

# EXPERT WITNESSES IN EMPLOYMENT LITIGATION

---

Robert E. Sheeder  
Clayton M. Davis  
Bracewell LLP

## In Federal Court at Least Seven (7) Applicable Rules of Evidence

- i. **Rule 104**: Preliminary questions
- ii. **Rule 702**: Testimony by experts
- iii. **Rule 703**: Bases of opinion testimony by experts
- iv. **Rule 704**: Opinion on ultimate issue
- v. **Rule 705**: Disclosure of facts or data underlying expert opinion
- vi. **Rule 401**: Definition of relevant evidence
- vii. **Rule 403**: Exclusion of relevant evidence on grounds of prejudice, confusion or waste of time

• Same rules apply in Texas state courts

## Four Requirements for Admission of Expert Witness Testimony

- 1) **Qualified expert**
- 2) **Reliability of opinions**
- 3) **Relevance of testimony**
- 4) **Probative value outweighs prejudice**

*See Watkins v. Telsmith, Inc.*, 121 F.3d 984 (5th Cir. 1997).

## Standard for Qualification of Experts – Little Changed in 40 Years

- 1) **Specialized knowledge, skill, experience, training or education**

**AND**

- 2) **Which will assist judge or jury to understand the evidence or determine a fact in issue.**

**See Fed. R. Evid. 702; Tex. R. Evid. 702.**

## Reliability Standards Have Undergone Dramatic Changes Since Three Supreme Court Decisions

- i. *Daubert v. Merrell Dow Pharmaceuticals*
- ii. *General Electric Co. v. Joiner*
- iii. *Kumho Tire Co. v. Carmichael*

### *Daubert Standard*

- Pronounced "Dow-burt," 43 Emory L.J. 867 (1994).
- 1993 case in which plaintiff alleged a drug caused birth defects.
- Prevalent standard for admissibility of expert testimony was "general acceptance" in the field, under the *Frye* test from *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923)
- Plaintiff's expert's opinion was based on studies which had not gained "general acceptance."
- Supreme Court rejected *Frye's* "general acceptance" test, expanding admissible testimony to include any that is based on a **reliable methodology**. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](http://utcle.org/elibrary)

Title search: Expert Witnesses In Employment Litigation

Also available as part of the eCourse

[2018 Labor and Employment Law eConference](#)

First appeared as part of the conference materials for the  
25<sup>th</sup> Annual Labor and Employment Law Conference session  
"Effective Use of Expert Witnesses"