



### E14 Ten Years After *Daubert*: The Status of the States

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The objective of this presentation is to provide members of the Academy with up-to-date information on the rules for the admission of scientific evidence in each of the states, with special attention given to the various states' reactions to *Daubert*. A second objective is to review the extent and manner that *Daubert* has changed the form of expert testimony over the past ten years.

Thus, the presentation will provide forensic scientists with a better understanding of the challenges to expert testimony that have arisen in the states over the past ten years

It has been ten years since the United States Supreme Court published its decision in *Daubert v. Merrell Dow Pharmaceuticals*. In the *Daubert* decision, the Court emphasized that the ultimate authority governing the admission of scientific evidence in federal court rests in the Federal Rules of Evidence, especially FRE 702. Having stated along the way that the old *Frye* "general acceptance" rule had been superseded, the Court proceeded to provide some guidelines by which the trial court could determine whether the proffered evidence was "reliable," a condition that, though unstated in FRE 702, the Court inferred was present. The guidelines included what have been referred to as the four "*Daubert* factors," which are really four inquiries: Had the scientific technique underlying the testimony been tested? Had it been subjected to peer review and publication? Was the technique known to have a reasonably low error rate? Did it have general acceptance within the relevant scientific community? It has been pointed out elsewhere that several of these "factors" are redundant and/or meaningless. To these factors can be added the question as to whether there are generally accepted standards for applying the technique.

In the years since the *Daubert* decision, the trend among the state high courts has been very strong to adopt *Daubert* as the scientific evidence standard within their respective states. This may not be surprising, since the majority of states have adopted state rules of evidence that include a rule regarding expert testimony that is identical, or very similar, to the FRE. Within the first year after *Daubert* was handed down, nine states adopted it (1). Three years after the decision, fifteen states had adopted *Daubert* (2). As of July 2003, twenty-seven states have adopted some form of *Daubert* as being applicable to at least some expert testimony. In contrast, other states continue to rely on the *Frye* standard, having either reaffirmed this as their standard or simply not having visited the scientific-evidence issue since *Daubert* came down. This paper will provide an annotated tabulation of the states' standards, including those that have embraced *Daubert*, those that hold fast to *Frye*, and the few that follow neither. The non-*Frye*, non-*Daubert* states are mostly those that maintain that the state equivalent of FRE 702 does not require proffered scientific testimony to be reliable in order for it to be admitted into evidence. (It is left up to the finder of fact - usually the jury - to determine reliability).

The states that have accepted *Daubert* have, for the most part, accepted the philosophy underlying *Daubert* (that is, that expert testimony must be shown to be based on valid methodology, regardless of whether it can be shown to be generally accepted) without imposing any particular hard and fast rules. In adopting *Daubert*, the states have largely given themselves a good deal of flexibility in determining what evidence is relevant and reliable. For example, Alabama applies *Daubert* criteria so far only to the admission of DNA evidence, and applies the *Frye* standard to all other scientific testimony.

Of the minority of states that have not adopted *Daubert*, a handful of these have rejected *Frye* as well. Two notable examples are Georgia and Maine, which have spelled out their own idiosyncratic standards for admissibility of expert testimony. Georgia continues to rely on a 1982 decision that simply states that scientific evidence must rest upon the laws of nature. Maine continues to employ the standard laid out in a 1978 decision that upheld the admissibility of voice spectrograph ("voiceprint") evidence. The admissibility rationales for all the non-*Daubert*/non-*Frye* states will be set out in the annotations associated with the individual states.

Finally, this paper will review what changes have occurred in the realm of expert testimony during the ten years after *Daubert*. These changes are in part the result of attacks in "*Daubert* hearings" on various techniques long accepted unquestioningly. Expert witnesses should now expect to be able to articulate how the techniques they are relying on can be shown to have a low rate of error. In areas of expert testimony that hitherto relied nearly entirely on the experience of the witness, such as appearance-based assessments of medical conditions, this requirement is not going to be an easy one to deal with.

- 1) Bohan, T.L. and Heels, E. J., The Case Against *Daubert*: The New Scientific Evidence 'Standard' and the Standards of the Several States, J. Foren. Sci., Vol. 40, No. 6, Nov 1995, pp.



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- 2) Bohan, T.L. and Heels, E.J., "*Daubert* Three Years Later: Does the Bitter Outweigh the Sweet? Is There Any Sweet?" Delivered to the 49th Annual Meeting of the AAFS, New York, NY, February 1997.

***Daubert*, Scientific Evidence Admissibility, State Laws**