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### When Daubert is the Way: The Road Less Traveled By

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*"Two roads diverged in a wood, and I — I took the one less traveled by,  
And that has made all the difference."*

– Robert Frost, "The Road Not Taken"

## When Daubert is the way: The road less traveled by

This month's subject continues with the issue of reliability of the methodology used by experts in a specialized field of knowledge. In my last column,<sup>1</sup> I discussed Montana's approach to admissibility of expert testimony under M.R.E. 702. Although the federal courts apply the *Daubert*<sup>2</sup> standard to all proffered expert opinions, Montana has a hybrid approach, and thus is more like Robert Frost's Vermont.<sup>3</sup> While our version of Evidence Rule 702 retains its original language, the federal version has been amended several times to reflect *Daubert*, so that now there is a significant difference between the two current rules. Furthermore, the Montana Supreme Court has expressly rejected *Daubert* as the sole test for "non-novel" expert testimony while endorsing it for "novel" expert methodology.

Thus, Montana lawyers dealing with the admissibility of expert opinion face a Frostian fork in the road. This month's column deals with the road less traveled by: assessing expert testimony based on novel methodology by the *Daubert* test. The next column will identify the much less rare types of non-novel expert

opinions which require different analysis. After that, I will address the ever-thorny admissibility of hearsay through an expert. Finally, the last column on expert testimony will circle back to the question of who is qualified to opine under Rule 702, which is an entirely different subject from the reliability-of-methodology issue which Rule 702 and *Daubert* address.

### Daubert per se applies only to novel methods

As detailed in the last column, the Montana Supreme Court first applied the *Daubert* standard to scientific expert testimony in *State v. Moore*<sup>4</sup>, decided only one year after the U.S. Supreme Court *Daubert* decision. In *Moore*, where the evidence involved forensic DNA analysis, the Court flatly and without qualification, said "we, therefore, adopt the *Daubert* standard for the admission of scientific expert testimony."<sup>5</sup> Only four years later, in *State v. Cline*<sup>6</sup>, the Court took a giant step backwards, creating two separate forks for assessing expert methodology:

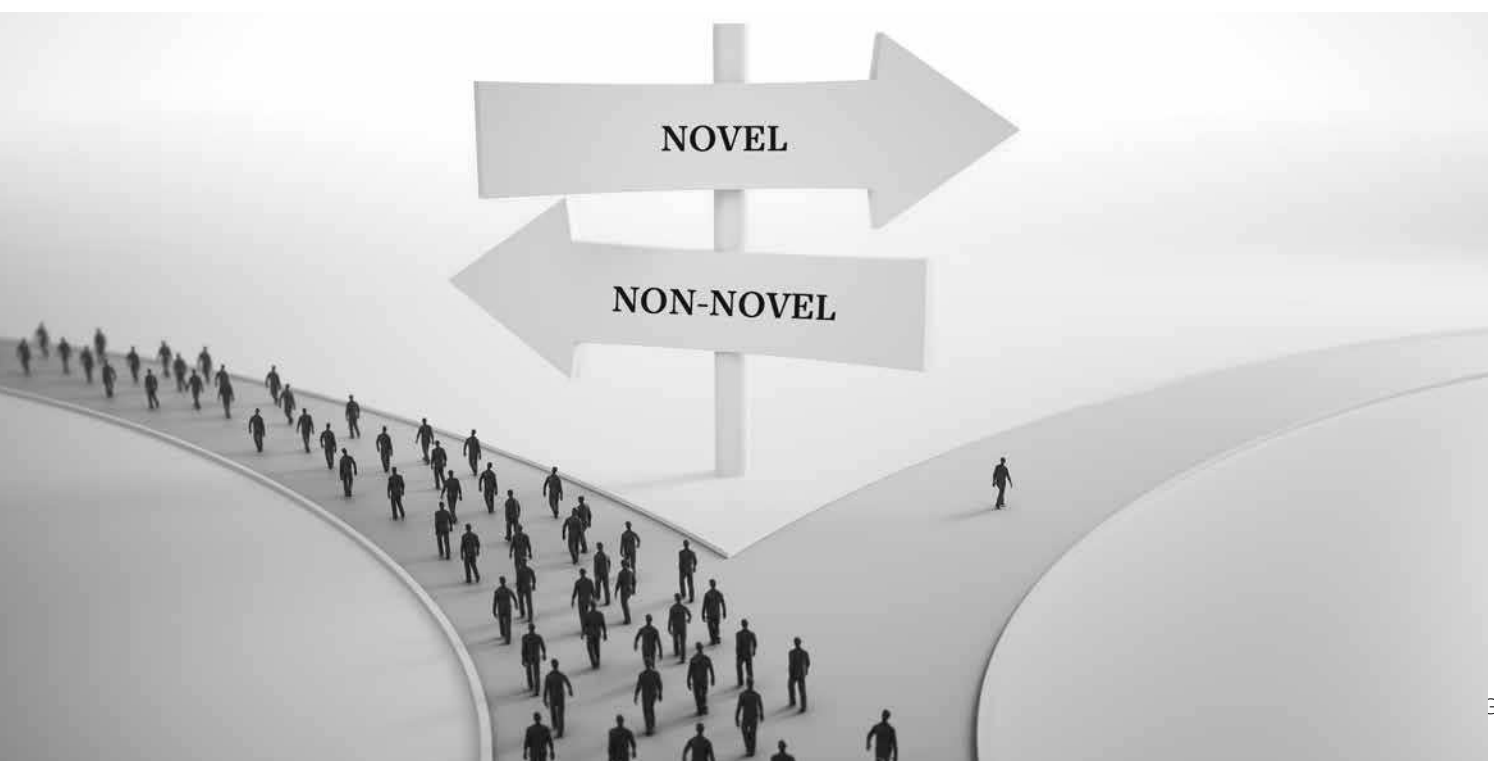
Certainly all scientific expert

testimony is not subject to the *Daubert* standard and **the *Daubert* test should only be used to determine the admissibility of novel scientific evidence.** (Emphasis added).

275 Mont. at 55 (1996). Two years after that, the Court reiterated its rejection of *Daubert* as the exclusive test for admissibility of expert testimony:

The Ninth Circuit Court of Appeals, after citing to this part of the *Daubert* decision, concluded that the requirements of *Daubert* "apply to all proffered expert testimony—not just testimony based on novel scientific methods or evidence." *Claar v. Burlington Northern Railroad Co.* (9th Cir.1994), 29 F.3d 499, 501 n. 2 (citing *Daubert*, 509 U.S. at 592 n. 11, 113 S.Ct. at 2796 n. 11).

We disagree with this interpretation of *Daubert* and reassert our holding in *Cline* that the *Daubert* test should only be used to determine the



admissibility of novel scientific evidence. *Cline*, 275 Mont. at 55, 909 P.2d at 1177.

*Hulse v. State*, 289 Mont. 1, 29, 961 P.2d 75, 91 (1998).

The Court unanimously reaffirmed this bifurcated approach most recently in 2015:

¶ 21 In contrast to its status in the federal system, *Daubert* is not generally applicable in Montana. In *State v. Moore*, (1994), we observed that *Daubert* was consistent with our previous precedent “concerning the admission of expert testimony of novel scientific evidence,” and we adopted *Daubert* “for the admission of scientific expert testimony.” *Moore*, 268 Mont. at 42, 885 P.2d at 471. We later clarified, however, that ***Daubert* does not apply to all expert testimony; instead, it applies only to “novel scientific evidence.”** *State v. Cline*, (1996); see *Hulse v. DOJ, Motor Vehicle Div.*, (1998) (reasoning that because “the HGN test is not novel scientific evidence,” a district court “need not employ” *Daubert* to determine the admissibility of the test results). (Emphasis added, citations omitted).

*McClue v. Safeco Ins. Co. of Illinois*, 2015 MT 222, ¶ 21, 380 Mont. 204, 210, 354 P.3d 604, 609.

Thus, the key question for Montana litigators, whether offering or objecting to expert testimony, is whether the subject of that testimony is “novel scientific evidence” or not. The only way to divine which side of the “novel” line, and thus which road (*Daubert* or not-*Daubert*) to travel, is to sift through the Montana cases. I have attempted to do that in this and the next column.

### **‘Novel’ methodology is ‘the road less traveled by’**

The Bible observes that “there is no new thing under the sun.” Ecclesiastes, 1:9. The Montana Supreme Court does not go quite that far, but close. As the Court itself has stated:

We have adopted the various factors set forth by the United States Supreme Court in *Daubert v. Merrell Dow Pharms.*, for assessing the reliability of proffered expert testimony, but we limit *Daubert’s* application to only novel scientific evidence. *State v. Damon*, 2005 MT 218, ¶ 18, 328 Mont. 276, ¶ 18, 119 P.3d 1194, ¶ 18. **We assess novelty from a very narrow perspective.** *Damon*, ¶ 18. (Citations omitted, emphasis added).

*State v. Clark*, 2008 MT 419, ¶ 42.<sup>7</sup>

In fact, after reading my way through a myriad, if not all,<sup>8</sup> the relevant Montana cases, I have concluded that in fact “very narrow” equals only one “novel” technique: narrow, indeed. I will provide more detail about what that novel technique is, but first will discuss how the line is drawn.

### **Drawing the line: Novel or not?**

The first case to draw a line between “novel” and “non-novel” methods was the same case which established the split analysis, *Cline*. Shawn *Cline* was convicted of robbery, burglary and assault based on a break-in at the Kountry Korner Cafe<sup>9</sup> west of Bozeman. Part of the evidence admitted against him was a fingerprint of his right thumb, located on an envelope in the café’s money drawer. *Cline* explained this fingerprint with two alternative theories: that he had worked at the café about a year before the break-in (so his fingerprint stemmed from that time), and that shortly before the burglary, he had given an envelope to his sister-in-law who still worked at the café. (She testified that he had never given her any envelope; the café manager testified that *Cline* had never had access to the till during his employment). At trial,

the District Court allowed Michael Wieners, a FBI fingerprint technician, to testify as to the age of *Cline’s* fingerprint found on the pie tin deposit envelope. Wieners testified that “I think this is a fresh latent print probably about a month or two old. But, again, there is leeway either way.”

*Cline* claims that because there is no reliable scientific procedure to evaluate the age of a fingerprint, Wieners’ testimony significantly undermined his defense theory that the fingerprint was laid prior to the break-in under innocuous circumstances unrelated to the break-in.

... *Cline* argues on appeal that the prejudicial affect [sic, ouch] of Wieners’ testimony outweighed the probative value of the information. *Cline* further argues that Wieners’ testimony did not meet the criteria for the introduction of scientific evidence in criminal cases.

275 Mont. at 54.

On appeal, the Supreme Court distinguished between the two fingerprint issues in the case, holding only the aging technique to be novel, thus requiring a *Daubert* analysis:

It must also be noted that **we do not consider fingerprint evidence in general to be novel scientific evidence.** However, in the present case the issue is whether it is possible to determine the age of a fingerprint utilizing magnetic powder. We apply the *Daubert* standard to this case because **we consider fingerprint aging techniques in this context to be novel scientific evidence.** Certainly all scientific expert testimony is not subject to the *Daubert* standard and the *Daubert* test should only be used to determine the admissibility of novel scientific evidence.

275 Mont. at 55. Unfortunately, the *Cline* Court did not explain how it reached its conclusion that fingerprint aging was novel scientific evidence while fingerprint identification was not.

Later cases demonstrate that the two factors which matter most to the Court in deciding whether a particular method are novel or not are its scientific history and its prior use in courts both in Montana and around the country. In 2003, the Court stated (out loud) that

“there is no set standard for determining whether a scientific technique is novel,” but went on to identify some factors which seem to matter:

¶ 38 In *Hulse*, we concluded that the Horizontal Gaze Nystagmus (HGN) test was not novel scientific evidence, noting that for several decades, law enforcement officials had used the HGN test, and that as early as 1986, the admissibility of the HGN test had been considered in other jurisdictions. We cited with approval the Minnesota Supreme Court comment that “the HGN test ‘can hardly be characterized as an emerging scientific technique’ because nystagmus has long been known and the tests have been in common medical use for many years.” *Hulse*, ¶ 68 (citing *State v. Klawitter* (Minn.1994), 518 N.W.2d 577, 584).

¶ 39 Likewise, we concluded in *Southern* that microscopic hair comparison evidence was not novel scientific evidence—noting that since 1978 we had considered several cases wherein witnesses had testified on such evidence and that comparing hair samples with a microscope had been done for decades — and therefore *Daubert* standards were not applicable to determine its admissibility. *Southern*, ¶ 59.

¶ 40 While it is clear from our prior decisions that **there is no set standard for determining whether a scientific technique is “novel,” we have consistently given credence not only to previous treatment of the technique by other cases and jurisdictions, but also to how long the technique or theory has been used in the scientific community.** (Emphasis added).

*State v. Ayers*, 2003 MT 114, ¶¶ 38-40.<sup>10</sup>

In *Ayers*, the State effectively used its expert to convince the trial judge, and ultimately the Supreme Court, that the “Likelihood [of paternity] Ratio” (“LR”)

was not novel so that *Daubert* did not apply:

Applying those standards here, we conclude that the LR is not a novel scientific technique.

¶ 41 First, according to Dr. Basten, the widely used paternity statistic known as “paternity index” or “probabilities of paternity” is basically the same thing as a “likelihood ratio.” A “paternity index” calculation considers the genetic evidence from a mother, child, and putative father and compares the hypothesis that the putative father is the father versus the hypothesis that another man is the father. According to Dr. Basten, while the specific equations might be slightly different between a paternity index (dealing with mother, child, and putative father) and the LR in a criminal investigation (suspect, victim and evidence stain), both involve the same theory: “you’re calculating the probability of what you see, evidence or data, given different ideas as to how it came about.”

¶ 42 In *State v. Weeks*, the State presented statistical analysis based on a paternity test to prove the defendant had sexual intercourse without consent with his thirteen-year old stepdaughter who became impregnated. *Weeks* (1995), 270 Mont. 63, 891 P.2d 477 (The statistical analysis determined the defendant was 154,000 times more likely to be the father of his stepdaughter’s baby). Dr. Basten, having reviewed *Weeks*, explained that the paternity index used in that case was basically a LR.

¶ 43 During the pre-trial hearing, Dr. Basten told the court that **in at least six previous cases, his testimony was based on the LR**, including a Montana case tried in 1998, *State v. Swan*, Fourth Judicial District Court, Missoula County, Cause No. 12594 (neither the admission of DNA evidence, nor the LR were appealed in that

case). Moreover, Dr. Basten also testified in *Garcia*, 197 Ariz. 79, 3 P.3d 999, where the Arizona Supreme Court concluded that interpretation of mixed DNA samples using statistical formulas for calculating LR’s were generally accepted by the relevant scientific community and were therefore admissible under *Frye v. United States* (D.C.Cir.1923), 293 F. 1013.

¶ 44 Second, we take note of **many journal articles** written on the topic of presenting DNA results which incorporate discussion of the LR. See, e.g., Jonathan J. Koehler, On Conveying the Probative Value of DNA Evidence: Frequencies, Likelihood Ratios, and Error Rates, 67 U. Colo. L.Rev. 859 (1996); William C. Thompson, DNA Evidence in the O.J. Simpson Trial, 67 U. Colo. L.Rev. 827, 828 (1996); Jonathan J. Koehler, Why DNA Likelihood Ratios Should Account for Error (Even When A National Research Council Report Says They Should Not), 37 *Jurimetrics J.* 425 (1997). (Emphasis added).

*State v. Ayers*, 2003 MT 114, ¶¶ 40-44.

In *State v. Bowman*<sup>11</sup>, the court held that an expert’s opinion on the cause of death of an allegedly poached elk was not based on novel science, even though only one laboratory in the world (where he worked) studied wildlife forensics:

The study of animal anatomy is not a new concept. It coincides with the study of human anatomy and can be dated back to, at the very least, Hippocrates (377–460 B.C.). In addition, schools of veterinary science date back to the mid-18th Century in Europe and about the time of the Civil War in America.

¶ 40 Aside from the lengthy history surrounding the study of animal anatomy and the development of veterinary schools, Stroud’s education, his studies, and his work experience, in the area to which he testified,



is extensive. His education includes a Doctor of Veterinary Medicine and a Master of Science in veterinary science pathology. In addition, Stroud has participated in one study, involving seals, where numerous bullet wounds were observed and another study involving deer, “[t]hat was specifically to determine wound ballistic characterization using various firearms.” Further, at the Lab he “primarily deal[s] with either cause of death or pathologic examination of evidence from wildlife ... [including] birds, eagles, hawks, owls, waterfowl, wolves, deer, elk, marine mammals, even fish.” Lastly, he has completed about 10,000 necropsies, or autopsies, on wildlife ranging from whales to elk, deer, wolves, and many different birds.

2004 MT 119, ¶¶ 39-40. Although there is “no set standard for determining whether a scientific technique is ‘novel,’” a synthesis of these cases shows that to successfully argue for the application of *Daubert*, the opponent should show both that the expert’s methodology is recent in origin, and that it has not been used in very many, if any, court cases.

The obvious caveat is that the opponent urging a *Daubert* analysis should not agree that the contested methodology is not novel. Sadly, that is exactly what sabotaged the argument in *Damon v. State*. *Damon* involved a PBT, also known as a Preliminary Alcohol Screening Test (PAST), that revealed defendant’s blood alcohol content (BAC) to be 0.274. After a pretrial hearing on the admissibility of the PBT, the judge allowed it into evidence at trial. *Damon* was convicted and designated a persistent felony offender. On appeal, he challenged the reliability of the test and its admission. The Supreme Court observed that:

¶ 23 Both parties in this case admit that the scientific technology used in the Alco-Sensor III to measure alcohol

**represents nothing new or novel.** The instrument itself has existed since the 1970’s. An Austrian scientist initially discovered the fuel cell technology used in the Alco-Sensor III PBT in the 1960s. We held in *Southern* that microscopic hair comparison was not novel because hair sampling with a microscope had been done for decades. *Southern*. ¶ 59. **Likewise, a PBT or PAST using fuel cell technology does not represent a novel scientific technique that requires a court to apply the *Daubert* factors.** (Emphasis added).

*State v. Damon*, 2005 MT 218, ¶ 23.<sup>12</sup>

### The List?<sup>13</sup> of novel methodologies in Montana

OK, here is the breaking news, at last. There is only one expert methodology that the Montana Supreme Court so far has held to be “novel,” requiring the application of *Daubert* per se:

1. Fingerprint identification (*Cline*):

It must also be noted that **we do not consider fingerprint evidence in general to be novel scientific evidence.** However, in the present case the issue is whether it is possible to determine the age of a fingerprint utilizing magnetic powder. We apply the *Daubert* standard to this case because **we consider fingerprint aging techniques in this context to be novel scientific evidence.** Certainly all scientific expert testimony is not subject to the *Daubert* standard and the *Daubert* test should only be used to determine the admissibility of novel scientific evidence.

*State v. Cline*, 275 Mont. 46, 55, 909 P.2d 1171, 1177 (1996). Of course, as new methodologies are developed and offered in Montana cases for the first time, they too may be deemed “novel” and the suggestions below would apply to them as well as to fingerprint aging. The converse is also true: what

was “novel” at the time one case was decided, requiring a *Daubert* analysis, may eventually ripen into “non-novel” once that method has met the *Daubert* standard repeatedly. A party who wants to use fingerprint aging, for example, could research both the current scientific literature and other case law across the country to see what has happened to the technique in the 14 years since *Cline*. If lots of scientists or courts have approved the technique in the interim, a proponent could use those facts to escape *Cline* and *Daubert*. (FYI: I did do a quick literature check in October 2018, and it seems that fingerprint aging still would be considered “novel,” requiring a *Daubert* analysis.<sup>14</sup>

All the other cases I have seen categorize the methodologies involved as “non-novel,” so that *Daubert* does not govern their admissibility. Instead, what I have dubbed the “Montana test” applies, but that is not without its own difficulty, as we will see next month.

### How to use *Daubert* in a “novel method” case

In *Cline*, the Montana Supreme Court referred back to *Moore*<sup>15</sup>, the case in which it originally had held that *Daubert* applied in Montana state court, as guidance for trial lawyers and judges:

We noted that Rule 702, Fed.R.Evid., still requires the district court to screen such evidence to ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable. *Moore*, 885 P.2d at 470.

To guide the trial court’s assessment of the reliability of the scientific evidence offered, we adopted in *Moore* the following four nonexclusive factors: (a) whether the theory or technique can be and has been tested; (b) whether the theory or technique has been subjected to peer review and publication; (c) the known or potential rate of error in using a particular scientific technique and the existence and maintenance of standards controlling the technique’s operation; and (d)

whether the theory or technique has been generally accepted or rejected in the particular scientific field. *Moore*, 885 P.2d at 470-71 (citing *Daubert*, 113 S.Ct. at 2796-97).

*State v. Cline*, 275 Mont. at 55-56. These four factors come directly from the U.S. Supreme Court decision in *Daubert*:

Faced with a proffer of expert scientific testimony, then, the trial judge must determine at the outset, pursuant to Rule 104(a), 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. This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue. We are confident that federal judges possess the capacity to undertake this review. Many factors will bear on the inquiry, and we do not presume to set out a definitive checklist or test. But some general observations are appropriate.

Ordinarily, a key question to be answered in determining whether a theory or technique is scientific knowledge that will assist the trier of fact will be whether it can be (and has been) tested....

Another pertinent consideration is whether the theory or technique has been subjected to peer review and publication....

Additionally, in the case of a particular scientific technique, the court ordinarily should consider the known or potential rate of error, ... and the existence and maintenance of standards controlling the technique's operation...

Finally, "general acceptance" can yet have a bearing on the inquiry...

The inquiry envisioned by Rule

702 is, we emphasize, a flexible one. Its overarching subject is the scientific validity and thus the evidentiary relevance and reliability—of the principles that underlie a proposed submission. The focus, of course, must be solely on principles and methodology, not on the conclusions that they generate.

*Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 593-95 (1993).

It is possible to satisfy *Daubert* without expressly addressing each of these factors. In *Cline*, where the Montana Supreme Court held that the fingerprint aging opinion was based on "novel scientific evidence," requiring *Daubert*, it affirmed the admission of the evidence even though Judge Olson had not expressly applied *Daubert*:

In this case, the State established the necessary foundation regarding the issue of determining the age of fingerprints. Wieners referenced and quoted a number of scientific treatises on fingerprint technology. The treatises established that while the age of a latent print cannot be established with complete accuracy, experienced examiners can proffer an opinion regarding the age of a latent print based on the examiner's experience and investigation. The District Court, although not applying the *Daubert* criteria, correctly found that this was an area where experts could disagree, that the testimony would be subject to cross-examination, and that the credibility of the witnesses and the weight of their testimony should be for the jury to decide, not the court. Rulings on the admissibility of evidence are left to the sound discretion of the trial court. *Moore*, 885 P.2d at 471 (citing *State v. Stewart* (1992), 253 Mont. 475, 479, 833 P.2d 1085, 1087). We conclude that the District Court did not abuse its discretion in allowing Wieners' testimony regarding the age of the fingerprint.

275 Mont. at 56.

The best practice, however, is to actually present evidence specifically addressed to each of the factors identified in *Daubert* and adopted by the Montana Supreme Court in *Moore* and *Cline*. Because most of us<sup>16</sup>, lawyers and judges alike, came to law school without extensive scientific or technical backgrounds and certainly haven't developed those during our litigation careers, it makes sense for each party's expert to do this work. Of course, the answers provided by the proponent's and opponent's experts will be contradictory, but both should address (ideally in a "*Daubert* hearing" on a motion in limine)

1. The expert's familiarity with the methodology behind the proffered opinion;
2. Whether that method can be tested, and why or why not;
3. If in fact that method has been tested;
4. The results of any testing of the methodology;
5. Whether the technique has been subject to peer review and publication, explaining when and where it was published, what peer review prior to publishing occurred, and what further peer review resulted from the publication;
6. Whether/what standards exist for the technique's operation, and how they are maintained;
7. The known or potential rate of error for the methodology;
8. The degree of acceptance of this methodology in the field of expertise.

I have developed this set of subjects from the explicit factors articulated in both *Daubert* and the Montana cases. As *Daubert* itself recognizes, those factors are not exclusive, so an advocate should also include any other evidence that tends to prove or disprove the ultimate issue: whether the technique is reliable or not. Because of the universal use of *Daubert* in the federal courts, and its adoption by some states, there are a host of practice articles which elaborate in much more on establishing and challenging sufficient reliability of an expert's methodology under *Daubert*.

## **Novel or not: Montana judges urged to err on side of admission**

The U.S. Supreme Court's decision in

*Daubert* was meant to, and did, broaden admissibility of expert opinions even where the methodology was not generally accepted in the field, which was the requirement previously imposed by the supplanted *Frye* decision. Similarly, the Montana Supreme Court has urged the district courts to lean on the side of admitting rather than excluding evolving methodologies, even as the court must guard against the clearly unreliable:

When we adopted the *Daubert* test in *Moore*, we specifically noted the continuing vitality of *Barmeyer* as that case pertained to the scientific evidence. In *Barmeyer* we held that “it is better to admit relevant scientific evidence in the same manner as other expert testimony and allow its weight to be attacked by cross-examination and refutation.” *Barmeyer*, 657 P.2d at 598 ... In *Barmeyer*, we rejected the “general acceptance” test, holding that it was not in conformity with the spirit of the new rules of evidence. (Citations omitted, emphasis added).

*Cline*, 275 Mont. at 55.

In adopting the *Daubert* test, we concluded that “before a trial court admits scientific expert testimony, there must be a preliminary showing that the expert’s opinion is premised on a reliable methodology.” *Moore*, 885 P.2d at 471. We noted, however, that such an inquiry must remain flexible.

“Not every error in the application of a particular methodology should warrant exclusion. An alleged error in the application of a reliable methodology should provide the basis for exclusion of the opinion only if that error negates the basis for the reliability of the principle itself.” *Moore*, 885 P.2d at 471 (quoting *United States v. Martinez* (8th Cir.1993), 3 F.3d 1191, 1198).

*State v. Cline*, 275 Mont. at 55–56.

The Court reiterated its preference for admission of evidence even where some question exists about the

methodology or its application:

¶ 48 We have noted that criticisms of specific applications of procedures or concerns about the accuracy of test results does “not render the scientific theory and methodology invalid or destroy their general acceptance. These questions go to the weight of the evidence, not the admissibility.” *Weeks*, 270 Mont. at 83, 891 P.2d at 489 (citation omitted). Moreover, we have consistently stated that “it is better to admit relevant scientific evidence in the same manner as other expert testimony and allow its weight to be attacked by cross-examination and refutation.” *Southern*, ¶ 50 (citing *Barmeyer v. Montana Power Co.* (1983), 202 Mont. 185, 193–94, 657 P.2d 594, 598, overruled on other grounds by *Martel v. Montana Power Co.* (1988), 231 Mont. 96, 752 P.2d 140). See also, *State v. Moore* (1994), 268 Mont. 20, 42–43, 885 P.2d 457, 471, overruled on other grounds by *State v. Gollehon* (1995), 274 Mont. 116, 906 P.2d 697 (even though the foundation for the State’s expert witness was “shaky,” the district court did not err in ruling the defendant’s objection to the DNA evidence went to the weight, and not the admissibility, of the evidence). Finally, “[n]ot every error in the application of a particular methodology should warrant exclusion. An alleged error in the application of a reliable methodology should provide the basis for exclusion of the opinion only if that error negates the basis for the reliability of the principle itself.” *Moore*, 268 Mont. at 42, 885 P.2d at 471 (citation omitted).

¶ 49 While we recognized in *Weeks*, 270 Mont. at 84, 891 P.2d at 489 \*409 (citation omitted), that “courts must be mindful that the probative value of statistical probabilities evidence is not outweighed by any unfair prejudicial effect,” we conclude

that admission of Dr. Basten’s conclusions using the LR did not unfairly prejudice *Ayers*. At both the hearing on his motion in limine and the trial, *Ayers* had the opportunity to cross-examine Dr. Basten concerning the computer program he used to run the formula, his methodology, and his application of various sampling error standards. While *Ayers* identified two expert witnesses at the pre-trial hearing, *Ayers* chose not to present an expert at trial to refute or challenge Dr. Basten’s calculations, methodology, or formulas.

¶ 50 We conclude that the issues concerning Dr. Basten’s techniques/methods went to the weight of the evidence, not its admissibility. Based on the foregoing, we further conclude the District Court did not abuse its discretion when it allowed Dr. Basten to testify using the LR.

*State v. Ayers*, 2003 MT 114, ¶¶ 48–50.

*Hulse*, the HGN case discussed above, also contained a map for lawyers and judges:

Certainly, if a court is presented with an issue concerning the admissibility of novel scientific evidence, as was the case in both *Moore* and *Cline*, the court must apply the guidelines set forth in *Daubert*, while adhering to the principle set forth in *Barmeyer*.

However, if a court is presented with an issue concerning the admissibility of scientific evidence in general, the court must employ a conventional analysis under Rule 702, M.R.Evid., while again adhering to the principle set forth in *Barmeyer* [liberal admissibility: see below].

*Hulse v. State, Dep’t of Justice, Motor Vehicle Div.*, 1998 MT 108, ¶ 63.

### **Fighting expert evidence which is admitted despite its novelty**

Both the U.S. and Montana Supreme Courts have acknowledged the concerns that the flexible *Daubert* standard would allow in more expert opinions than the stricter general-acceptance-necessary

standard which preceded *Daubert*. Justice Blackmun responded directly:

Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence. ... Additionally, in the event the trial court concludes that the scintilla of evidence presented supporting a position is insufficient to allow a reasonable juror to conclude that the position more likely than not is true, the court remains free to direct a judgment, Fed. Rule Civ. Proc. 50(a), and likewise to grant summary judgment, Fed. Rule Civ. Proc. 56. (Citations omitted).

*Daubert v. Merrell Dow Pharm.*, 509 U.S. 579, 596 (1993). The Montana Supreme Court similarly endorsed

impeachment rather than wholesale exclusion of expert testimony:

In *Barmeyer* we held that “**it is better to admit relevant scientific evidence in the same manner as other expert testimony and allow its weight to be attacked by cross-examination and refutation.**” *Barmeyer*, 657 P.2d at 598

*State v. Cline*, 275 Mont. at 55.

In the “novel” fingerprint aging context, the opposing lawyer should first object to admission the expert’s opinion using the *Daubert* factors both in cross-examination of the proffered expert and in the direct of the opponent’s expert. If the judge overrules the objection, those same tools should reappear at trial, as grounds for a jury argument that the expert’s opinion should be discounted or disregarded altogether because the methodology is “novel” and unreliable.

## Conclusion

The rarity of “novel” methodology, necessitating a straight application of *Daubert*, shows that this branch of the expert methodology trail is indeed the road less traveled by. Although more types of expert opinions based on developing methodologies may be held “novel” in the future, the only technique which has been categorized as novel so far is fingerprint aging.

In the next column, we will explore the far more numerous cases holding that particular methods are not novel, and decide whether “that [classification] has made all the difference.”

***Cynthia Ford teaches Civil Procedure, Evidence, Family Law, and Remedies. She coached the Trial Team for 20 years, and regularly serves on the faculty of the Advanced Trial School at the School of Law.***

## Endnotes

- 1 “*Daubert*, or not *Daubert*?” *Montana Lawyer*, August 2018.
- 2 *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).
- 3 I speak of Vermont in the poetic sense, perhaps especially appropriate now that we are in leaf season. I have done no research into Vermont’s state court approach to expert testimony, because this is the “**Montana** Lawyer.”
- 4 268 Mont. 20, 885 P.2d 75 (1998).
- 5 268 Mont. at 42.
- 6 275 Mont. 46, 909 P.2d 1171 (1996).
- 7 347 Mont. 354, 366, 198 P.3d 809, 819.
- 8 No warranty here, boss. If you DO know of a case holding a technique to be “novel” so that *Daubert* alone applies, please

let me know: [Cynthia.ford@umontana.edu](mailto:Cynthia.ford@umontana.edu).

- 9 Why not the “Kountry Korner Kafe” as long as you are going that far?
- 10 315 Mont. 395, 406–07, 68 P.3d 768, 777.
- 11 321 Mont. 176, 89 P.3d 986 (2004).
- 12 328 Mont. 276, 282, 119 P.3d 1194, 1199.
- 13 If a single entry constitutes a “list.”
- 14 For example, the abstract of a May 2016 online article from *Forensic Science International*, <https://www.sciencedirect.com/science/article/pii/S0379073816301074>, includes these highlights:

Numerous court cases show disparities in the management of fingerprint dating issues.

This lack of consensus is due to the absence

- of a validated fingerprint dating method. Research about fingerprint dating is ongoing and some approaches show promise. Based on these approaches, a methodological framework for dating issues is proposed. Data from cases and research should interact to develop a relevant dating methodology.
- 15 268 Mont. 20, 885 P.2d 75 (1998).
  - 16 For example, I have double majors in the very-useful (actually, I am not being ironic as to life in general) areas of Medieval English Literature and Philosophy.