



# HOUSTON LAW REVIEW

## ARTICLES

PROCEDURAL ISSUES UNDER *DAUBERT*  
*Judge Harvey Brown*

FROM COLORADO TO ALASKA BY WAY OF CINCINNATI: ON *ROMER*, *EQUALITY*  
*FOUNDATION*, AND THE CONSTITUTIONALITY OF REFERENDA  
*Mark Strasser*

## ESSAY

THE *MIRANDA* DEBATE: QUESTIONS PAST, PRESENT, AND FUTURE  
*Laurie Magid*

## COMMENTS

A CONCILIATORY APPROACH TO WORKPLACE HARASSMENT:  
*BURLINGTON INDUSTRIES, INC. v. ELLERTH*  
AND *FARAGHER v. CITY OF BOCA RATON*  
*Richelle Wise Kidder*

THE FINAL PIECE OF THE SEAT BELT EVIDENCE PUZZLE  
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*EASTERN PHILOSOPHY*: A CONSTITUTIONAL ARGUMENT FOR FULL  
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*Bentzion S. Turin*

HATE CRIME LEGISLATION: A POLICY ANALYSIS  
*Craig L. Uhrich*

## NOTE

AFTER *COLLEGE SAVINGS v. FLORIDA PREPAID*,  
ARE STATES SUBJECT TO SUIT FOR COPYRIGHT INFRINGEMENT?:  
THE COPYRIGHT REMEDY CLARIFICATION ACT AND  
*CHAVEZ v. ARTE PUBLICO PRESS*  
*Peter Bray*

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### NOTE

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### I. INTRODUCTION

Expert testimony is admissible only if it can pass eight different gates. Five of these gates are an outgrowth of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*<sup>1</sup> and are intended to ensure that the expert's opinion is reliable.<sup>2</sup> Reliability requires an examination of the expert's methodology, the foundational data and assumptions utilized by the expert, and the reasoning process used by the expert to apply that methodology or foundational data to the facts of the case.<sup>3</sup>

In addition to the substantive challenges created by *Daubert* and its progeny, there is a number of developing procedural issues. These issues are addressed in Part II of this Article and include the burden of demonstrating the admissibility of expert testimony,<sup>4</sup> the timing of expert challenges, and the types of evidence that may be used in a hearing on the challenge to the expert. Part II will also identify some traps for the unwary. With regard to foundational reliability, for example, when an expert's opinion is based upon information obtained outside the courtroom, the opinion can be properly objected to if the data is

1. 509 U.S. 579 (1993).

2. See generally *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549 (Tex. 1995).

3. See Judge Harvey Brown, *Eight Gates for Expert Witnesses*, 36 HOUS. L. REV. 743, 748-49, 814 (1999).

4. See *Daubert*, 509 U.S. at 596; *Robinson*, 923 S.W.2d at 557.