

**KENTUCKY BAR ASSOCIATION
KENTUCKY RULES OF EVIDENCE**

**ARTICLE VII
OPINIONS AND EXPERT TESTIMONY**

KRE 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, if (1) testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Evidence Rules Review Commission Notes (2007)

When the Kentucky Rules of Evidence were adopted in 1992, Ky. Rule 702 used the same language as Federal Rule of Evidence 702. In addition, the Kentucky Rule was interpreted to follow the traditional rule of Frye v. United States, 293 F. IO13 (D.C. Cir. 1923). The "Frye Test" would allow admission of scientific evidence if it was generally accepted in the scientific community.

The United States Supreme Court in Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993) overruled the "Frye Test" and interpreted Federal Rule of Evidence 702 to require an analysis of factors by the trial judge in order to determine whether the scientific evidence was admissible. In order to admit such evidence the trial court was to act as a "gatekeeper" and make a preliminary determination that the underlying science was, in fact, "valid." In Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137 (1999), the "Daubert Test" was extended to cover not only "scientific" evidence, but also any evidence of "scientific, technical, or other specialized knowledge."

In 2000, Rule 702 of the Federal Rules of Evidence was amended in order to codify the approach taken in Daubert. The items listed as numbers (1), (2), and (3) are not intended to specifically state the factors found in Daubert and Kumho Tire. They are, instead, intended to indicate that the court is to determine the reliability of such evidence based upon the flexible factors suggested by such cases. Although there is no attempt to codify the specific factors from that case, the purpose of the amendment is clearly stated by the Federal Advisory Committee Notes to that amendment.

No attempt has been made to "codify" these specific factors. Daubert itself emphasized that the factors were neither exclusive nor dispositive. Other cases have recognized that not all of the specific Daubert factors can apply to every

type of expert testimony ... The standards set forth in the amendment are broad enough to require consideration of any or all of the specific Daubert factors where appropriate.

In 1995, the Kentucky Supreme Court followed the lead of the United States Supreme Court and adopted the rationale of the Daubert decision as the appropriate interpretation of the language of Rule 702. Mitchell v. Commonwealth, 908 S.W.2d 100 (Ky. 1995). In 2004, the Kentucky Supreme Court restated the flexible standard originally espoused in Daubert in Toyota Motor Corp. v. Gregory, 136 S.W.3d 35 (Ky. 2004).

The 2007 amendment to Kentucky Rule of Evidence, Rule 702 is designed to follow the development and adopts exact language set by the Federal Rules. The amendment will codify the approach taken in the Daubert case; followed in the Toyota Motor Corp. case and allow the trial court to act as gatekeeper to the introduction of "scientific, technical, or, other specialized knowledge." The amendment does not specifically require the use of all or any one of the factors suggested by the court. It allows the trial court to use those factors that are appropriate to the case at trial.

HISTORY: Amended by Supreme Court Order 2007-02, eff. 5-1-07; 1992 c 324, § 34, eff. 7-1-92; 1990 c 88, § 50