

States Following the *Daubert/Kumho* Doctrine

This chart addresses whether the standards for the admissibility of expert opinion established by the U.S. Supreme Court in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993) and Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999), and incorporated into Fed. R. Evid. 702, superseding the older standard of “general acceptance” set by Frye v. United States, 293 F. 1013 (D.C. Cir. 1923), have been adopted by the states for cases governed by state evidence law. Certain exceptions may apply and law is subject to change. Contact White and Williams LLP for additional information.

■ **ALABAMA**

With respect to scientific evidence, follows Daubert in civil cases (other than domestic relations, child support, juvenile and probate cases), effective Jan. 2012. Ala. Code § 12-21-160; Ala. Rule Evid. 702(b). With respect to technical, non-scientific evidence, still follows Frye. Ala. Rule Evid. 702(a); Swanstrom v. Teledyne Continental Motors, Inc., 43 So.3d 564 (Ala. 2009); but cf. Mazda Motor Corp. v. Hurst, 2017 Ala. LEXIS 66 (2017) (suggesting that the trial court has discretion to admit the testimony of an expert qualified based on his knowledge and experience).

■ **ALASKA**

Daubert partially followed. Expert testimony based strictly on scientific knowledge is generally subject to Daubert's reliability and relevance requirements, but experience-based expert testimony does not need to meet Daubert's requirements. Instead it is admissible when the expert witness has substantial experience in the relevant field and the testimony might help the jury. Thompson v. Cooper, 290 P.3d 393 (Alaska 2012); see Alaska R. Evid. 702(a). See also Alaska Stat. § 09.20.185 (expert qualifications in professional negligence cases).

■ **ARIZONA**

Follows Daubert and Kumho Tire. See Ariz. R. Evid. R. 702; State v. Salazar-Mercado, 325 P.3d 996 (2014).

■ **ARKANSAS**

Follows Daubert and Kumho Tire. A.R.E. 702; Farm Bureau Mut. Ins. Co. v. Foote, 14 S.W.3d 512 (Ark. 2000); Dundee v. Horton, 477 S.W.3d 558 (Ark. Ct. App. 2015); but cf. Dundee (suggesting that courts need not engage in a Daubert reliability analysis in all cases).

■ **CALIFORNIA**

Rejects Daubert and follows the reasoning of Frye. People v. Leahy, 882 P.2d 321 (Cal. 1994); People v. Kelly, 549 P.2d 1240 (Cal. 1976); Cal. Evid. Code § 801.

■ **COLORADO**

Follows a Daubert-like analysis. C.R.E. 702; People v. Rector, 248 P.3d 1196 (Colo. 2011) (stating that under the test set forth in People v. Shreck, 22 P.3d 68 (Colo. 2001), a court may, but is not required to, consider the factors mentioned in Daubert).

■ **CONNECTICUT**

Follows Daubert. Conn. Code of Evidence § 7-2; State v. Porter, 698 A.2d 739 (Conn. 1997).

■ **DELAWARE**

Follows Daubert and Kumho Tire. D.R.E. 702; M.G. Bancorporation, Inc. v. LeBeau, 737 A.2d 513 (Del. 1999).

■ **DISTRICT OF COLUMBIA**

Follows Daubert. Motorola Inc. v. Murray, 147 A.3d 751 (D.C. 2016) (adopting Fed. R. Evid. 702).

■ **FLORIDA**

Follows Frye, but test is only to be applied to expert opinions based upon new or novel scientific techniques. DeLisle v. Crane Co., 2018 WL 5075302 (Fla. 2018), holding F.S.A. § 90.702, which purported to adopt Daubert, unconstitutional.

■ **GEORGIA**

Follows Daubert and Kumho Tire. O.C.G.A. § 24-7-702; Cash v. LG Electronics, Inc., 804 S.E.2d 713 (Ga. App. 2017).

■ **HAWAII**

Daubert not expressly adopted, but instructive in interpreting Haw. Rev. Stat. § Rule 702, which is patterned on Federal Rule 702. State v. Vliet, 19 P.3d 42 (Haw. 2001).

■ **IDAHO**

Idaho has not adopted the Daubert standard for admissibility of expert testimony but has used some of Daubert's standards in assessing whether the basis of an expert's opinion is scientifically valid. Weeks v. E. Idaho Health Services, 153 P.3d 1180 (Idaho 2007); I.R.E. 702.

■ **ILLINOIS**

Daubert not adopted. People v. Safford, 910 N.E.2d 143 (Ill. App. 1st Dist. 2009). Frye followed. Id.; In re Commitment of Simons, 821 N.E.2d 1184 (Ill. 2004); Ill. R. Evid. 702.

■ **INDIANA**

Daubert is helpful but not binding. There is no specific test or set of prongs which must be considered in order to satisfy Indiana Evidence Rule 702(b). Turner v. State, 953 N.E.2d 1039 (Ind. 2011).

■ **IOWA**

Rejects Frye but Daubert not adopted, either. When scientific evidence is particularly novel or complex, courts should consider the relevant Daubert factors to assess whether the testimony is reliable. In cases involving technical or other specialized knowledge, the application of Daubert considerations is not appropriate. Ranes v. Adams Laboratories, Inc., 778 N.W.2d 677 (Iowa 2010); State v. Hall, 297 N.W.2d 80 (Iowa 1980); Iowa R. Evid. 5.702.

■ **KANSAS**

Follows Daubert and Kumho Tire. K.S. § 60-456(b); City of Topeka v. Lauck, 401 P.3d 1064 (Kan. Ct. App. 2017); Lundeen v. Lentell, 397 P.3d 453 (Kan. Ct. App. 2017).

■ **KENTUCKY**

Follows Daubert and Kumho Tire pursuant to Ky. R. Evid. 702 and Toyota Motor Corp. v. Gregory, 136 S.W.3d 35 (Ky. 2004).

■ **LOUISIANA**

Follows Daubert. La. Code Evid. § art. 702; State v. Foret, 628 So. 2d 1116, 1123 (La. 1993); Independent Fire Ins. Co. v. Sunbeam Corp., 755 So. 2d 226 (La. 2000).

■ **MAINE**

Daubert not adopted. Searles v. Fleetwood Homes of Pennsylvania, Inc., 878 A.2d 509 (Me.2005). Evidence is admissible if shown to be sufficiently reliable, even if it is not generally accepted in the scientific community. State v. Williams, 388 A.2d 500 (Me. 1978); Me. R. Evid. 702.

■ **MARYLAND**

Follows Frye. Reed v. State, 391 A.2d 364 (Md. 1978). Daubert not adopted, but it may be instructive. Fleming v. State, 1 A.3d 572 (Md. App. 2010); Md. Rule 5-702.

■ **MASSACHUSETTS**

Expert testimony must be reliable, as shown by Frye's general acceptance standard or, alternatively, under Daubert and Kumho Tire. Com. v. Lanigan, 641 N.E.2d 1342 (Mass. 1994); Commonwealth v. Powell, 877 N.E.2d 589 (Mass. 2007); Commonwealth v. Caruso, 67 N.E.3d 1203 (Mass. 2017).

■ **MICHIGAN**

Follows Daubert and Kumho Tire. M.R.E. 702; Gilbert v. Daimler Chrysler Corp., 685 N.W.2d 391 (Mich. 2004).

■ **MINNESOTA**

Expert testimony is admissible if: 1) the witness is qualified; 2) the expert's opinion has foundational reliability; and 3) the expert's testimony is helpful. Minn. R. Evid. 702; Doe v. Archdiocese of St. Paul & Minneapolis, 817 N.S.2d 150 (Minn. 2012). In addition, if the testimony involves a novel scientific theory, the Frye-Mack standard applies. The Frye-Mack standard requires that the proponent of novel scientific evidence prove that the science is generally accepted in the relevant scientific community and that the particular scientific evidence at issue has foundational reliability. Minn. R. Evid. 702; Doe; Goeb v. Tharaldson, 615 N.W.2d 800 (Minn. 2000).

■ **MISSISSIPPI**

Follows Daubert. M.R.E. Rule 702; Janssen Pharm., Inc. v. Bailey, 878 So.2d 31 (Miss. 2004).

## MISSOURI

With the exception of certain domestic-relations actions such as divorce, adoption and support, to which the older, Frye-related standard continues to apply, Missouri follows Daubert. See M.R.S. § 490.065 (eff. Aug. 8, 2017).

## MONTANA

Follows Daubert only partially. An expert may offer opinion testimony if the testimony will assist the trier of fact and is reliable. M.R.E. 702; Cleveland v. Ward, 364 P.3d 1250 (Mont. 2016). When the introduction of novel scientific evidence is sought, Daubert applies. State v. Price, 171 P.3d 293 (Mont. 2007).

## NEBRASKA

Follows Daubert and Kumho Tire. Schafersman v. Agland Coöp, 631 N.W.2d 862 (Neb. 2001); Neb. Rev. Stat. Ann. § 27-702.

## NEVADA

Follows neither Daubert nor Frye. See N.R.S. 50.275; Higgs v. State of Nevada, 222 P.3d 648 (Nev. 2010). Daubert factors may be examined but not mechanically applied. Id.

## NEW HAMPSHIRE

Follows Daubert and Kumho Tire. N.H. R. Evid. 702; Baker Valley Lumber, Inc. v. Ingersoll-Rand Co., 813 A.2d 409 (N.H. 2002).

## NEW JERSEY

Has not adopted Daubert. Kemp ex rel. Wright v. State, 809 A.2d 77 (N.J. 2002). To be admissible as expert testimony, (1) the intended testimony must concern a subject matter that is beyond the ken of the average juror; (2) the field testified to must be at a state of the art such that an expert's testimony could be sufficiently reliable; and (3) the witness must have sufficient expertise to offer the intended testimony. Hisenaj v. Kuehner, 942 A.2d 769 (N.J. 2008) (applying N.J.R.E. 702).

## NEW MEXICO

Daubert followed with respect to scientific evidence. State v. Alberico, 861 P.2d 192 (N.M. 1993); 11-702 NMRA. Kumho Tire not followed; Daubert factors do not apply to non-scientific testimony. Acosta v. Shell W. Exploration & Prod., 370 P.3d 761 (N.M. 2016).

## NEW YORK

Adheres to Frye, not Daubert. Kelly v. Metro-North Commuter R.R., 902 N.Y.S.2d 78 (N.Y. A.D. 1st Dept. 2010); People v. Wesley, 633 N.E.2d 451 (N.Y. 1994).

## NORTH CAROLINA

Follows Daubert and Kumho Tire. N.C.G.S. § 8C-1, Rule 702; State v. McGrady, 787 S.E.2d 1 (N.C. 2016).

## NORTH DAKOTA

Does not follow Daubert or Kumho Tire. N.D.R.Ev. 702 envisions generous allowance of the use of expert testimony if the witness is shown to have some degree of expertise in the field in which the witness is to testify. An expert need not be a specialist in a highly particularized field if the expert's knowledge, training, education, and experience will assist the trier of fact. A trial court has broad discretion to determine whether a witness is qualified as an expert and whether the witness's testimony will assist the trier of fact. State v. Hernandez, 707 N.W.2d 449 (N.D. 2005).

## OHIO

Follows Daubert. Miller v. Bike Athletic Co., 687 N.E.2d 735 (Ohio 1998); Ohio Evid. R. 702.

## OKLAHOMA

Follows Daubert and Kumho Tire. Christian v. Gray, 65 P.3d 591 (Okla. 2003); 12 Okl. Stat. § 2702.

## OREGON

Applies a Daubert-like test, first articulated in State v. Brown, 687 P.2d 751 (Or. 1984), to analyze the admissibility of expert scientific evidence. State v. O'Key, 899 P.2d 663 (Or. 1995); O.R.S. § 40.410 (Rule 702).

## PENNSYLVANIA

Rejects Daubert. The Frye test, which is premised on the rule of "general acceptance," is more likely to yield uniform, objective, and predictable results among the courts, than is the application of the Daubert standard, which calls for a balancing of several factors. Grady v. Frito-Lay, Inc., 839 A.2d 1038 (Pa. 2003); Pa. R.E. 702.

## RHODE ISLAND

Follows Daubert and Kumho Tire pursuant to R.I. R. Evid. Art. VII, Rule 702 and Raimbeault v. Takeuchi Mfg. (U.S.), Ltd., 772 A.2d 1056 (R.I. 2001).

## SOUTH CAROLINA

Does not follow Daubert or Frye. Factors for the admission of scientific expert testimony are: (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. State v. Council, 515 S.E.2d 508 (S.C. 1999); Rule 702, SCRE. Non-scientific expert testimony is not subject to the Council factors. State v. White, 676 S.E.2d 684 (S.C. 2009). However, the expertise, reliability, and the ability of the testimony to assist the trier of fact are all threshold determinations to be made prior to the admission of expert testimony, and generally, a witness's expert status will be determined prior to determining the reliability of the testimony. State v. Tapp, 728 S.E.2d 468 (S.C. 2012); Graves v. CAS Med. Sys., 735 S.E.2d 650 (S.C. 2012).

## SOUTH DAKOTA

Follows Daubert. S.D.C.L. § 19-19-702 (eff. Jan. 1, 2016); see State v. Johnson, 860 N.W.2d 235 (S.D. 2015).

## TENNESSEE

Daubert not adopted, but Daubert factors are helpful in applying Tenn. R. Evid. 702. McDaniel v. CSX Transp., Inc., 955 S.W.2d 257 (Tenn. 1997). Rule 702's requirement that that the witness's knowledge must "substantially" assist the trier of fact sets a higher admissibility standard than Federal Rule 702. State v. Scott, 275 S.W.3d 395 (Tenn. 2009).

## TEXAS

Follows Daubert. Tex. Evid. R. 702; Merrell Dow Pharm. v. Havner, 953 S.W.2d 706 (Tex. 1997).

## UTAH

Daubert is helpful but not followed. Gunn Hill Dairy Properties, LLC v. Los Angeles Dept. of Water & Power, 269 P.3d 980 (Utah App. 2012). Utah follows its own test for admissibility. Expert testimony is admissible if there is a threshold showing that the principles or methods underlying in the testimony: 1) are reliable; 2) are based upon sufficient facts or data; and 3) have been reliably applied to the facts. The required threshold showing is satisfied if the underlying principles or methods, including the sufficiency of facts or data and the manner of their application to the facts of the case, are generally accepted by the relevant scientific community. Utah R. Evid. 702; Brewer v. Denver & Rio Grande Western R.R., 31 P.3d 557 (Utah 2001).

## VERMONT

Follows Daubert. V.R.E. Rule 702; 985 Associates, Ltd. v. Daewoo Electronics America, Inc., 945 A.2d 381 (Vt. 2008).

## VIRGINIA

Does not follow Daubert. John v. Im, 559 S.E.2d 694 (Va. 2002); Va. Code Ann. § 8.01-401.3. Expert testimony is inadmissible if it is speculative or founded on assumptions that have an insufficient factual basis. Such testimony is also inadmissible when an expert has failed to consider all variables bearing on the inferences to be drawn from the facts observed. John.

## WASHINGTON

Follows Frye and rejects Daubert. State v. Copeland, 922 P.2d 1304 (Wash. 1996); Wash. ER 702.

## WEST VIRGINIA

Follows Daubert to assess scientific evidence. Anstey v. Ballard, 787 S.E.2d 864 (W.Va. 2016); Wilt v. Buracker, 443 S.E.2d 196 (1993); W. Va. R. Evid. 702;. Non-scientific testimony is assessed under W.V. R. Evid. 702. Antsey.

## WISCONSIN

Follows Daubert. Wis. Stat. Ann. § 907.02; In re Commitment of Knipfer, 842 N.W.2d 526 (Wis. App. 2013).

## WYOMING

Follows both Daubert and Kumho Tire. Bunting v. Jamieson, 984 P.2d 467 (Wyo. 1999); W.R.E. Rule 702.

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