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# Daubert, or Not Daubert? That is the Question on Expert Testimony in Montana State Courts

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**By Cynthia Ford**

DNA evidence is regularly admitted in court, both in real life and on TV. Psychic evidence is not. Trial judges are required to police the border between "good enough" and "junk/woo-woo" science, but that border is sinuous and ever-changing as knowledge evolves. What standard must judges, lawyers and litigants apply in disputes over the admissibility of expert testimony in Montana state cases?

In federal court cases, the answer to the title question is easy: the *Daubert*[1] standard for expert[2] testimony applies in all federal cases. However, unless there is a constitutional component, the Federal Rules of Evidence and federal cases construing them are only persuasive in Montana state courts. The Montana Supreme Court is our binding authority, and, like many other states, we have diverged from the U.S. Supreme Court and recent amendments to FRE 702 regarding expert testimony. As a result, in Montana, the answer to the question is "it depends." Montana judges are required to apply the *Daubert* analysis only for testimony based on "novel" scientific methods. In most cases, where the specialized field is "non-novel," the state court is not required to apply the *Daubert* test, but still must apply a traditional Rule 702 analysis for challenged expert testimony.

In this article, I will do a brief refresher on the *Daubert* standard, and then discuss the Montana line between "novel" and "non-novel" expert testimony. In the next Evidence Corner column, I will examine in more detail the application of MRE 702 when the area in question is non-novel, as most are. Finally, in a third column, I will delve into the most recent Montana cases about whether a particular witness was sufficiently qualified to give expert testimony.

## Daubert standard in federal court

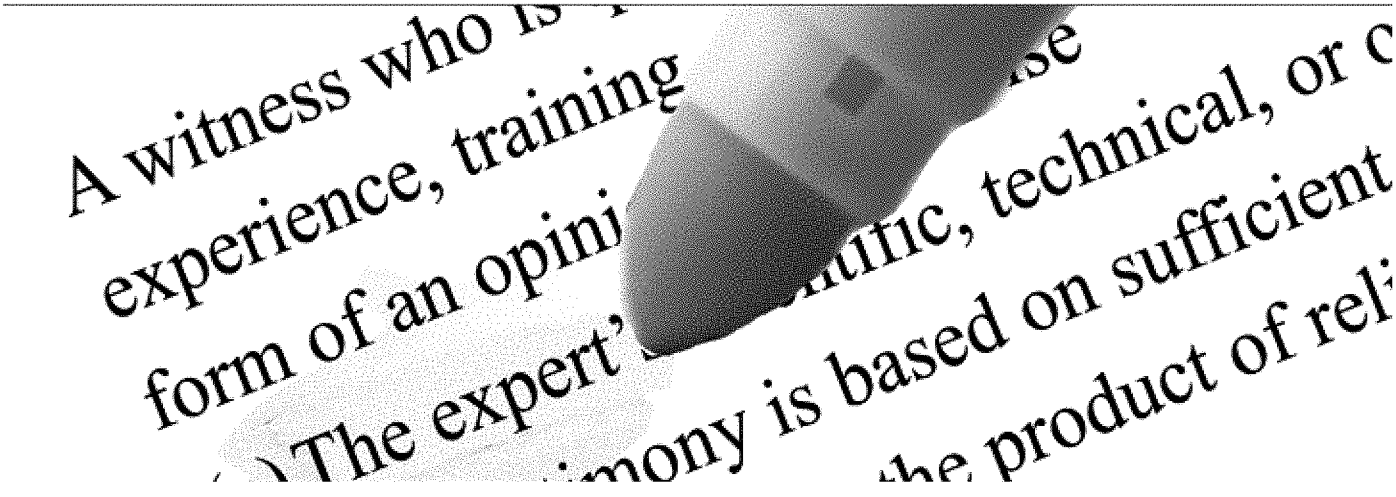
The Federal Rules of Evidence were adopted in 1973 and became effective in 1975. They included Rule 702, governing the admissibility of expert testimony (see below for a comparison of the history and current texts of the federal and Montana versions of Rule 702). Before the FRE became effective, and after that date until 1993, the federal courts assessed the admissibility of expert testimony per the "*Frye*[3] test:" was the methodology used by the expert "generally accepted" in the relevant field? However, in 1993, the U.S. Supreme Court's landmark decision in *Daubert v. Dow Chemical*[4] held that *Frye* had been supplanted by the adoption of FRE 702, and that general acceptance was only one, but not the sole, factor to consider in determining the reliability of the methodology used by the expert:

> In the 70 years since its formulation in the *Frye* case, the "general acceptance" test has been the dominant standard for determining the admissibility of novel scientific evidence at trial. Although under increasing attack of late, the rule continues to be followed by a majority of courts, including the Ninth Circuit.
> The *Frye* test has its origin in a short and citation-free 1923 decision…
> The merits of the *Frye* test have been much debated, and scholarship on its proper scope and application is legion. Petitioners' primary attack, however, is not on the content but on the continuing authority of the rule. They contend that the *Frye* test was superseded by the adoption of the Federal Rules of Evidence. We agree. (Citations and footnotes omitted).

509 U.S. at 585. Note that there was no issue in *Daubert* about the qualifications of the plaintiff's experts; even the Supreme Court noted that all of them were experts in their fields. Rather, the issue was whether the novel techniques the experts had applied were sufficiently reliable to allow the admission of their opinions thus derived.

Although it rejected "general acceptance" as the tool for doing so, *Daubert* continued to require that judges patrol the border between admissible and inadmissible expert testimony:

> That the *Frye* test was displaced by the Rules of Evidence does not mean, however, that the Rules themselves place no limits on the admissibility of purportedly scientific evidence. Nor is the trial judge disabled from screening such evidence. **To the contrary, under the Rules the trial judge must ensure**



**that any and all scientific testimony or evidence admitted is not only relevant, but reliable.**

(Footnote omitted, emphasis added). 509 U.S. at 589. The Court (which does not itself have to make these difficult decisions on the field) then supplied some guidelines for how to do so:

> 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.

509 U.S. at 592–93. The Court then laid out a list of non-exhaustive "*Daubert* factors" for trial judges to use in assessing the reliability of a proffered theory/technique: 1. whether it can be tested; 2. whether it has been tested; 3. whether it has been subjected to peer review and publication; 4. its known or potential rate of error; and 5. the degree of its acceptance in the relevant scientific community. The Court did not indicate the weight to be given to each or any of the factors, nor how to proceed when the factors were equally divided. Subsequent cases throughout the federal system have added more information, but the application of this "test" in specific circumstances remains uncertain and inconsistent.

*Daubert* represents an attempt to allow admission of more cutting-edge expert testimony based on theories or techniques which have not yet been generally accepted,[5] and concludes with an exhortation to judges and litigants to trust the system:

> In this regard respondent seems to us to be overly pessimistic about the capabilities of the jury and of the adversary system generally. 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.

509 U.S. at 596.

Implementation of *Daubert* has not been easy.[6] Nonetheless, it continues to be the standard by which federal courts measure the admissibility of expert testimony. FRE 702 since has been amended in an attempt to digest *Daubert* into the rule itself (see below). The Supreme Court itself has cited *Daubert*, with approval, 18 times since it issued the original opinion. Most recently, in 2016, it cited *Daubert* in two separate cases. In an abortion case, the Court affirmed a trial court's admission of the opinion testimony of a university researcher who tracked the availability of abortion services in Texas, on the probable effect of the state's surgical center requirement. *Whole Women's Health v. Hellerstedt*[7]. In *Tyson Foods v. Bouaphakeo*,[8] a Fair Labor Standards case about overtime pay, the Court noted (twice) that the respondent's expert statistical evidence was correctly admitted, because the petitioners neither moved for a hearing under *Daubert* to exclude the testimony nor presented contrary evidence of their own. Thus, it is clear that despite much criticism of *Daubert*, it binds federal judges and lawyers practicing in federal courts.

## States' adoption of Daubert spotty

Although most states (including Montana) have adopted some version of the FRE in general, many fewer have bought into the *Daubert* standard and the revised form of FRE 702 which now reflects *Daubert*.[9] In 2016, Bloomberg Law published an article entitled "States Slow to Adopt *Daubert* Evidence Rule,"[10] estimating that nearly a quarter of states have retained their own expert testimony standards. Several nationally prominent evidence professors were quoted to support and explain the premise of the article, including Georgetown professor Paul Rothstein:

> "Judges do not feel competent to decide what is good science, as *Daubert* commands them to do," Rothstein told Bloomberg BNA. Rothstein said that states may also be reluctant to switch over to *Daubert* because it "hasn't worked out very well in federal courts."
> The criteria *Daubert* sets out—testability/testing[11], peer review, low error rate, professional standards, acceptability in the discipline, all leading to reliability—are "so spongy that the cases come out all over the place," he said.

According to the Bloomberg article, several large states have rejected *Daubert* altogether, retaining the *Frye*[12] "general acceptance" test: California, New York, New Jersey, Illinois, Maryland, Washington and D.C.[13] The article described three other states as "hybrid … and not easily categorized:" Virginia, Missouri, Nevada and North Dakota. Montana belongs on this hybrid list, having rejected *Frye* but not incorporating *Daubert* wholesale in its stead.

## MRE 702 differs greatly from FRE 702

At the time Montana adopted the Montana Rules of Evidence in 1977, MRE 702 was identical to FRE 702.[14] At that point, the federal courts applied the *Frye* "general acceptance" standard to determine the admissibility of proposed expert testimony. In the interim, the U.S. Supreme Court decided in *Daubert* that the adoption of Rule 702 had supplanted *Frye*. In its stead, the Supreme Court outlined five non-exclusive "*Daubert* factors" to guide the district courts in assessing the reliability, and thus admissibility, of expert testimony. Those factors have been clarified and expanded in hundreds, if not thousands, of federal cases since. In 2000, FRE 702 was amended to reflect the holdings of those cases. The Federal Advisory Committee noted:

> Rule 702 has been amended in response to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and to the many cases applying *Daubert*, including *Kumho Tire Co. v. Carmichael*, 119 S.Ct. 1167 (1999). In *Daubert* the Court charged trial judges with the responsibility of acting as gatekeepers to exclude unreliable expert testimony, and the Court in *Kumho* clarified that this gatekeeper function applies to all expert testimony, not just testimony based in science. *See also Kumho*, 119 S.Ct. at 1178 (citing the Committee Note to the proposed amendment to Rule 702, which had been released for public comment before the date of the *Kumho* decision). The amendment affirms the trial court's role as gatekeeper and provides some general standards that the trial court must use

to assess the reliability and helpfulness of proffered expert testimony.

The current version of FRE 702, reflecting the 2000 and 2011[15] amendments, is:

> Rule 702. Testimony by Expert Witnesses
> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
> (b) the testimony is based on sufficient facts or data;
> (c) the testimony is the product of reliable principles and methods; and
> (d) the expert has reliably applied the principles and methods to the facts of the case.

Meanwhile, Montana has not amended the original version of MRE 702 in any way. Because the FRE have been amended to reflect the holding of *Daubert* and its progeny, the two versions of Rule 702 now differ significantly. Montana's 702 states (just as it did when originally adopted in 1977):

> Rule 702. Testimony by experts.
> 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 knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

The difference between the Montana and the federal version of Rule 702 reflects a conscious decision by the Montana Supreme Court to avoid inflicting a full-fledged *Daubert* analysis on the judges, lawyers, and litigants in most Montana cases. The current (original) version of MRE 702 is consistent with Montana's judicial approach.

## Montana rejects Frye and Daubert

The Montana Supreme Court rejects both the general acceptance test and wholesale adoption of the *Daubert* standard for admissibility of expert testimony

**Background cases:**

Like the federal courts, Montana has struggled with the line between admissible "good-enough" and non-admissible "junk" science. Like other states, Montana has struggled with whether to follow the federal lead in drawing that line. Ten years before the *Daubert* decision did so for federal courts, the Montana Supreme Court rejected the *Frye* general acceptance test in *Barmeyer v. Montana Power*:[16] "the general acceptance rule is not in conformity with the spirit of the new rules of evidence." 657 P.2d at 598. In *Barmeyer*, a clearly qualified metallurgical engineer testified for the defense, using "corrosion analysis" to controvert the plaintiff's evidence on the causation of the Pattee Canyon Fire in Missoula. On appeal, the plaintiffs argued that this methodology was not generally accepted, and therefore the opinion was inadmissible. The Supreme Court acknowledged that this might bar admission under the *Frye* standard, but pointed to the courtroom usefulness of new developments, even before they achieved general scientific acceptance, quoting from a 4th Circuit case[17]:

> "Absolute certainty of result or unanimity of scientific opinion is not required for admissibility. 'Every useful new development must have its first day in court. And court records are full of the conflicting opinions of doctors, engineers, and accountants, to name just a few of the legions of expert witnesses.' Unless an exaggerated popular opinion of the accuracy of a particular technique makes its use prejudicial or likely to mislead the jury, 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."

202 Mont. at 192. The Court affirmed the admission of the corrosion analysis testimony, commenting that the plaintiff's "searching and adept cross-examination" was sufficient guarantee that the jury would understand any problems with the expert's methodology.

*Barmeyer* clearly rejected Frye and opened the door to more liberal admission of expert testimony, but it did not offer a specific new test, other than "not *Frye*." Ten years later, the U.S. Supreme Court did lay out an alternative analysis, in *Daubert*. Initially, Montana seemed inclined to adopt *Daubert*.

*State v. Moore*[18] was decided in 1994, just a year after *Daubert*. Moore was accused of deliberate homicide. Part of the evidence against him stemmed from human tissue fragments found in his camper. In its opinion, the Montana Supreme Court noted that *Moore* was the first case presented to it in which forensic DNA analysis evidence had been introduced in a criminal trial. It also noted that the U.S. Supreme Court had recently joined Montana's abandonment of the *Frye* test for reliability of the expert's methodology, and outlined the "flexible inquiry" to be performed by a trial judge. Finally, the Montana Supreme Court recited the specific *Daubert* factors, and appeared to hold that the *Daubert* test would henceforth govern the admissibility of expert testimony:

> The [Supreme] Court emphasized that the inquiry under Rule 702, F.R.Evid., is "a flexible one," and that the focus is on the principles and methodology underlying the proffered evidence rather than the conclusions they generate. *Daubert,* 509 U.S. at ----, 113 S.Ct. at 2797. We conclude that the guidelines set forth in *Daubert* are consistent with our previous holding in *Barmeyer* concerning the admission of expert testimony of novel scientific evidence, and **we, therefore, adopt the *Daubert*** standard for the admission of scientific expert testimony. Accordingly, we conclude 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. We note, however, that the court must be flexible in its inquiry. "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." (Citation omitted; emphasis added)

268 Mont. at 42.

The Montana Court quickly tempered its original blanket statement about the application of *Daubert* to all scientific expert testimony. First, in a 1996 fingerprinting case, the Court described its holding in *Moore* as adopting the *Daubert* standard for "determining whether to allow expert testimony concerning **novel** scientific evidence",

despite the absence of any such adjective in *Moore*. *State v. Cline*[19]. The Court then clarified its position:

> We apply the *Daubert* standard to this case because we consider fingerprint aging[20] 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. (Emphasis added).

275 Mont. at 55. (The district court had not held a formal *Daubert* hearing on the reliability of fingerprint aging, for the simple reason that *Daubert* had not yet been decided at the date of the trial. However, it did consider the information submitted by the defense as to the alleged unreliability of the technique, and relied further on the availability of both cross-examination and contrary evidence by opposing experts. The Supreme Court found that the district court had met its responsibility to ensure reliability and affirmed the admission of the testimony.)

Two years after *Cline*, and only four years after *Moore*, Montana cemented the distinction between novel and non-novel scientific methodology in *Hulse v. State*.[21] Ms. Hulse petitioned for reinstatement of her driving license, arguing inter alia that the HGN (horizontal gaze nystagmus) field sobriety test was not sufficiently reliable to be admitted under the *Daubert* standard. The Supreme Court reiterated that *Daubert* applied only to novel scientific evidence, and held that because HGN was not novel scientific evidence, *Daubert* was not the appropriate test:

> Hulse suggests that *Daubert* is not limited to the admissibility of "novel" scientific evidence and that *Barmeyer* and *Daubert* are inconsistent. We disagree. Accordingly, we take this opportunity to clarify our decision in *Clark* concerning the admissibility requirements of HGN test results and to clarify the admissibility requirements of scientific evidence in general.
>
> ¶ 56 First, as is clearly stated in *Cline*, **"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." . ...We reassert our holding in *Cline* that **the *Daubert* test should only be used to determine the admissibility of novel scientific evidence.** (Citations omitted; Emphasis added)

1998 MT 108, ¶¶ 55-56, 289 Mont. 1, 28. The Court then delineated the two paths and the liberal admissibility approach inherent in both:

> a trial court, presented with scientific evidence, novel or not, is encouraged to liberally construe the rules of evidence so as to admit all relevant expert testimony pursuant to *Barmeyer*. 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*.

1998 MT 108, ¶ 63, 289 Mont. 1, 31. The Court found that the HGN methodology itself was not novel because it had been in use by law enforcement for several decades and had been admitted at trial by courts around the country. Thus, the Court held that no *Daubert* analysis was necessary but that a district court dealing with non-novel expert testimony "must still conduct a conventional Rule 702[22], M.R.Evid., analysis to determine the admissibility of HGN test results while adhering to the principle of *Barmeyer*." 1998 MT 108, ¶ 69, 289 Mont. 1, 33. Its final conclusion was that HGN tests are sufficiently reliable but that the specific officer who testified to administering the test and Ms. Hulse's result lacked sufficient expertise in the scientific background of the HGN test to testify. (Even without this evidence, however, the Court found that the officer had probable cause to arrest Ms. Hulse and affirmed the suspension of her license for refusal to take a breath test. Good try.)

## Novel v. non-novel split persists

There has been a steady stream of cases posing expert testimony/702/*Daubert* issues since the early cases discussed above.[23] A 2015 case, *McClue v. Safeco Ins. Co. of Illinois*[24], synthesizes these cases and expresses the current approach. Justice Baker's opinion elegantly examined the differences between the Montana and federal versions of Rule 702 and the reasons for these differences. She then reaffirmed Montana's twofold approach to *Daubert*:

> ¶ 21 In contrast to its status in the federal system, *Daubert* is not generally applicable in Montana. In *State v. Moore*,... 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."
>
> 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 Division, 1998 MT 10 ¶ **69** (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).

McClue also reiterated the Court's preference to admit scientific evidence on the border of either approach (novel or non-novel):

> ¶ 23 District courts should "construe liberally the rules of evidence so as to admit all relevant expert testimony." *Beehler*, ¶ 23 (quoting *State v. Damon*, 2005 MT 218, ¶ 17, 328 Mont. 276, 119 P.3d 1194). Our standard recognizes that **admissible expert evidence should come in, even if that evidence may be characterized as "shaky."** The expert's testimony then is open for attack through "the traditional and appropriate" methods: "vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof." *Clifford*, ¶ 28 (quoting *Daubert*, 509 U.S. at 596, 113 S.Ct. at 2798).

## But a question remains

In McClue, the plaintiff alleged that a motor vehicle accident had caused his wife's ALS (from which she had died). The plaintiff listed two (clearly qualified[25]) neurologists as expert witnesses to establish the causation link. After

deposing them, the defense moved to exclude their testimony. The trial judge excluded both, and then granted the defense motion for summary judgment. On appeal, after making the general statements quoted above, the Supreme Court reversed, holding that one of the plaintiff's experts should have been allowed to give an opinion, although the other was properly excluded. The key difference lay in the experts' degrees of certainty as to their opinions. One neurologist testified in his deposition that the cause of the victim's ALS was trauma she sustained during the accident. He also testified that the cause of ALS is unknown, which led the trial court to conclude he was inconsistent and thus should be excluded. The Supreme Court held this to be an abuse of discretion:

> ¶ 22 The District Court purported to apply M. R. Evid. 702 in excluding Dr. Sabow's testimony. Safeco has not argued that Dr. Sabow's testimony is based on novel scientific evidence, and does not suggest that *Daubert* should be invoked to determine its admissibility. Indeed, we have noted that *Daubert* is used to assess whether the expert field is reliable, the first factor in our expert testimony jurisprudence. *Clifford,* ¶¶ 29–30. When the District Court assessed the reliability of the *opinion* that Dr. Sabow offered, it ventured to the third factor, misinterpreting its role. Under M. R. Evid. 702, the District Court needed simply to determine "whether the expert field is reliable" and "whether the expert is qualified," leaving to the jury "whether the qualified expert reliably applied the reliable field to the facts." *Harris,* ¶ 36.
>
> 2015 MT 222, ¶ 22.

WHOA, cowpersons! Did you see the "no *Daubert* because not novel" but "*Daubert* is part of the 702 jurisprudence" conundrum above? Here it is again:

> Safeco has not argued that Dr. Sabow's testimony is based on novel scientific evidence, and does not suggest that *Daubert* should be invoked to determine its admissibility. Indeed, we have noted that *Daubert* is used to assess whether the expert field is reliable, the first factor in our expert testimony jurisprudence. *Clifford,* ¶¶ 29–30.

So: we don't use *Daubert* because this is not an issue of novel science, but we do use *Daubert* as part of the traditional Rule 702 analysis which applies to non-novel science?

## Fade to black: Continued next month

Clearly, we need to go on to explore this further, but it is the summer, and you have done more than enough reading. Thus, I will encourage you to get outside (if it's not too smoky), and we will resume this inquiry in the next episode. I will there lay out the Montana tests for both the very rare novel science cases where *Daubert* for sure rules and the usual non-novel science cases where Rule 702 applies, but *Daubert* still may lurk. Meanwhile, in the river or on the lake or the mountain, ponder:

> Whether 'tis nobler in the mind to suffer
> The slings and arrows of outrageous fortune [*Daubert*?],
> Or to take arms against a sea of troubles,
> And by opposing end them?

## Endnotes

1 Shouldn't we start by deciding on how to pronounce the name of the plaintiffs, the Dauberts? Apparently, they themselves use the French pronunciation, which starts with an "o" and omits the "t" sound at the end: doh-bayr. However, during oral argument in the Supreme Court, the Chief Justice mispronounced the name as daw-bert, and on the fly, plaintiffs' counsel had to choose whether to correct the Chief Justice. His choice to "go with it" means that in most places (and I think this includes Montana), the Americanized version is used. See, Michael H. Gottsman, "Admissibility of Expert Testimony after Daubert," 43 Emory L.J. 867, 867 (1994); Garner's Dictionary of Legal Usage (3d ed., 2011), p. 246.

2 I use the term "expert" in this context as shorthand for Rule 702 opinion testimony based on specialized knowledge helpful to the jury. However, as I explained in an earlier column, I (and more importantly, the ABA) recommend against the use of the term "expert" by counsel or the judge before a jury, including in the jury instructions. See, "Tender is the Night: Should Your Expert Be?" Montana Lawyer, August 2013.

3 Frye v. United States, 54 App.D.C. 46, 47, 293 F. 1013, 1014 (1923). Maybe we should have stuck with this test not only for its simplicity, but for ease in pronunciation.

4 509 U.S. 579 (1993).

5 A frequently given example is allowing Magellan to testify that the earth is round, despite the fact that most other geographers believe it to be flat.

6 WestlawNext (as of July 10, 2018) shows 19,737 federal cases (at all levels) citing Daubert, and 13,970 secondary sources. This article should boost the total to 13,971. ☒

7 136 S.Ct. 2292, 2318 (2016).

8 136 S.Ct. 1036 (2016).

9 Rather than actually surveying all 50 states myself, I used the ever-helpful interweb. The most authoritative source I found is the ABA's Litigation Section "50 State Survey of Daubert/Frye Applicability" located at http://apps.americanbar.org/litigation/committees/trialevidence/daubert-frye-survey.html. Note: you must log in as a member of the Section to access this survey.

10 https://www.bna.com/states-slow-adopt-n57982070384/.

11 Prof. Rothstein has combined the first two factors listed by the Supreme Court into one: "testability/testing." Above, I chose to keep them separate only because that is what the Supreme Court did. Again, this is a flexible standard. ☒ But, if I were in federal court or in Montana on an issue of novel scientific theory, I would ask my expert both "Is this theory testable? Please explain" AND "Has this theory in fact been tested? When? What were the results?"

12 293 F. 1013 (D.C, 1923).

13 Disclaimer: I have not independently verified or updated this list.

14 The Montana Evidence Commission Comment to MRE 702 states: "This rule is identical to Federal and Uniform Rules (1974) Rule 702. It states the two common-law standards required before an expert is allowed to give his opinion, each of which is found in existing Montana law.... The first standard is concerned with whether or not the subject matter is that requiring expert testimony. Case law has construed the phrase 'science, art, or trade' to include any particular area' ... not within the range of ordinary training or intelligence....' The second standard is concerned with whether or not the particular witness is qualified as an expert to give an opinion in the particular area of his testimony. This is consistent with Section 93-401-27(9), R.C.M. 1947 [superseded], quoted above (' ... when he is skilled therein.'), and with case law which has allowed an expert to be qualified in the same terms of the rule, that is ' ... qualified as an expert by knowledge, skill, experience, training, or education ...' "

15 The 2011 amendment was stylistic only.

16 202 Mont. 185, 193-194, 657 P.2d 594, 594-598 (1983).

17 United States v. Baller (4th Cir.1975), 519 F.2d 463, cert. den. 423 U.S. 1019, 96 S.Ct. 456, 46 L.Ed.2d 391.

18 268 Mont. 20, 885 P.2d 457.

19 275 Mont. 46, 54.

20 The Court commented that fingerprint identification was not novel, but that determining the age of a given fingerprint was, necessitating a Daubert analysis.

21 289 Mont. 1, 961 P.2d 75 (1998)

22 The next installment in the Evidence Corner series will examine the requirements for a "traditional Rule 702 analysis" in more detail.

23 For example, as of July 10, 2018, WestlawNext indicates that 98 Montana Supreme Court cases have cited Hulse.

24 2015 MT 222, 380 Mont. 204, 354 P.3d 604.

25 Dr. Sabow was a board-certified neurologist, with over 40 years' experience in neurology and particular expertise in ALS. He himself testified that he knew more about the cause and effect of ALS than probably 90 percent of neurologists.