INTRODUCTION

Nearly one hundred years ago, the Court of Appeals for the District of Columbia articulated the first evidentiary standard for admission of expert testimony in *Frye v. United States*. For the next seventy years, *Frye* was the dominant standard for determining admissibility of opinion testimony in both state and federal courts. Then, in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), the U.S. Supreme Court held that the *Frye* “general acceptance” standard was inconsistent with the Federal Rules of Evidence, and *Frye* was no longer the applicable standard in federal courts. Because the Supreme Court was interpreting federal law, and not the Constitution, its *Daubert* holding did not apply to state courts. Thus, states have remained free to determine their own standards relating to the admission of expert testimony. The result has been an ever-changing array of evidentiary standards.

**Frye v. United States**

An early form of a lie detector test was administered to a defendant accused of murder, and at the trial, the defendant sought to introduce the testimony of a scientist who conducted the test. *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). The trial court excluded this testimony; the defendant was convicted and then appealed. At the time of *Frye*, the established rule regarding expert testimony was that when a “question involved does not lie within the range of common experience or common knowledge, but requires special experience or special knowledge,” then testimony by expert witnesses is admissible. *Frye*, 293 F. at 1014. However, “[j]ust when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized . . . .” *Id.* The court held that the expert testimony must be “deduced from a well-recognized scientific principle or discovery,” that has “gained general acceptance in the particular field [to] which it belongs.” *Id.* For the next seven decades, many courts examined the “twilight zone” to determine if scientific evidence had gained “general acceptance” and permitted or excluded expert testimony based on that analysis.

**The Daubert Trilogy**

Jason Daubert and co-plaintiff Eric Schuller were children born with birth defects allegedly caused by the drug Bendectin, a medication prescribed to pregnant women for nausea. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993). After discovery, Merrell Dow moved for summary judgment contending that Bendectin did not cause birth defects in humans. In support of its motion, Merrell Dow offered the affidavit of a physician and epidemiologist who testified that no published studies connected birth defects with ingestion of Bendectin. In response, the plaintiffs offered eight experts who testified that Bendectin could cause birth defects. The district court concluded that the plaintiffs’ experts could not meet the *Frye* general acceptance test, and granted summary judgment in favor of Merrell Dow. The Ninth Circuit, following *Frye*, affirmed the district court. The Supreme Court of the United States granted certiorari based on a circuit split that had emerged regarding the proper standard to admit or exclude expert testimony.

The Supreme Court concluded that the Federal Rules of Evidence, specifically Rule 702, had displaced the *Frye* test. Outlining the factors a district court must consider when analyzing admissibility under Rule 702, the court emphasized that the Rule 702 inquiry was meant to be “flexible.” The “overarching subject [of the inquiry] 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." Id. at 594–95. Finally, the court did not eliminate "general acceptance" from the inquiry altogether, but emphasized the court’s role as gatekeeper by requiring expert evidence to be based on reliable methodology and principles. "General acceptance is not a necessary precondition to the admissibility of scientific evidence under the Federal Rules of Evidence, but the Rules of Evidence—especially Rule 702—do assign to the trial judge the task of ensuring that an expert’s testimony both rests on a reliable foundation and is relevant to the task at hand." Id. at 597.

In the six years that followed Daubert, the Supreme Court clarified the standard in two additional cases. In General Electric Co. v. Joiner, 522 U.S. 136 (1997), the Supreme Court held that the proper standard in reviewing admission of expert testimony is abuse of discretion. Then, in Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137 (1999), a products liability case involving design defect expert testimony, the Supreme Court held that the Daubert standard also applies to expert testimony by engineers and other experts who are not scientists. The court emphasized the district court’s responsibility as gatekeeper ensuring expert evidence presented is both relevant and reliable.

In 2000, Federal Rule of Evidence 702 was amended to codify the elements from the "Daubert trilogy." The current text of the rule is as follows:

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.

Fed. R. Evid. 702.

USING THIS BOOK

The importance of experts in litigation has increased over the years, and a significant body of case law has emerged interpreting the Daubert trilogy and Rule 702 standard. While the federal courts enjoy a relatively uniform standard to apply in this important area, states remain divided in their approach to admission of expert testimony. Many states have adopted the Daubert standard, a few have retained Frye, and many others have modified the Daubert and Frye approaches to create their own standard.

The Trial Evidence Committee of the ABA’s Section of Litigation has closely followed the developments regarding admissibility of expert evidence over the years, publishing updates, articles, and surveys of the case law. Over many recent months, the Committee members endeavored to create an updated fifty-state survey to aid practitioners in navigating the various approaches in the state courts.

This book provides an analysis of the standard employed by each state for the admissibility of expert testimony. The appendices contain helpful materials for the practitioner in formulating strategy for expert discovery and admission. These materials provide a starting point for research and drafting motions, and also provide context for the landscape of expert testimony admissibility across jurisdictions.

States are constantly considering the best framework for evaluating expert testimony, and the landscape of approaches is changing all the time. In 2013, Florida, formerly a Frye

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1 All of the Federal Rules of Evidence, including Rule 702, were amended stylistically in 2011.
state, enacted legislation to become a Daubert jurisdiction. The Florida Bar voted to reject the legislation and the issue is currently pending before the Florida Supreme Court. And, the very jurisdiction that created Frye, and has continued to use it for nearly a century, recently reconsidered the Frye decision and adopted the Rule 702/Daubert standard. Each jurisdiction considering these standards of admissibility looks to the relative successes and failures of other approaches, and practitioners would be well-served to consider jurisdictions near and far in their advocacy and approach. The material provided in this book ensures you are well on your way.