 prior to its December 1, 2000 amendment.

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[8] Not Reported in A.2d.

Massachusetts has, however, adopted the basic reasoning of the *Daubert* opinion. *Commonwealth v. Lanigan*, 641 N.E.2d 1342, 1349 (Mass. 1994). In doing so, the court stated that it suspects that "general acceptance in the relevant scientific community will continue to be the significant, and often the only issue," but accepted the idea that "a proponent of scientific opinion evidence may demonstrate the reliability or validity of the underlying scientific theory or process by some other means." *Id.* The "ultimate test, however, is the reliability of the theory or process underlying the expert's testimony." *Id*. at 1348. *See also Commonwealth v. Sok*, 683 N.E.2d 671, 677 (Mass. 1997) ("the touchstone of admissibility is reliability," and a party seeking to introduce scientific evidence may "lay a foundation either by showing that the underlying scientific theory is generally accepted within the relevant scientific community or by showing that the theory is reliable or valid through other means") (quoting *Lanigan*).

In *Com. v. Patterson*, 445 Mass. 626, 840 N.E.2d 12 (Mass., 2005), the Supreme Judicial Court of Massachusetts reaffirmed the position it took in *Lanigan* observing: "*Lanigan* 's progeny make clear that general acceptance in the relevant community of the theory and process on which an expert's testimony is based, on its own, continues to be sufficient to establish the requisite reliability for admission in Massachusetts courts regardless of other *Daubert* factors." (*Id*. at 640).

In *Canavan's Case*, 432 Mass. 304, 310 (Mass. 2000), the Supreme Judicial Court established, following the United States Supreme Court in *Joiner,* that appellate review of a trial court's admission or rejection of expert testimony should be conducted under an abuse of discretion standard, overruling its ruling in *Commonwealth v. Sok*, 683 N.E.2d 671, 677 (Mass. 1997), that such review should be conducted de novo.

Addtionally, in *Canavan's Case*, the Supreme Judicial Court adopted the *Kuhmo* extension of *Daubert* to non-scientific, experience-based testimony. "There is no logical reason why conclusions based on personal observations or clinical experience should not be subject to the Lanigan analysis." *Canavan's Case*, 432 Mass. 304, 313 (Mass. 2000).

*Daubert*, as modified by *Lanigan*, has been applied in civil and criminal cases in Massachusetts.

**Michigan**

Mich. R. Evid. 702, was amended effective January 1, 2004 to reflect Federal Rule of Evidence 702, and reads as follows: "If the court determines that 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 if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case. In *Gilbert v. DaimlerChrysler Corp,* 470 Mich. 749, 781; 685 NW2d 391 (2004), the Supreme Court observed in dicta that the amendment of MRE 702 "explicitly" incorporated the *Daubert standards.* The Court also noted that the language of MRE 702 conveyed an even stronger gatekeeper function to the trial court by virtue of the "if the court determines" language present in MRE 702 but absent from FRE 702. *Id*. at n.46.

In *Brabant v. St. John River Dist. Hosp.*, 2005 WL 3481511 (Mich. App., 2005),[9] the Michigan Court of Appeals noted the Supreme Court's purported adoption of the *Daubert* standard in *Gilbert v. DaimlerChrysler Corp*. The Appeals Court opined (at page *4) that the *Gilbert* decision has "… not altered the court's fundamental duty of ensuring that *all* expert opinion testimony – regardless of whether the testimony is based on "novel" science – is reliable. Thus, properly understood, the court's gatekeeper role is the same under *Davis-Frye* and *Daubert.*"(quoting *Gilbert*).

*Daubert* has been applied in civil and criminal cases in Michigan.

**Mississippi**

Mississippi Rule of Evidence 702 is identical to the current Fed. R. Evid. 702 as amended on December 1, 2000. *See* Miss. R. Evid. 702.

In its May 2003 amendment to Rule 702, the Mississippi Supreme Court adopted the *Daubert* standard for admissibility of expert testimony (see also *Mississippi Transp. Comm'n v. McLemore* 863 So.2d 31 (Miss., 2003) (specifically recognizing the adoption of the federal *Daubert* jurisprudence and the repudiation of the previous *Frye* standard)). The comment to the rule explains that the amendment "recognizes the gate keeping responsibility of the trial court to determine whether the expert testimony is relevant and reliable" and that it follows the amendment to Federal Rule 702 in response to *Daubert*. *See also Poole v. Avara*, 908 So. 2d 716, 722 (Miss. 2005) (specifically affirming the adoption of the federal jurisprudence, including *Kumho Tire*).

The Mississippi Court of Appeals recently applied the *Daubert* analysis in *Mooneyham v. State*, 915 So.2d 1102 (Miss.App., 2005). The Court stated (915 So.2d at 1105) that "In every case," whether testimony is based on professional studies or personal experience, the 'gatekeeper' must be certain that the expert exercises the same level of 'intellectual rigor that characterizes the practice of an expert in the relevant field.' " *Id.* at 37-38 (¶ 15)."

*Daubert* has been applied in both civil and criminal cases in Mississippi.

**Montana**

Montana Rule of Evidence 702 is identical to Fed. R. Evid. 702 prior to its December 1, 2000 amendment. *See* Mont. R. Evid. 702.

In a 1994 civil case, the Montana Supreme Court cited *Daubert* for the proposition that the "expansive test" embodied in Rule 702 is whether the expert is proposing to "testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue." *Hart-Albin Company v. McLees Inc.*, 870 P.2d 51, 56 (Mont. 1994). Later that year, in a criminal case, the Montana Supreme Court formally adopted the *Daubert* standard for the admissibility of "scientific expert testimony." *State v. Moore*, 885 P.2d 457, 471 (Mont. 1994). In 1996, the Montana Supreme Court clarified its interpretation of *Daubert*, holding that the *Daubert* test should only be used to determine the admissibility of novel scientific evidence. *State v. Cline*, 909 P.2d 1171, 1177 (Mont. 1996); *see also State v. Southern*, 1999 WL 296978 (Mont. 1999); *Hulse v. State*, 961 P.2d 75

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[9] Not Reported in N.W.2d.

(Mont. 1998). The Supreme Court overruled *Moore, Cline, Southern* and *Hulse* in *State v. Clifford* 328 Mont. 300, 121 P.3d 489 (Mont., 2005) holding that it had "improperly limited *Daubert*" only to cases involving novel scientific evidence. 328 Mont. 300, 322. This limitation was removed and in Montana *Daubert* will apply to expert evidence of any kind. The *Daubert* standard continues to apply exclusively to the admission of "novel" scientific expert testimony leading to the odd result that a challenge to the methodological reliability of proffered expert testimony offered in the form of an opposing expert witness might be subject to a pre-trial *Daubert* hearing, while the testimony to be challenged is not. This and more criticism of the ostensible application of *Daubert* in Montana, along with a plea to bring both Montana's case law and Rules of Evidence in line with the Federal law, was made by Justice Nelson, the author of the *State v. Moore* opinion, in a concurrence in *State v. Clifford*. Justice Nelson's recommendations have not thus far been adopted.

**Nebraska**

Nebraska Revised Statute § 27-702 is identical to Fed. R. Evid. 702 prior to its December 1, 2000 amendment. *See* Neb. Rev. Stat. § 27-702 (1997).

In *Schafersman v. Agland Coop.*, 262 Neb. 215 (Neb. 2001), the Nebraska Supreme Court adopted *Daubert* and, implicitly, the related Supreme Court jurisprudence and stated that courts would need to evaluate the admissibility of expert opinion testimony under the analytical framework first established in *Daubert* for trials commencing on or after October 1, 2001.

In *City of Lincoln v. Realty Trust Group, Inc.*, 270 Neb. 587, 705 N.W.2d 432 (Neb.,2005), the Supreme Court of Neabraska discussed *Schafersman,* remarking "In S*chafersman*, this court adopted the framework for evaluating expert testimony set out in *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), and its progeny (Daubert/Schafersman." 270 Neb. 587, 590.

*Daubert* is applicable to both civil and criminal cases in Nabraska. has been applied only in a civil case in Nebraska.

**New Hampshire**

New Hampshire Rule of Evidence 702 is identical to Fed. R. Evid. 702 prior to its December 1, 2000 amendment. *See* N.H. R. Evid. 702.

In 1995, the New Hampshire Supreme Court cited and relied on *Daubert* in a criminal case. It did not, however, decide whether the adoption of the New Hampshire Rules of Evidence superseded the *Frye* test, because the parties stipulated to the use of the *Daubert* standard. *State v. Cavaliere*, 140 N.H. 108, 663 A.2d 96, 97-98 (N.H. 1995). In 2002, the New Hampshire Supreme Court applied the *Daubert* standard to New Hampshire Rule of Evidence 702 in a products liability case, and held the trial court erred by focusing on the reliability of the expert's conclusion rather than the reliability of the method used to reach the conclusion. *Baker Valley Lumber, Inc. v. Ingersoll-Rand Company*, 148 N.H. 609; 813 A.2d 409 (N.H. 2002).

The Supreme Court of New Hampshire maintains that New Hampshire has adopted *Daubert* on the terms announced in *Baker Valley*. In *State v. Pelletier*, 149 N.H. 243,252, 818 A.2d 292, (N.H., 2003) the Supreme Court observed: "We have stated that expert testimony must rise to a threshold

level of reliability to be admissible...In *Baker Valley*, we applied the *Daubert* standards concerning the reliability of expert testimony to Rule 702...."

*Daubert* is applicable to both Civil and Criminal Cases in New Hampshire. However, in *State v. Whittey,* 149 N.H. 463, 821 A.2d 1086 (N.H. 2003), the validity of a particular method of DNA testing was judged under the *Frye* standard. In *Whittey* this was done by the stipulation of the parties, but in *State v. Thompson*, the New Hampshire Supreme Court in reviewing an appeal, seemed to sanction a lower court's denial of a motion to review the validity of DNA evidence under a *Daubert* standard instead of a *Frye* standard.

**New Jersey**

New Jersey Rule of Evidence 702 is identical to Fed. R. Evid. 702 prior to its December 1, 2000 amendment. *See* N.J. R. Evid. 702.

In a 1995 civil toxic tort case, *Daubert* was cited for the proposition that experts must identify the factual bases for their conclusions, explain the methodology, and show that both the methodology and conclusions are reliable. *Bahrle v. Exxon Corp.*, 652 A.2d 178, 192 (N.J. Super. Ct. App. Div. 1995), *cert. granted Bahrle v. Texaco Corp.*, 658 A.2d 726 (N.J. 1995), *judgment aff'd Bahrle v. Exxon Corp.*, 678 A.2d 225 (N.J. 1996).

The position in New Jersey with respect to *Daubert* in cases other than those involving toxic torts remains uncertain. In *Rubanick v. Witco Chem. Corp.*, 125 N.J. 421, 593 A.2d 733, the New Jersey Supreme Court first established that a purely general acceptance standard was not appropriate for toxic tort cases. In *Kemp v. State,* 174 N.J. 412, 809 A.2d 77 (N.J. 2002) the New Jersey Supreme Court, after acknowledging the U.S. Supreme Court's *Daubert* decision, reiterated that a more relaxed standard than general acceptance is appropriate for cases in which the plaintiffs bear the burden of proving medical causality, such as toxic torts. The Appellate Division of New Jersey remarked recently *In re Phenylpropanolamine (PPA)*, 2003 WL 22417238 at *22 (N.J.Super., 2003)[10]: "New Jersey courts, which had previously adhered to the 'general acceptance' standard as expressed in *Frye v. United States,* 293 F. 1013 (D.C.1923) never adopted *Daubert*, a standard that some federal courts recognize as having restrictive results. 'In an attempt to prohibit the presentation of junk science to the trier of fact, perhaps *Daubert* has raised the bar for admissibility of expert testimony too high.' *Siharath v. Sandoz Pharm. Corp.,* 131 F.Supp.2d 1347, 1373 (N.D.Ga.2001). 'Maybe there should be a middle ground between the *Daubert* standard and a standard that would allow sympathetic plaintiffs with catastrophic injuries to recover against pharmaceutical manufacturers based upon nothing more than speculation and conjecture.' *Id.* It is clear that the New Jersey standard is that middle ground, ensuring fair and objective standards when correctly applied by the court."

In criminal actions, however, *Frye* remains the standard in New Jersey. *See State v. Harvey*, 699 A.2d 596, 621 (N.J. 1997) (stating that because *Daubert's* more relaxed standard of admissibility of scientific testimony has only been applied in toxic tort cases in New Jersey, the test in criminal cases remains whether the scientific community generally accepts the evidence).

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[10] Not Reported in A.2d.

New Jersey's version of the *Daubert* standard has been cited only in toxic torts actions. The Supreme Court of New Jersey has declined to extend *Daubert* to other types of cases and other cases will be governed by New Jersey's "middle ground" standard until the New Jersey Supreme Court's position changes.

**New Mexico**

New Mexico Rule of Evidence 11-702 is identical to Fed. R. Evid. 702 prior to its December 1, 2000 amendment. *See* N.M. R. Evid. 11-702.

New Mexico adopted *Daubert* in 1993. *See State v. Alberico*, 861 P.2d 192, 203 (N.M. 1993) (rejecting *Frye* as an independent controlling standard of admissibility and citing *Daubert*). In determining whether scientific evidence is reliable, New Mexico examines the evidence in light of the *Daubert* factors and adds one other factor: "whether the scientific technique is based upon well-recognized scientific principle and whether it is capable of supporting opinions based upon reasonable probability rather than conjecture." *Id.* The admission of expert testimony or other scientific evidence is within the sound discretion of the trial court and will not be reversed absent a showing of abuse of discretion. *Id.* at 205. This position was affirmed by the Supreme Court of New Mexico in *State v. Fry*, 126 P.3d 516, 2005 WL 3690451, (N.M., 2005), in which the Court remarked "We relied on the analysis of the United States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc., ...* to specify '"[s]everal factors [that] could be considered by a trial court in assessing the validity of a particular technique to determine if it is 'scientific knowledge' under Rule [11-]702."' *Alberico,* 116 N.M. at 168, 861 P.2d at 204." 2005 WL 3690451 at *23.

In *State v. Torres*, 976 P.2d 20 (N.M. 1999), however, the New Mexico Supreme Court appears to have rejected *Kumho Tire*, stating, "We believe the better view is expressed by the United States Court of Appeals for the Tenth Circuit, which has concluded that 'application of the *Daubert* factors is unwarranted in cases where expert testimony is based solely on experience or training.' *Compton v. Subaru of Am. Inc.*, 82 F.3d 1513, 1518 (10th Cir. 1996)." *Id.* at 34.

In New Mexico, *Daubert* has been applied in criminal and civil cases.

**Ohio**

Ohio's Rule of Evidence 702 reads as follows:

> A witness may testify as an expert if all of the following apply:
>
> The witness' testimony either relates to matters beyond the knowledge or experience possessed by lay persons or dispels a misconception common among lay persons;
>
> The witness is qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony;
>
> The witness' testimony is based on reliable scientific, technical, or other specialized information. To the extent that the testimony reports the result of a procedure, test, or experiment, the testimony is reliable only if all of the following apply:

> The theory upon which the procedure, test, or experiment is based is objectively verifiable or is validly derived from widely accepted knowledge, facts, or principles;
>
> The design of the procedure, test, or experiment reliably implements the theory;
>
> The particular procedure, test, or experiment was conducted in a way that will yield an accurate result.

Ohio R. Evid. 702.

Ohio rejected *Frye* and its general acceptance test in 1983. *See State v. Williams*, 446 N.E.2d 444, 446-47 (Ohio 1983) (finding that the general acceptance test governing the admissibility of expert evidence has been widely criticized, endorsing the flexible standard contemplated by the Federal Rules of Evidence, and holding that trial courts have discretion when deciding issues regarding the admissibility of expert testimony). The standard of review is abuse of discretion. *See McCubbin v. Michigan Ladder Co.*, 679 N.E.2d 1142, 1144 (Ohio Ct. App. 1996). Recently, in *Miller v. Bike Athletic Co.*, 687 N.E.2d 735, 741 (Ohio 1998), the Ohio Supreme Court cited *Daubert* extensively but did not explicitly adopt it as controlling law. The Ohio Court of Appeals recently discussed the *Daubert* principles in *State v. Wilson*, Slip Op., 2005 WL 3112874 (Ohio App. 5 Dist., 2005). The court emphasized the reliability flavor of the *Daubert* decision, noting that an assessment as to reliability did not necessarily require a judgment as to the accuracy of the evidence.

*Daubert* has been applied in civil and criminal cases in Ohio.

**Oklahoma**

Oklahoma Rule of Evidence is identical to Fed. R. Evid. 702 prior to its December 1, 2000 amendment. *See* 12 Okl. St. §2702.

The Oklahoma Court of Criminal Appeals (the highest court in the state with jurisdiction over criminal cases) explicitly rejected *Frye* and adopted *Daubert* for testing the admissibility of novel scientific evidence. *Taylor v. State*, 889 P.2d 319, 328-29 (Okla. Crim. App. 1995). The court later clarified that *Daubert* analysis will not be applied to scientific subjects previously accepted as valid for expert testimony, *Romano v. State*, 909 P.2d 92, 112 (Okla. Crim. App. 1995), *cert. denied, Romano v. Oklahoma*, 117 S. Ct. 151 (1996), and that a *Daubert* hearing will only be held if the proffered expert testimony is both novel and scientific. *Bryan v. State*, 935 P.2d 338 (Okla. Crim. App. 1997), *cert. denied, Bryan v. Oklahoma,* 118 S. Ct. 383 (1997).

The Oklahoma Supreme Court (the highest court in the state with jurisdiction over civil cases) adopted *Daubert* and *Kumho Tire* as appropriate standards for Oklahoma trial courts in deciding the admissibility of expert testimony in civil matters. *Dwain Lee Christian III v. Karl Gray, et al*., No. 96, 813 Ok. 10, 65 P.3d 591 (Okla. 2003). However, a *Daubert* inquiry is only appropriate with regard to novel expert testimony or situations in which the expert's method is not established. *Cline v. DaimlerChrysler Co.*, Corp., 2005 Ok. Civ. App. 31, 114 P.3d 468 (Div. 3, 2005), cert. denied, May 9, 2005.

The Oklahoma courts most recently applied the *Daubert* principles in *Frasier, Frasier & Hickman, L.L.P. v. Flynn*, 114 P.3d 1095 (Okla.Civ.App. Div. 4, 2005), holding a partner in a law firm qualified to testify as to the division of fees customarily made at the firm.

## Oregon

Oregon Rule of Evidence 702 is identical to Fed. R. Evid. 702 prior to its December 1, 2000 amendment. *See* Or. R. Evid. §40.410, Rule 702.

In 1984, Oregon rejected the *Frye* standard for the admission of scientific evidence and adopted a standard of relevancy and reliability based on the Oregon Evidence Code. *State v. Brown*, 687 P.2d 751, 759 (Or. 1984). *Brown* sets out seven factors to be used as guidelines by trial courts in determining the admissibility of scientific evidence: (1) the technique's general acceptance in the field; (2) the expert's qualifications and stature; (3) the use the expert made of the technique; (4) the potential rate of error; (5) the existence of specialized literature; (6) the novelty of the invention; and (7) the extent to which the technique relies on the subjective interpretation of the expert. *Id.* These factors are not exclusive and the list is not a mechanical checklist of foundational requirements. *State v. O'Key,* 899 P.2d 663, 676-77 (Or. 1995). Although *Brown* focused on novel scientific evidence, the *Brown* standard, still followed by Oregon courts, is not limited to novel scientific evidence. *Id*. at 673 n.9.

After *Daubert* was decided, the Oregon Supreme Court found it consistent with *Brown* and stated that Oregon trial courts should find *Daubert* instructive. *Id.* at 680. Oregon trial courts will hold *Daubert*-type hearings on the admissibility of scientific evidence. *See State v. Lyons*, 924 P.2d 802, 804 (Or. 1996). Under *Brown*, Oregon appellate courts apply a *de novo* standard of review to rulings on admissibility of scientific evidence. *Id.* at 805. *Brown* continues to control the admission of expert evidence in Oregon.

*Daubert* has been applied only in criminal cases in Oregon. *Brown* has been applied in civil and criminal cases in Oregon.

## Rhode Island

Rhode Island's evidentiary rule regarding testimony by experts is identical to Fed. R. Evid. 702 prior to its December 1, 2000 amendment, except that in Rhode Island's version, the phrase "in the form of fact or opinion" replaces the federal rule's phrase "in the form of an opinion or otherwise." *See* R.I. R. Evid. 702.

Rhode Island case law is consistent with *Daubert*, holding that a trial judge determining the admissibility of expert testimony based on novel scientific evidence must decide whether the evidence is relevant, determine whether the subject matter is appropriate, assess the expert's qualifications, and consider whether the expert's testimony will assist the jury. *State v. Morel*, 676 A.2d 1347, 1355 (R.I. 1996) (citing *State v. Wheeler*, 496 A.2d 1382, 1388 (R.I. 1985)). The *Wheeler* court stated that Rhode Island courts are "open to evidence of developments in science that would tend to assist the trier of fact." *Wheeler*, 496 A.2d at 1388. An element of reliability is required. *See In re Odell*, 672 A.2d 457 (R.I. 1996) (citing *State v. Dery*, 545 A.2d 1014, 1017 (R.I. 1988)). In both criminal and civil cases, the trial court must conduct a preliminary examination prior to admitting novel scientific evidence if such evidence is challenged. *State v. Quattrocchi*, 681 A.2d 879, 884 (R.I. 1996). The *Quattrocchi* court stated that it has not necessarily abandoned *Frye*, but left for another day "the emphasis to be placed on general acceptance as set forth in both *Frye* and *Daubert* as opposed to the three other factors set forth in *Daubert*." *Quattrocchi*, 681 A.2d at 884 n.2.) The standard for appellate review of rulings on admissibility of expert testimony is absent

an abuse of discretion. *State v. Morel*, 676 A.2d 1347, 1354 (R.I. 1996). A trial court may abuse its discretion it if fails to hold a preliminary or non-jury evidentiary hearing to determine admissibility of proffered expert testimony when one party files a sufficiently specific pretrial motion. *DiPetrillo v. Dow Chemical Co.*, 729 A.2d 677 (R.I. 1999). The Supreme Court of Rhode Island recently discussed the *Daubert* principle in *In re Mackenzie C. 877 A.2d 674* (R.I., 2005 ) and affirmed its treatment of *Daubert* in *DiPetrillo v. Dow Chemical Co.*, 729 A.2d 677 (R.I. 1999).

Although the *Daubert/Wheeler* standard has not been cited or applied in a civil case, the language from *Quattrocchi* indicates that the standard applies in both criminal and civil actions.

**South Dakota**

South Dakota Rule of Evidence 702 is identical to Fed. R. Evid. 702 prior to its December 1, 2000 amendment. *See* S.D. R. Evid. 702 (SDCL § 19-15-2).

The South Dakota Supreme Court adopted *Daubert* in *State v. Hofer*, 512 N.W.2d 482, 484 (S.D. 1994) (holding that general acceptance in the scientific community is no longer required; the trial judge has the task of ensuring that an expert's testimony rests on a reliable foundation and is relevant to the task at hand; and that "pertinent evidence based on scientifically valid principles will satisfy those demands"). The admissibility of an expert's opinion is within the trial court's discretion and will not be reversed absent a clear showing of an abuse of that discretion. *Kuper v. Lincoln-Union Electric Co.*, 557 N.W.2d 748, 756-57 (S.D. 1996) (stating that expert opinions require a reliable foundation). In *State v. Guthrie*, 2001 SD 61, P33 (S.D. 2001), the South Dakota Supreme Court accepted the *Kumho Tire* extension of *Daubert*, pointing out that "The standards set forth in *Daubert* are not limited to what has traditionally been perceived as scientific evidence. These standards must be satisfied whenever scientific, technical, or other specialized knowledge is offered." *Id* at P34. The Supreme Court of South Dakota recently applied the *Daubert* analysis in *First Premier Bank v. Kolcraft Enterprises, Inc.* 686 N.W.2d 430 (S.D. 2004)

*Daubert* has been applied in civil and criminal cases in South Dakota.

**Tennessee**

Tennessee's version of Rule 702 is similar to Fed. R. Evid. 702 prior to its December 1, 2000 amendment, and reads as follows: "If scientific, technical or other specialized knowledge will substantially 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 in the form of an opinion or otherwise." Tenn. R. Evid. 702.

In 1997, the Tennessee Supreme Court held that Tennessee's evidentiary rules supersede *Frye*. *McDaniel v. CSX Transportation, Inc.*, 955 S.W.2d 257 (Tenn. 1997) (holding that the Tennessee Rules of Evidence require trial courts to evaluate the scientific validity or reliability of the evidence; unless the scientific evidence is valid, it will not substantially assist the trier of fact, nor will its underlying facts and data appear to be trustworthy; there is no requirement that it be generally accepted). The court declined to explicitly adopt *Daubert,* but indicated that the *Daubert* factors were useful in evaluating potential evidence. The Supreme Court of Tennessee applied *Daubert* recently in *Brown v. Crown Equipment Corp.*, 181 S.W.3d 268 ___ S.W.3d ___, 2005 WL 2787845 (Tenn. 2005), where the court assessed the reliability of evidence tendered by a mechanical engineer

in a personal injuries case. In that case the court pointed out that the list of factors set out in *McDaniel* was not exhaustive nor to be used as a checklist, instead the inquiry should be flexible and open.

In Tennessee, *Daubert* has been applied in a civil case and its premise, as adopted by *McDaniel*, has been applied in criminal cases. *See State v. Thomas*, 158 S.W.3d 361, 415 (Tenn. 2005).

**Texas**

Texas Rule of Evidence 702 is identical to Fed. R. Evid. 702 prior to its December 1, 2000 amendment. *See* Tex. R. Evid. 702. Tex. R. EVID. 101(b) indicates that the Texas Rules of Evidence govern both civil and criminal proceedings.

In 1992, prior to *Daubert*, the Texas Court of Criminal Appeals concluded that *Frye* was no longer controlling in Texas. *Kelly v. State*, 824 S.W.2d 568, 572 (Tex. Crim. App. 1992). *Kelly* holds that, to be admissible under Rule 702, scientific evidence must be relevant and reliable. *Id.* at 573. To be reliable, the underlying scientific theory must be valid, the technique or method applying the theory must be valid, and the technique or method must have been properly applied on the occasion in question. *Id.* These criteria must be proved to the trial court by clear and convincing evidence outside the presence of the jury. *Id.* Additionally, *Kelly* set forth a list of seven nonexclusive factors for a trial court to consider in determining reliability: (1) general acceptance of the theory and technique by the relevant scientific community; (2) the expert's qualifications; (3) the existence of literature supporting or rejecting the theory; (4) the technique's potential rate of error; (5) the availability of other experts to test and evaluate the technique; (6) the clarity with which the theory or technique can be explained to the trial court; and (7) the experience and skill of the person who applied the technique on the occasion in question. *Id.*

In 1995, the Texas Supreme Court adopted both *Kell*y and *Daubert* and held that, in addition to showing that an expert is qualified, Rule 702 also requires the proponent to demonstrate by clear and convincing evidence that the expert's testimony is relevant and is based on a reliable foundation. *E.I. du Pont de Nemours and Co. v. Robinson*, 923 S.W.2d 549, 556 (Tex. 1995). *Kelly* also directs trial courts to hold pre-trial Daubert-type hearings and holds that the proponent of the testimony in such hearings has the burden of demonstrating its admissibility. *Id.* at 557.

The standard adopted in *Kelly* (and subsequently affirmed by *Robinson*) applies to all scientific evidence offered under Rule 702. *Hartman v. State*, 946 S.W.2d 60, 63 (Tex. Crim. App. 1997). Although a split of opinion had developed among the Texas appellate courts on the issue of whether the *Kelly/Daubert/Robinson* standard of admissibility applies to non-scientific expert testimony, that split has been resolved in both criminal and civil cases. *Nenno v. State*, 970 S.W.2d 549 (Tex. Crim. App. 1998) (the general principles of *Daubert* apply to both scientific and nonscientific expert testimony); *Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713 (Tex. 1998) (*Daubert* principles apply to all scientific evidence regardless of whether it is novel or conventional, and to all expert evidence).

In *Ablanedo v. Texas*, ___ S.W.3d ___, 2005 WL 3703973 (Tex.App.Austin 2005) the Court of Appeals for Texas recently examined the reception of the *Daubert* principles in Texas and remarked: "Through the "*Daubert, Robinson,* and *Kelly*" trilogy of cases, the high courts have developed several non-exclusive factors to analyze whether the evidence meets this standard. *See Daubert v.*

*Merrell Dow Pharm., Inc*., 509 U.S. 579, 593- 95 (1993); *E.I. du Pont de Nemours & Co., Inc., v. Robinson*, 923 S.W.2d 549, 557 (Tex.1995); *Kelly v. State,* 824 S.W.2d 568, 573 (Tex.Crim.App. 1992)."[11]

*Daubert* has been applied in civil and criminal cases in Texas.

**Utah**

Utah Rule of Evidence is identical to Fed. R. Evid. 702 prior to its December 1, 2000 amendment. *See* Utah R. Evid. 702.

Utah abandoned exclusive reliance on the *Frye* test and adopted an "inherent reliability" standard in 1980. *See Phillips v. Jackson*, 615 P.2d 1228, 1234 (Utah 1980). Subsequent to *Phillips*, Utah adopted its current version of Rule 702. In 1989, the Utah Supreme Court decided that *Phillips* survived the enactment of Rule 702. *State v. Rimmasch*, 775 P.2d 388, 398 (Utah 1989) (holding that a trial court must conduct the following three-step analysis to determine the admissibility of scientific evidence: determine that the scientific principles and techniques underlying the expert's testimony are inherently reliable; determine that the scientific principles or techniques at issue have been properly applied to the facts of the particular case by sufficiently qualified experts; and determine that the proffered scientific evidence will be more probative than prejudicial). *Rimmasch* is still good law in Utah. *See State v. Crosby*, 927 P.2d 638, 642 (Utah 1996); *State v. Brown*, 948 P.2d 337, 340-41 (Utah 1997). To meet the *Rimmasch* threshold showing of inherent reliability, a proponent may proffer a sufficient foundation to demonstrate the inherent reliability of the underlying principle or technique or show that it has been generally accepted in the relevant scientific community. *State v. Adams*, 955 P.2d 781 (Utah Ct. App. 1998).

The Utah Court of Appeals recently examined *Daubert* in *Haupt v. Heaps*, 775 P.2d 388, 2005 WL 2586633 (Utah App., 2005). The court remarked that "Four years after *Rimmasch* was decided, the United States Supreme Court joined the Utah Supreme Court in recognizing the need for trial courts to carefully regulate the admissibility of scientific evidence." 2005 WL 2586633 at *5. However, since the decision in *Kumho Tire,* the Utah Supreme Court has reiterated that the *Rimmasch* test "applies only to novel scientific methods and techniques", citing *Alder v. Bayer Corp.,* 2002 UT 115, 61 P.3d 1068; *see also Green v. Louder,* 2001 UT 62, ¶ 27, 29 P.3d 638; *State v. Adams,* 2000 UT 42, 5 P.3d 642; *State v. Kelley,* 2000 UT 41, ¶ 19, 1 P.3d 546; and *State v. Schultz,* 2002 UT App 366, 58 P.3d 879."

*Daubert* has been cited or but not applied in a civli and criminal cases in Utah for the reasons outlined above.

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[11] In *Merrell Dow Pharms., Inc. v. Havner*, 953 S.W.2d 706, 729 (Tex. 1997), *cert. denied*, 523 U.S. 1119 (1998), the Texas Supreme Court wrote an articulate explanation of the relevant scientific principles, and was one of the few courts to adopt a numerical "risk factor" as satisfying the scientific probability for causation. *Havner* requires that "[t]he underlying data should be independently evaluated in determining if the opinion itself is reliable," *id.* at 713 and "[i]f the foundational data underlying opinion testimony are unreliable, an expert will not be permitted to base an opinion on that data because any opinion drawn from that data is likewise unreliable." *Id.* at 713-714.

**Vermont**

Vt. R. Evid. 702 was amended effective July 1, 2004 to accord verbatim with Federal Rule 702.

Vermont explicitly adopted the *Daubert* standard to determine the admissibility of scientific evidence in *State v. Brooks*, 643 A.2d 226, 229 (Vt. 1993) (holding that *Daubert* applies because Vermont's evidentiary rules governing the admissibility of scientific evidence are essentially identical to the Federal Rules of Evidence). *See also State v. Streich*, 658 A.2d 38, 46 (Vt. 1995) (the Vermont Supreme Court, which had never adopted *Frye*, decided to follow *Daubert's* principles in scientific evidence cases).

In *USGen New England, Inc. v. Town of Rockingham,* 177 Vt. 193, 862 A.2d 269 (Vt., 2004), the Supreme Court of Vermont reaffirmed *Brooks* and usefully condensed its position on *Daubert* into a single paragraph. The court remarked: "Following the *Brooks* decision, in *Streich,* 163 Vt. at 342, 658 A.2d at 46, we reiterated our decision to follow *Daubert* and reject *Frye.* In 2000, although not explicitly, we followed *Kumho Tire,* when we applied the *Daubert* standard in *State v. Kinney,* 171 Vt. 239, 248-49, 762 A.2d 833, 841-42 (2000), where an expert testified about rape trauma syndrome. Recently, we made our adoption of *Kumho Tire* explicit by amending V.R.E. 702 to include its holding. See 2004 Amendment to V.R.E. 702 (effective July 1, 2004) (making V.R.E. 702 identical to Fed.R.Evid. 702." 177 Vt. 193, 200.

*Daubert* has been applied in criminal and civil cases in Vermont.

**West Virginia**

West Virginia Rule of Evidence 702 is identical to Fed. R. Evid. 702 prior to its December 1, 2000 amendment. *See* W. Va. R. Evid. 702.

West Virginia adopted the *Daubert* analysis in *Wilt v. Buracker*, 443; S.E.2d 196, 203 (W. Va. 1993), *cert. denied*, 511 U.S. 1129 (1994) (concluding that *Daubert's* analysis of Federal Rule of Evidence 702 should be followed in analyzing the admissibility of expert testimony under W. Va. R. Evid. 702.) *See also Mayhorn v. Logan Medical Foundation*, 454 S.E.2d 87, 91-92 (W. Va. 1994) (examining the *Daubert/Wilt* analysis and stating that W. Va. R. Evid. 702 provides the test for determining whether an expert's testimony is admissible). The West Virginia Supreme Court clarified the *Daubert/Wilt* analysis and held that it only applies if the expert testimony deals with scientific knowledge. *Gentry v. Mangum*, 466 S.E.2d 171, 170-82 (W. Va. 1995). *See also State v. Wiseman*, 2002 WL 1453986 (W. Va. 2002) (allowed treating physician to testify as to novel, unorthodox opinion not generally accepted by the medical community; opinion "valid enough to be reliable"); and *Watson v. INCO Alloys Int'l Inc*., 209 W. Va. 234 (W. Va. 2001) (holding that testimony by an engineer was "technical" and not scientific and therefore not subject to *Daubert*/*Wilt* analysis). The West Virginia courts dealt with the *Daubert* principles in *In re Frances J.A.S.*,213 W.Va. 636, 584 S.E.2d 492 (W.Va., 2003) where the court admitted evidence from a psychologist despite the fact that one questioning method (but not all questioning methods) failed the *Daubert* test.

*Daubert* has been cited and applied in civil and criminal cases in West Virginia.

**Wyoming**

Wyoming Rule of Evidence 702 is identical to Fed. R. Evid. 702 prior to its December 1, 2000 amendment.

Prior to *Daubert*, the Wyoming Supreme Court held that the correct approach in determining the admissibility of scientific evidence was through analysis under the Wyoming Rules of Evidence, rather than the *Frye* test of general acceptance. *Rivera v. State*, 840 P.2d 933, 942 (Wyo. 1992). In 1993, the Wyoming Supreme Court examined *Rivera* in light of the recently announced *Daubert* decision and held that the two paralleled one another. *Springfield v. State*, 860 P.2d 435, 443 (Wyo. 1993). The Wyoming Supreme Court expressly adopted *Daubert* as "guidance" for admissibility of all expert testimony in *Bunting v. Jamieson,* 984 P.2d 467-(Wyo. 1999). *Bunting* dealt with the admission of testimony by a physician and the court found that under *Kumho Tire,* the focus should be on the gatekeeping role of the trial court and not on whether the testimony in question was of a scientific nature.

In *Hoy v. DRM, Inc.,* 114 P.3d 1268 (Wyo., 2005) the Wyoming Supreme Court reaffirmed *Bunting* and observed: "In *Bunting,* we adopted *Daubert's* two-part test: first, the trial court is to determine whether the methodology or technique used by the expert is reliable, and second, the trial court must determine whether the proposed testimony "fits" the particular case. *Bunting,* 984 P.2d at 471. We also noted with approval the non-exclusive criteria that have been utilized to guide trial courts in making that first determination…" 114 P.3d 1268, 1277.

*Daubert* has been cited and applied in criminal and civil cases in Wyoming.

## JURISDICTIONS REJECTING DAUBERT (14)[12]

**Arizona**

Arizona Rule of Evidence 702 is identical to Fed. R. Evid. 702 prior to its December 1, 2000 amendment.

In *State v. Tankersley*, 956 P.2d 486 (Ariz. 1998) the Court declined the State's request that it abandon *Frye* and apply *Daubert* for new scientific evidence on DNA typing. The Arizona Supreme Court continues to apply the *Frye* test in a manner laid out in *State v. Hummert*, 188 Ariz. 119, 933 P.2d 1187, *reh'g denied*, (1997). *See also State v. Bible*, 175 Ariz. 549, 858 P.2d 1152 (1993) (discussing the merits of the *Frye* and *Daubert* standards and declining to adopt the latter) and *Logerquist v. McVey*, 196 Ariz. 470, 1 P.3d 113 (2000) (discussing at length the merits of the *Frye* and *Daubert* standards and reaffirming *Hummert*). In *State v. Lucero*, 207 Ariz. 301, 85 P.3d 1059; (Ariz.App. Div. 1, 2004), the Court of Appeals of Arizona remarked: " The admissibility of certain scientific evidence in Arizona is determined by the Frye standard." 207 Ariz. 303.

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[12] 13 States and the District of Columbia.

**California**

California's evidentiary rules on the testimony of experts reads in relevant part as follows:

> A person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates . . . .
>
> A witness' special knowledge . . . may be shown by any otherwise admissible evidence, including his own testimony.

Ca. Evid. Code § 720 (2006).

> If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is:
>
> Related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact; and
>
> Based on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion.

Ca. Evid. Code § 801 (2006).

California has not made any changes to Ca. Evid. Code Subsection 720 or 801 since September 1999. *See* Ca. Evid. Code § 801 (2006).

*People v. Leahy*, 882 P.2d 321, 331 (Cal. 1994), held that the "more conservative" *Kelly/Frye* approach to determining the reliability of expert testimony regarding scientific techniques is appropriate and survives *Daubert* in California. "General acceptance" under *Kelly/Frye* means a consensus drawn from a typical cross-section of the relevant qualified scientific community. *Id.* at 337. The *Kelly* standard requires proof of reliability of a new scientific technique by showing that (i) the technique has gained general acceptance in the particular field to which it belongs, (ii) any witness testifying on general acceptance is properly qualified as an expert on the subject, and (iii) correct scientific procedures were used in the particular case. *People v. Kelly*, 549 P.2d 1240 (Cal. 1976). In 1999, the Supreme Court of California noted that *Frye* had been superseded by *Daubert* in Federal jurisprudence, but the *Kelly* test remained the standard in California. *People v. Soto*, 91 P.2d 858, 960 (Calif. 1999).

Subsequent cases such as *Roberti v. Andy's Termite & Pest Control, Inc.,* (2003) 113 Cal.App.4th 893, 6 Cal.Rptr.3d 827 (Cal.App. 2 Dist.) confirm that *Kelly* controls the admission of expert evidence in California, and not *Daubert*. However, there is a split in opinion among California intermediate courts of appeal. *See Jennings v. Palomar Pomerado Health Systems, Inc.*, (2003) 114 Cal.App.4th 1108; *Korsak v. Atlas Hotels, Inc.* (1992) 2 Cal.App.4th 1516. In *People v. Leahy*, (1994) 8 Cal.4th 587, 598 itself the court remarked that "Sections 720 and 801, in combination,

seem the functional equivalent of Federal Rules of Evidence, rule 702, as discussed in *Daubert*." This issue is now before the California Supreme Court in *Aguilar v. ExxonMobil Corporation* (Lockheed Litigation Cases), Case No. S132167, which has been fully briefed and is awaiting argument.

The standard of review of a trial court's decision to exclude expert testimony on the ground that the foundation for the testimony is unreliable is abuse of discretion. *See, e.g.*, *Lockheed Litigation Cases,* (2004) 115 Cal.App.4th 558, 10 Cal.Rptr.3d 34; *County Sanitation Dist. v. Watson Land Co.* (1993) 17 Cal.App.4th 1268, 1277; *Korsak v. Atlas Hotels, Inc.* (1992) 2 Cal.App.4th 1516, 1523).

**Colorado**

Colorado Rule of Evidence 702 is identical to Fed. R. Evid. 702 prior to its December 1, 2000 amendment.

In *Brooks v. People*, 975 P.2d 1105 (Colo. 1999) the Colorado Supreme Court applied Rule 702 but declined to adopt *Daubert* in case addressing admissibility of expert testimony explaining scent tracking and identification of a criminal defendant by a police bloodhound, because such testimony is from experience-based specialized knowledge, and *Daubert'*s holding is limited to the scientific realm. The Colorado Supreme Court further clarified the standard for admitting scientific evidence in *People v. Schrek*, 22 P.3d 68, 75 (Colo. 2001), in which it stated that Colorado Rules of Evidence 702 and 403 are a better standard than *Frye* "because their flexibility is consistent with a liberal approach which considers a wide range of issues." *Id.* at 77. The Court, citing *Daubert* and *Brooks,* also said "The focus of a Rule 702 inquiry is whether the scientific evidence proffered is both reliable and relevant. *Id.* Since the trial court's reliability inquiry under Colo. R. Evid. 702 is to be broad and to consider the totality of the circumstances of the specific case, factors mentioned in *Daubert* or *United States v. Downing*, 753 F.2d 1224 (3d Cir. 1985), may, but need not be considered, depending on the totality of the circumstances of a given case. Id. at 76-77. The Court stated that its holding is "consistent with [our] previous declination to 'give any special significance to the Daubert factors,' in the context of considering evidence [they] considered to be experience-based specialized knowledge. *Id.* at 77 (citing *Brooks*, 975 P.2d at 1114). The Supreme Court of Colorado recently discussed the expert evidence test in *People v. Wilkerson*, 114 P.3d 874 (Colo., 2005) and held that *Brooks* and *Schrek* remain good law.

The Colorado standard for the admission of expert testimony has been applied in both criminal and civil cases. *See e.g. Kinney v. Keith, 128 P.3d 297* (Colo. Ct. App. 2005).

**District of Columbia**

The District of Columbia applies the following three-part test to determine admissibility of expert testimony: (1) the subject matter must be so distinctively related to some science, profession, business or occupation as to be beyond the ken of the average [lay person]; (2) the witness must have sufficient skill, knowledge, or experience in that field or calling as to make it appear that his [or her] opinion or inference will probably aid the trier in his [or her] search for truth; and (3) the expert testimony is inadmissible if the state of the pertinent art or scientific knowledge does not permit a reasonable opinion to be asserted even by an expert. *Dyas v. United States*, 376 A.2d 827,

832 (D.C. 1977), *cert. denied*, 434 U.S. 973 (1977)(quoting McCormick on Evidence § 13, at 29-31 (2d ed. 1972)) (emphasis deleted). *See also Nixon v. United States*, 728 A.2d 582 (D. C. 1999).

"The third part of the *Dyas* test requires the trial court to determine that the scientific method used by the expert is sufficiently established to have gained general acceptance in the particular field in which it belongs. This part of the test goes to the reliability of the scientific technique involved." *Street v. Hedgepath*, 607 A.2d 1238, 1244 (D.C. App. 1992) (internal citation omitted). Citing *Nixon*, the District of Columbia Court of Appeals stated that the *Frye* test remains in effect in the District of Columbia. *Bahura SEW Investors,* 754 A.2d 928, 943 (D.C. 1999).

In *U.S. v. Jenkins*, 887 A.2d 1013 (D.C., 2005) the District of Columbia confirmed that *Frye* is the applicable standard within the District, remarking "The *Frye* analysis, however, begins and ends with "the acceptance of particular scientific methodology" and not the acceptance of a particular result or conclusion derived from that methodology. *Id.* (citing *Ibn-Tamas v. United States,* 407 A.2d 626, 638 (D.C.1979)). The trial court erred in failing to focus on methodology." 887 A.2d 1021.

**Florida**

Florida's rule on "Testimony by experts" reads as follows:

> If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion; however, the opinion is admissible only if it can be applied to evidence at trial.

Fla. Stat. Ann. § 90.702 (2005).

In *Flanagan v. State*, 625 So. 2d 827, 829 n.2 (Fla. 1993) the court recognized *Daubert* in a footnote, but stated that Florida continues to adhere to the *Frye* test for the admissibility of scientific opinions); *see also Brim v. State*, 695 So. 2d 268, 271-72 (Fla. 1997) (Florida maintains the "higher standard of reliability as dictated by *Frye*," despite the federal adoption of "a more lenient standard" in *Daubert*); *Hadden v. State*, 690 So. 2d 573, 578 Fla. 1997) (Florida's specific adoption of the *Frye* test after the enactment of the evidence code manifests Florida's intent to use the *Frye* test as the proper standard for admitting "novel scientific evidence," even though the *Frye* test is not set forth in the evidence code). The Florida Supreme Court reaffirmed its adherence to *Frye* in *Murray v. State*, 692, So.2d 157 (Fla. 1997). In *Roeling v. State*, 880 So.2d 1234 (Fla.App. 1 Dist. 2004) the Court of Appeal refers to the *Frye* test as the law applicable to expert testimony.

**Kansas**

The Kansas rule on expert testimony limits expert opinions to those which the judge finds to be "(1) based on facts or data perceived by or personally known or made known to the witness at the hearing and (2) within the scope of the special knowledge, skill, experience or training possessed by the witness." *See* K.S.A. § 60-456(b) (2005). Kansas has not adopted an equivalent of Fed. R. Evid. 702.

The Supreme Court of Kansas continues to apply the *Frye* test when determining the admissibility of expert scientific evidence. *See State v. Shively,* 999 P.2d 952, 955 (Kan. 2000). The *Frye* test only concerns the methodology underlying the expert opinion, not "pure opinion" testimony. *See*

*Kuhn v. Sandoz Pharmaceutical Corp.*, 14 P.3d 1170, 1179 (Kan. 2000). Kansas decisions jurisprudence to March 2006 reveals no intention to adopt the *Daubert* principles.

**Maryland**

Maryland's rule on testimony by experts reads as follows:

> Expert testimony may be admitted, in the form of an opinion or otherwise, if the court determines that the testimony will assist the trier of fact to understand the evidence or to determine a fact in issue. In making that determination, the court shall determine (1) whether the witness is qualified as an expert by knowledge, skill, experience, training, or education, (2) the appropriateness of the expert testimony on the particular subject, and (3) whether a sufficient factual basis exists to support the expert testimony.

Md. Code Ann., Cts. & Jud. Proc. § 5-702 (2005). The committee notes state that this rule is not intended to overrule Maryland case law adopting *Frye*.

Maryland adopted the *Frye* test in *Reed v. State*, 283 Md. 374, 391 A.2d 364, 97 A.L.R.3d 201 (1978). *See Hutton v. State*, 663 A.2d 1289, 1295 n.10 (Md. 1995) (applying the *Frye* standard and referencing the committee note appended to Md. R. Evid. 5-702); *Burral v. State*, 724 A.2d 65 (Md. 1999) (holding that Maryland has not abandoned *Frye* in favor of standards set forth in Fed. R. Evid. 702).

In *Smith v. State*, 388 Md. 468, 880 A.2d 288 (Md., 2005) the Maryland Supreme Court wrote that "Maryland has not rejected the *Daubert* standard, leaving to case-by-case development whether and to what extent *Daubert* may apply here. *See* Committee Note to Md. Rule 5-702." 388 Md. 468 at footnote 12.

**Nevada**

The Nevada rule on admissibility of expert 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 special knowledge, skill, experience, training or education may testify to matters within the scope of such knowledge." Nev. Rev. Stat. Ann. § 50.275 (2005).

The Nevada Supreme Court declined to adopt *Daubert* in a silicone gel breast implant case stating its belief that the *Daubert* doctrine is a "work in progress" that should be observed for further development in the federal courts before being adopted in the state. *Dow Chemical Company v. Mahlum*, 970 P.2d 98 (Nev. 1998), *overruled on other grounds, Ges, Inc. v. Corbilt,* 21 P.3d 11 (Nev. 2001). Nevada courts have neither cited to nor adopted the *Frye* decision. *See Santillanes v. Nevada*, 765 P.2d 1147, 1150 n.3 (Nev. 1988) ( Nevada courts determine "admissibility of scientific evidence, like other evidence, in terms of its trustworthiness and reliability.") "Decisions regarding the admissibility of expert testimony lie within the discretion of the trial court." *Emmons v. Nevada*, 807 P.2d 718, 720 (Nev. 1991); *Yamaha Motor Company, U.S.A. v. Arnoult*, 955 P.2d 661 (Nev. 1998) (assessing the efficacy of warnings does not implicate "laws of science" but falls within "specialized knowledge" not governed by scientific method to which *Daubert* does not apply).

For an overview of Nevada's expert testimony jurisprudence, see Brian Irvine, *Waiting for Daubert*: *The Nevada Supreme Court and the Admission of Expert Testimony,* 2 Nev. L.J. 158 (2002).

**New York**

New York's rule dealing with the testimony of an expert witness, N.Y. C.P.L.R. § 4515 (McKinney 2006), reads as follows:

> Unless the court orders otherwise, questions calling for the opinion of an expert witness need not be hypothetical in form, and the witness may state his opinion and reasons without first specifying the data upon which it is based. Upon cross-examination, he may be required to specify the data and other criteria supporting the opinion.

The supplementary practice commentary to this rule states that an expert witness may base his or her opinion, in part, on data that has not been introduced in evidence if it is of a type that is accepted in the expert's profession as reliable. *People v. Angelo*, 666 N.E.2d 1333 (N.Y. 1996), holds that if such out of court material consists of scientific methods or procedures, the reliability standard of the *Frye* test must be met.

*People v. Wesley*, 633 N.E.2d 451, 454 n.2 (N.Y. 1994), applying the *Frye* test to affirm the admissibility of DNA profiling evidence (stating that *Daubert* "is not applicable here") is the current decision of the state's 3-2)highest court cited frequently by lower court. *See also People v. Victory*, 631 N.Y.S.2d 805, 810-11 (N.Y. City Crim. Ct. 1995) ("New York still follows the '*Frye'* test on whether evidence is scientifically reliable"); *People v. Lee,* 96 N.Y.2d 157 (N.Y. 2001) (expert testimony may be based upon novel scientific theory and therefore the Court must evaluate whether it is generally accepted by the scientific community.)

In *DeMeyer v. Advantage Auto*, 9 Misc.3d 306, 797 N.Y.S.2d 743 (Sup. Ct. N.Y. Co. 2005) the trial court reaffirmed *Wesley* and declined "…to apply Daubert to the facts of the pending case."

However, the law in New York may be in flux. In *Parker v. Mobil Oil Corporation*, http://www.nycourts.gov/ctapps/decisions/oct06/107opn06.pdf (N.Y. Ct. App. 10/17/06) (not officially reported) the state's highest court, a nanimous court,while invoking *Frye*[13], referred to cases that "employ a *Daubert* analysis... [but]...are instructive to the extent that they address the reliability of an expert's methodology." (Slip. Op. at 12) Moreover, the Parker court rested its affirmance of the intermediate appellate court on the issue of quantifying exposure levels, a criterion often used in cases that rely on *Daubert*. In *Nonnon v. City of New York*, 2006 NYSlipOp 04373 (N.Y. App. Div. 1st Dep't, June 6, 2006), decided by an intermediate appellate court before the *Parker* decision was handed down), a sharply divided (3-2) court held in a toxic tort case involving numerous plaintiffs and several alleged toxins and several diseases allegedly caused by exposure

[13] The court remarked "Although some amici urge the Court to adopt the federal standard (or some portions of it) as expressed in Daubert v Merrell Dow Pharmaceuticals, Inc. (509 US 579, 589-590 [1993] [requiring that scientific testimony be relevant and reliable in order to assist the trier of fact under Federal Rule of Evidence 702]), the parties make no such argument and acknowledge that Frye is the current standard in New York.

to a waste site, that the plaintiffs' experts did not have to quantify the levels of exposure to the various chemicals, and affirmed a denial by the trial court of defendant's motion for summary judgment.

The *Nonnon* court held that the intermediate appellate decision in *Parker* could not be applied to the facts in *Nonnon* because "no scientist could make an accurate measurement of the doses of the combined carcinogens to which these plaintiffs were exposed." and that "The federal reference manual instructs that 'dose-response' relationships are only one of nine factors which can lead an epidemiologist to draw a causal inference." (Citing the Federal Judicial Conference Reference Manual on Scientific Evidence, at 374-379) and that "It is not the dispositive measure here." The Appellate Division also distinguished *Parker* because *Nonnon*

> "does not involve one plaintiff alleging that exposure to one carcinogen from one source caused cancer. This litigation arose from a community with a disproportionate incidence of fatal cancers in an area surrounding a landfill containing approximately one million gallons of hazardous waste. It is uncontested that defendant allowed years of illegal dumping of what are known to be carcinogens at the Pelham Bay landfill, and one of plaintiffs' experts identified four 'exposure pathways' through which these plaintiffs could have been 'poisoned' by the dumped carcinogens. It is uncontested that the landfill was closed because it contained unacceptable levels of carcinogens. Proper methods of containing the spread of hazardous materials through a variety of exposure pathways were conceitedly not implemented.

In the classic rejoinder to a *Daubert*-like screening role for the judge, the majority in *Nonnon* concluded by stating that "To the extent that the City challenges the methodology of [plaintiffs' experts]. . . these issues are properly the subject of cross-examination at trial, as they go to credibility and to the weight to be given to the evidence." (Slip. Op. at 15)

The dissent argued that plaintiffs' epidemiological and toxicological experts failed to use generally accepted scientific methodology, their opinions lacked a proper foundation and that plaintiffs' failed to present any evidence establishing a causal relationship between the toxic substances in the landfill and the diseases from which they suffered. Once *Frye* has been satisfied, the question is "whether the accepted techniques were employed by the experts in this case," and the focus moves from the general reliability concerns of *Frye* to the specific reliability of the procedures followed to generate the evidence proffered and whether they establish a foundation for the reception of the evidence at trial. The dissent also noted that the question is not whether epidemiology or toxicology are "novel," but whether the opinions of plaintiffs' experts were based upon generally accepted techniques within their disciplines.

Thus although the court in *Parker* and both the majority and dissent in *Nonnon* invoke *People v. Wesley* and *Frye*, there appears to be some movement in New York towards a hybrid test for admissibility of expert testimony.

**North Dakota**

North Dakota Rule of Evidence 702 is identical to Fed. R. Evid. 702 prior to its December 1, 2000 amendment.

In *City of Fargo v. McLaughlin*, 512 N.W.2d 700,(N.D. 1994) the court stated that *Frye* governs the admissibility of scientific test results in North Dakota, but cited *Daubert* in a footnote (512 N.W.2d 705 n.2).

In *State v. Hernandez*, 707 N.W.2d 449 (North Dakota, 2005), the North Dakota Supreme Court declined to adopt *Daubert*: "This Court has a formal process for adopting procedural rules after appropriate study and recommendation by the Joint Procedure Committee, and we decline Hernandez's invitation to adopt *Daubert* by judicial decision." 707 N.W.2d at 453.

**Pennsylvania**

Pennsylvania Rule of Evidence 702 is similar to Fed. R. Evid. 702 prior to its December 1, 2000 amendment. However, a comment to the rule states: "Adoption of Pa. R. Evid. 702 does not alter Pennsylvania's adoption of the standard in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), which requires scientific evidence to have 'general acceptance' in the relevant scientific community."

"Pennsylvania courts continue to apply the *Frye* standard to determine whether scientific evidence is admissible." *Commonwealth v. Arroyo*, 723 A.2d 162 (Pa. 1999). Subsequently, the Pennsylvania Supreme Court reviewed a case in which the trial court applied *Daubert* and on appeal the Pennsylvania Court of Appeals applied *Frye*. The Supreme Court held that the expert's testimony was inadmissible under both *Daubert* and *Frye*, stating that it would be "jurisprudentially unsound" to use the case to resolve the conflict. *Blum v. Merrell Dow Pharmaceutical*, 764 A.2d 1, 5 (Pa. 2000).

In *Grady v. Frito-Lay, Inc.*, 576 Pa. 546, 839 A.2d 1038 (Pennsylvania 2003) the Supreme Court of Pennsylvania reviewed the *Daubert* test and held: "After careful consideration, we conclude that the *Frye* rule will continue to be applied in Pennsylvania. In our view, *Frye's* "general acceptance" test is a proven and workable rule, which when faithfully followed, fairly serves its purpose of assisting the courts in determining when scientific evidence is reliable and should be admitted." 576 Pa. 557.

**South Carolina**

South Carolina Rule of Evidence 702 is identical to Fed. R. Evid. 702 prior to its December 1, 2000 amendment.

In *State v. Council*, 515 S.E.2d 508, 517 (S.C. 1998) the South Carolina Supreme Court declined to adopt *Daubert* and held that the proper analysis for determining admissibility of scientific evidence is now set forth in South Carolina Rule of Evidence 702, and the trial judge must find the evidence will assist the trier of fact, the expert witness is qualified, and the underlying science is reliable. The trial judge should apply the factors discussed in *State v. Jones*, 273 S.C. 723 (1979)) *Jones* factors to determine reliability. Under the *Jones* standard, the Court looks at several factors, including: (1) the publications and peer review of the technique; (2) prior application of the method

to the type of evidence involved in the case; (3) the quality control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures." *See also State v. Ford*, 392 S.E.2d 781 (1990). In *re Robert R.,* 340 S.C. 242, 531 S.E.2d 301 (S.C.App 2000) the Appeals Court discussed *Council* and, despite an invitation to apply *Daubert*, followed the test outlined by the Supreme Court of South Carolina in *Council*.

**Washington**

Washington Rule of Evidence 702 is identical to Fed. R. Evid. 702 prior to its December 1, 2000 amendment.

Nevertheless, the Washington Supreme Court has declined to adopt *Daubert* and has held that *Frye* and the evidence rules co-exist as the law of Washington. *State v. Copeland*, 922 P.2d 1304, 1314 (Wash. 1996); *State v. Jones*, 922 P.2d 806, 808-09 (Wash. 1996).

In *State v. Gore*, 143 Wash.2d 288, 21 P.3d 262 (Washington 2001) *overruled on other grounds State v. Hughes*, 154 Wash.2d 118, 110 P.3d 192 (2005), the Supreme Court of Washington amended elements of the *Frye* test, but only with respect to standards of proof when DNA evidence is at issue. A review of recent caselaw produces no inclination by Washington courts to adopt *Daubert*.

**Wisconsin**

Wisconsin's rule on admissibility of expert testimony is identical to Fed. R. Evid. 702 prior to its December 1, 2000 amendment. *See* Wis. Stat. Ann. § 907.02 (2006).

According to the Wisconsin Court of Appeals, the standard for the admission of scientific evidence is unaffected by *Daubert* because Wisconsin courts had previously rejected the *Frye* test. *State v. Peters*, 534 N.W.2d 867, 872 (Wis. Ct. App. 1995). The court explained that scientific evidence is admissible if it is relevant, if the witness is qualified as an expert, and if the evidence will assist the trier of fact in determining an issue of fact. *Id.* Notably, Wisconsin courts do not consider the reliability of expert testimony as a condition of its admission. *Id.*

The Court of Appeal of Wisconsin in *City of West Bend v. Wilkens*, 278 Wis.2d 643, 693 N.W.2d 324 Wis.App., (Wisconsin 2005) confirmed that "Wisconsin is not a *Daubert* state." 278 Wis.2d at 655. *See also, State v. Brown (In re Brown),* 2006 WI App 20 (Wis. Ct. App. 2005).

## STATES THAT HAVE NEITHER ADOPTED NOR REJECTED DAUBERT (7)

**Alabama**

Alabama Rule of Evidence 702 is identical to Fed. R. Evid. 702 prior to its December 1, 2000 amendment.

Alabama courts continue to apply the *Frye* test to determine the admissibility of expert testimony. *Courtaulds Fibers, Inc. v. Long*, 779 So. 2d 198 (Ala. 2000). In *General Motors Corp. v. Jernigan*, 883 So.2d 646 (Alabama 2003) the court observed: "GM argues that we should change the law in Alabama to embrace the standard for admitting expert testimony set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), instead of retaining

the standard set forth in *Frye v. United States,* 293 F. 1013 (D.C.Cir.1923), which we have followed for many years. See *Courtaulds Fibers, Inc. v. Long,* 779 So.2d 198 (2000), and *Southern Energy Homes, Inc. v. Washington,* 774 So.2d 505 (2000). We decline to change the standard in this case." 883 So.2d at 661.

Alabama has, by statute, adopted the *Daubert* standard for admissibility of DNA evidence. Ala. Code § 36-18-30 (1997). *See Turner v. State,* 746 So. 2d 355 (Ala. 1998), but on subjects other than DNA techniques, however, *Frye* remains the general standard. *Id.*

**Hawaii**

Hawaii Statute §702 is identical to Fed. R. Evid. 702 prior to its December 1, 2000 amendment. *See* Haw. Rev. Stat. Ann. §702. In 1992, however, the state legislature added the following sentence to the rule: "In determining the issue of assistance to the trier of fact, the court may consider the trustworthiness and validity of the scientific technique or mode of analysis employed by the proffered expert." *Id.* This language was added to clarify the rule and to allow not only the application of the *Frye* test, but the consideration of other factors, including the scientific procedure itself and other evidence of its reliability. Haw. Rev. Stat. Ann. § 702 (1996) (supplemental commentary). Hawaii has not adopted the amendment to Fed. R. Evid. 702 nor have any other changes been made since September 1999. The Hawaii Supreme Court has determined that while Haw. Rev. Stat. Ann. § 702 has not yet been amended, the discretion accorded trial courts in Hawaii would not preclude them from using those flexible factors. *See State v. Vliet*, 19 P.3d 42, 57 (2001).

Hawaii adopted the *Frye* test for scientific testimony in 1992.. The state also uses a two-prong test to determine the admissibility of expert testimony that mirrors Fed. R. Evid. 702 and 703 and has been described by the Hawaii Supreme Court as follows:

> The critical inquiry with respect to expert testimony under our new code is whether such testimony "will assist the trier of fact to understand the evidence or determine a fact in issue. . . ." Generally, in order to so assist the jury an expert must base his testimony upon a sound factual foundation; any inferences or opinions must be the product of an explicable and reliable system of analysis; and such opinions must add to the common understanding of the jury. Moreover the probative value of such testimony must not be outweighed by the likelihood of prejudice, confusion or waste of time. Hawaii v. Kim, 645 P.2d 1330, 1336 (Haw. 1982), overruled on other grounds, Hawaii v. Batangan, 799 P.2d 48 (1990) (citations omitted).

*See Hawaii v. Maelega*, 907 P.2d 758, 768 (1995). In *Maelega*, the Supreme Court of Hawaii dealt with the possibility of implementing *Daubert*, but the court continued its use of the *Frye* test and the corresponding *Kim* two-prong analysis. *Maelega*, 907 P.2d at 768-69.

The Hawaii Supreme Court has held that an independent reliability determination is unnecessary for expert testimony based on technical knowledge, such as hair and fiber analysis, because the underlying scientific principles and procedures have been proven valid and reliable. *State v. Fukusaku,* 946 P.2d 32 (Haw. 1997). *See also State v. Ito*, 90 Haw. 225, 978 P.2d 191 (Haw. Ct.

App. 1999), as amended, (May 14, 1999) (finding it not clear whether the Hawaii Supreme Court in *Fukusaku* meant to adopt the *Daubert* principles or not).

The Hawaii Supreme Court has "neither expressly approved nor rejected the *Daubert* criteria." *Acoba v. General Tire, Inc.,* 986 P.2d 288, 300 n.6 (1999). This was reaffirmed in *State v. Vliet*, 19 P.3d at 52. However, since the Hawaii Rules of Evidence are patterned after the Federal Rules of Evidence, the court found the construction of the Federal Rules of Evidence and Federal case law on Fed. R. Evid. 702 instructive in interrupting the Hawaii Rules of Evidence. *Id.* at 52-53. The court also reaffirmed that relevance and reliability are the touchstones of admissibility for expert testimony under Haw. Rev. Stat. Ann. § 702. *Id.* at 53 (citing *Fukusaku*, 946 P.2d 32, 43 (1997)). This position appears to have been accepted in *State v. Escobido-Ortiz*, 109 Hawaii 359, 126 P.3d 402, 2005 WL 3292575 (Hawaii App. 2005). In *Escobido-Ortiz* the Appeals Court remarkedthat, "Although the Hawaii Supreme Court has not adopted the *Daubert* test in construing HRE Rule 702, it has found the *Daubert* factors instructive." *Id.* at 367. The Hawaii Supreme Court also found that it is not "necessary or essential" that the trial court determine whether the expert testimony is scientific or technical. *State v. Vliet*, 19 P.3d at 55. A plain reading of Haw. Rev. Stat. Ann. § 702 encompasses both scientific and technical expert testimony and distinguishes it from lay testimony covered by Haw. Rev. Stat. Ann. § 701. *Id.* at 56-57.

**Illinois**

Illinois does not follow the federal model in determining the admissibility of expert testimony. The Illinois rules of evidence are embedded in the state's of civil procedure. Much of Illinois evidence law is based on stare decisis, and only one state rule, which applies to medical malpractice cases, specifically governs expert testimony. *See* 735 Ill. Comp. Stat. 5/8-2501 (1996). There is no substantial equivalent to Fed. R. Evid. 702. *See* Robert J. Steigmann, 1 ILLINOIS EVIDENCE MANUAL § 7:10 - § 7:48 (3d ed. 1995).

Illinois applies the *Frye* test for admissibility of novel scientific expert evidence. *See Illinois v. Miller*, 670 N.E.2d 721, 731 (Ill. 1996). An Illinois appellate court has declined to apply the *Daubert* test, stating, "[U]ntil such time as our supreme court ceases to recognize the *Frye* test as the applicable standard for admitting novel scientific evidence in this state, we shall continue to apply it." *Illinois v. Watson*, 629 N.E.2d 634, 641 (Ill. Ct. App. 1994) *overruled on other grounds, People v. Watson*, 214 Ill. 2d 271. The Supreme Court of Illinois has yet to consider the matter. In *Miller*, the court refused to raise the issue sua sponte and refused to replace the *Frye* standard with *Daubert*. *See Miller*, 670 N.E.2d at 731. In *People v. Basler*, 193 Ill. 2d 545, 740 N.E.2d 1 (Ill. 2000), the Court, while not mentioning *Daubert,* confirmed that *Frye* was the governing standard in Illinois. In *Turner v. Williams*, 326 Ill.App.3d 541, 260 Ill. Dec. 804 Ill.App. 2 Dist., (Illinois 2001) the Court of Appeal again refused to apply the *Daubert* standard, noting; "In Illinois, the admission of scientific evidence is strictly governed by the standard enunciated in *Frye.*"326 Ill.App.3d 54, 554.

In *Donaldson v. Central Illinois Public Service Co.*, 199 Ill. 2d 63, 767 N.E.2d 314 (Ill. 2002), the Illinois Supreme Court officially rejected the "*Frye* plus reliability" test that had been adopted by the Illinois Court of Appeals for the 4th district. *See Harris v. Cropmate Co.*, 706 N.E.2d 55, 59-60 (Ill. Ct. App. 4th Dist. 2000). The court reaffirmed that *Frye* was "the exclusive test for the admission of expert testimony" under Illinois law. *Donaldson*, 199 Ill. 2d at 75. Consistent with *Miller*, the court once again stated that "[t]he parties have not argued, and we have not considered,

the adoption of a new standard consistent with the United States Supreme Court decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc*. We will not raise this issue *sua sponte*." *Id.* at 80 n.1 (citation omitted).

The Supreme Court of Illinois most recently considered the *Frye* standard in *In re Commitment of Simons*, 213 Ill.2d 523, 290 Ill.Dec. 610 (Illinois, 2004). The court observed " … the admission of expert testimony is governed by the standard first expressed in *Frye v. United States,* 293 F. 1013 (D.C.Cir.1923)." 290 Ill.Dec. 610, 614.

**Minnesota**

Minnesota Rule of Evidence 702 is identical to Fed. R. Evid. 702 prior to its December 1, 2000 amendment.

Minnesota courts apply the "*Frye-Mack*" standard to determine the admissibility of novel scientific evidence. The test includes the general acceptance test of *Frye,* plus it requires that the evidence derived from that test to have a scientifically reliable foundation. *See Goeb v. Tharaldson*, 615 N.W.2d 800, 810 (Minn. 2000). The Court of Appeals in *Timmer v. Shamineau Adventures*, 2005 WL 3371049 Minn.App. (Minnesota, 2005)[14] observed that the "court in *Goeb*...refused to adopt the principals of *Daubert and its progeny, and, therefore, appellant's reliance on .... Daubert* [in this case] is misguided.." 2005 WL 3371049 fn 5.

**Missouri**

Missouri had adopted Fed. R. Evid. 702 prior to its amendment effective December 1, 2000 with a few minor modifications. *See* Mo. Rev. Stat. § 490.065(1) (2005). The Missouri version contains the phrase "In any civil action," at the beginning of the rule and omits the comma after "education." It also contains three paragraphs that are nearly identical to Federal Rules 703, 704, and 705.

The Missouri Court of Appeals addressed the *Frye*/*Daubert* issue in *Lasky v. Union Electric Company*, 1996 WL 330879 (Mo. App. E.D. 1996) (*removed to Supreme Court on other grounds*, 936 S.W.2d 797 (Mo. 1997)). In *Lasky*, the court of appeals explained that, although Missouri has not adopted the Federal Rules of Evidence, it has enacted similar guidelines for the admission of expert testimony, citing Mo. Rev. Stat. § 490.065. Because the Missouri Supreme Court had not spoken on whether § 490.065 supersedes *Frye*, the court of appeals stated that it was "governed by two different standards for the admission of expert testimony: the Frye test and § 490.065 RSMo." *Id*. at 7. On further appeal, the Missouri Supreme Court, in an *en banc* opinion, stated, "on remand the trial court shall be guided by RSMo 490.065 in evaluating the admission of expert testimony." *Lasky v. Union Electric Company*, 936 S.W.2d 797, 801 (Mo. en banc 1997). The Missouri Court of Appeals, Western District, subsequently found that the Missouri Supreme Court "has yet to address whether § 490.065 supplants the *Frye* test in Missouri as the standard for admission of expert testimony." Missouri courts have continued to apply *Frye. See, e.g., Whitman's Candies,*

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[14] Not Reported in N.W.2d.

*Inc. v. Pet Inc.*, 974 S.W.2d 519 (Mo. App. W.D. 1998) (citing *Bray v. Bi-State Dev. Corp.*, 949 S.W.2d 93, 98 (Mo. App. 1997). The *Whitman's* court determined that because the disputed expert testimony was admissible under both *Frye* and *Daubert* it need not decide whether § 490.065 superseded *Frye*. The Missouri Court of Appeals, Eastern District, has ruled that a trial court's application of *Daubert* was reversible error stating, "The Missouri Supreme Court has consistently applied only the *Frye* test to the issue of admission of expert testimony since *State v. Stout*, 478 S.W.2d 368 (Mo. 1972)." *State v. Swain*, 977 S.W.2d 85 (Mo. App. E.D. 1998). One Missouri appellate court explicitly said that "until the Missouri Supreme Court dictates otherwise, we think the admissibility of expert testimony regarding non-scientific testimony can be assessed under Section 490.065, Mo. Rev. Stat., without applying any of the *Daubert* factors." *Long v. Missouri Delta Medical Center,* 33 S.W.3d 629, 642 (Mo. Ct. App. 2001). *See also Schumann v. Missouri Highway and Transportation Commission,* 912 S.W.2d 548 (Mo. W. Dist. 1995).

The Supreme Court of Missouri in *State Board of Registration for the Healing Arts v. Edward W. McDonagh*, 123 S.W.3d 146 (Missouri 2003) has resolved any confusion and confirmed the Appellate Court's view in *Missouri Delta Medical Center* that only Section 490.065, Mo. Rev. Stat., applies to the admission of expert evidence in civil cases. The Court in *State Board of Registration for the Healing Arts* said "...[insofar as] cases since *Lasky* have suggested that the standard of admissibility of expert testimony in civil cases is that set forth in *Frye* or some other standard, they are no longer to be followed. The relevant standard is that set out in section 490.065." 123 S.W.3d 146, 153.

The *Frye* standard, however is still used in criminal cases in Missouri. *See State v. Keightley,* 147 S.W.3d 179, 183 (Mo. Ct. App. 2004).

**North Carolina**

North Carolina's Rule 702(a) is identical to Fed. R. Evid. 702 prior to its amendment as of December 1, 2000, except that the words "or otherwise" which appear at the end of the federal rule after the word "opinion" have been deleted. *See* N.C. Gen. Stat. §8C-1 Rule702(a).[15]

In 1995, the North Carolina Supreme Court cited *Daubert* for the proposition that the admissibility of expert scientific testimony requires a preliminary finding that the reasoning or methodology underlying the testimony is sufficiently valid and that the reasoning or methodology can be properly applied to the facts in issue. *State v. Goode*, 461 S.E.2d 631, 639 (N.C. 1995). The court also cited other North Carolina cases that appear to be consistent with *Daubert* and stated that North Carolina does not adhere exclusively to the general acceptance formula enunciated in *Frye*. *Id*. at 640. In *Praxair, Inc. v. Airgas, Inc.*, 2000 WL 33954577 (N.C. Super., 2000)[16] at page *5 the Court remarked that: "The North Carolina Rules of Evidence are patterned after the Federal Rules. Therefore, although this Court is not bound by federal case law, these cases prove to be helpful in arriving at a list of factors relevant to assessing the reliability of the expert testimony proffered in this case."

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[15] The balance of North Carolina's Rule 702 deals with medical malpractice actions and expert testimony given by physicians.

[16] Not Reported in S.E.2d.

However, in *Howerton v. Arai Helmet, Ltd.,* 358 N.C. 440, 597 S.E.2d 674 (2004), the North Carolina Supreme Court expressly repudiated claims that it had explicitly adopted *Daubert*, stating instead, "While these and other North Carolina cases share obvious similarities with the principles underlying *Daubert*, application of the North Carolina approach is decidedly less mechanistic and rigorous than the 'exacting standards of reliability' demanded by the federal approach. *See Weisgram*, 528 U.S. at 455, 145 L. Ed. 2d at 972. Moreover, had we ever intended to adopt *Daubert* and supercede this established body of North Carolina case law, we would certainly have referenced the basic *Daubert* factors that have come to define the federal standard. But we did not."

Instead, North Carolina uses a three pronged test to gauge the admissibility of expert testimony as laid out in *State v. Goode*, *supra.* In order to be admissible, 1) the expert's method must be sufficiently reliable, 2) the expert must be qualified in the area and 3) the testimony must be relevant.

The requirements to meet the prong of reliability are stated by the *Howerton* court to be set out in *State v. Pennington*, 327 N.C. 89, 98 (N.C. 1990).

In *State v. Anderson*, 624 S.E.2d 393 (N.C.App., 2006), a recent judgment from the Appeals Court of North Carolina, Judge Geers observed at page that "our Supreme Court has held that the principles of *Daubert* do not apply in this State*. See Howerton v. Arai Helmet, Ltd.,* 358 N.C. 440, 597 S.E.2d 674 (2004)." *See also* Elizabeth Strickland, *Making Waves in a Sea of Uncertainty: Howerton Muddies the Waters of Expert Testimony Admissibility Standards in North Carolina*, 83 N.C.L. Rev. 1613 (2005).

The North Carolina three pronged standard for the admission of expert testimony has been applied in civil and criminal cases in North Carolina.

**Virginia**

Virginia's rule on opinion testimony by experts states as follows:

> In any civil action any expert witness may give testimony and render an opinion or draw inferences from facts, circumstances or data made known to or called upon to testify. The facts, circumstances or data relied upon by such witness in forming an opinion or drawing inferences, if of a type normally relied upon by others in the particular field of expertise in forming opinions and drawing inferences, need not be admissible in evidence.
>
> The expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.
>
> To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals or pamphlets on a subject of history, medicine or other science or art, established as a reliable authority by testimony or by stipulation shall not be excluded as hearsay. If admitted, the statements may be read into evidence but may not be received as exhibits. If the statements are to be introduced

> through an expert witness upon direct examination, copies of the statements shall be provided to opposing parties thirty days prior to trial unless otherwise ordered by the court.

Va. Code Ann. § 8.01-401.1 (1996). *See also McMunn v. Tatum*, 379 S.E.2d 908, 912 (Va. 1989) ("The text of Code § 8.01-401.1 gives it no broader scope than that of the parent federal rules, and we will not attribute to the General Assembly any purpose beyond that which motivated the federal drafters.").

Virginia does not apply, and has repeatedly rejected, the *Frye* test, but requires a court to make a threshold finding of fact about the reliability of the scientific method offered, unless the method is of a type sufficiently familiar and accepted to require no foundation to establish that the method is fundamentally reliable, unless the considerations requiring its exclusion have "ripened into rules of law.... or unless its admission is regulated by statute." *Spencer v. Virginia*, 393 S.E.2d 609, 621 (Va. 1990); *O'Dell v. Virginia*, 364 S.E.2d 491 (Va. 1988).

The Supreme Court of Virginia appears never to have considered adopting the *Daubert* standard. Indeed, the court remarked in *John v. Im*, 263 Va. 315, 559 S.E.2d 694 (Virginia 2002) that "... we have not previously considered the question whether the *Daubert* analysis employed by the federal courts should be applied in our trial courts to determine the scientific reliability of expert testimony. Therefore, we leave this question open for future consideration." 559 S.E.2d at 698.