IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PASCO COUNTY, STATE OF FLORIDA
CRIMINAL FELONY DIVISION

STATE OF FLORIDA,
Plaintiff,

vs.

CURTIS JUDSON REEVES,
Defendant.
_____/

Case No: CRC14-000216-CFAES

Division: 1

DEFENSE NOTICE OF SUPPLEMENTAL AUTHORITY

COMES NOW the Defendant, CURTIS JUDSON REEVES, by and through the undersigned counsel and files the attached Florida Bar Journal article entitled: The Daubert Expert Standard: A Primer for Florida Judges and Lawyers.

1. The defense supplements all pending Daubert related Motions before the Court in the above-styled matter and will rely on the article in its arguments to the Court.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Electronic Submission to the Office of the State Attorney, glennmartin@flsa6.gov, 38053 Live Oak Ave., Dade City, Florida 33523

/s/ Dino M. Michaels
Dino M. Michaels, Esquire
Escobar & Associates, P.A.
2917 W. Kennedy Boulevard, Suite 100
Tampa, Florida 33609
Tel: (813) 875-5100
Fax: (813) 877-6590
Florida Bar No: 526290
Attorney for Defendant

THE DAUBERT EXPERT STANDARD: A PRIMER FOR FLORIDA JUDGES AND LAWYERS

Vol. 94, No. 2 March/April 2020 Pg 8 Thomas S. Edwards, Jr., and Jennie R. Edwards

Featured Article

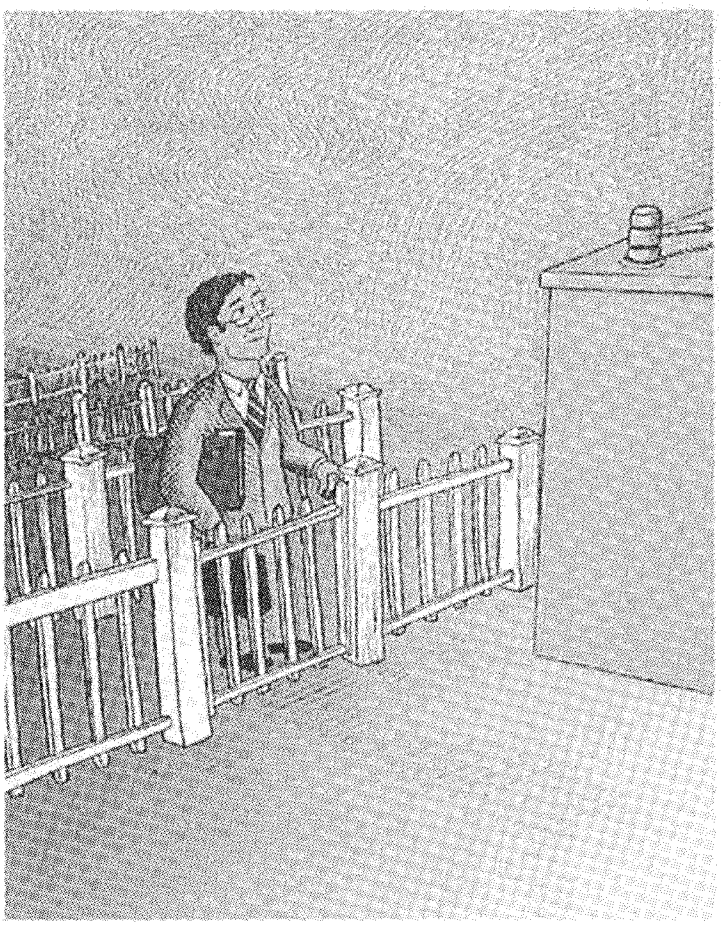

Illustration by Barbara Kelley

In May 2019, the Florida Supreme Court made clear that *Daubert v. Merrell-Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), is the standard for admission of expert testimony in Florida.[1] In 2013, the Florida Legislature amended the evidence statutes to adopt the *Daubert* standard.[2] In 2017, the Florida Supreme Court rejected the *Daubert* standard, insofar as it was procedural and upheld *Frye*[3] as the standard for admission of expert testimony.[4] In 2018, in *DeLisle v. Crane Co.*, 258 So. 3d 1219, 1223 (Fla. 2018), *reh'g denied*, SC16-2182, 2018 WL 6433137 (Fla. Dec. 6, 2018), the legislature's amendment to F.S. §90.702 was declared an unconstitutional infringement of the court's oversight of the procedural rules of evidence. In 2019, the court reversed course and adopted *Daubert* as a procedural rule.[5]

History of *Frye* and *Daubert*

Daubert and *Frye* are two distinct trial court standards for deciding the reliability of expert testimony for admission. Both standards require the testimony to be relevant to issues in the case, assist the trier of fact, and the expert must be qualified in the area of testimony.

Frye was adopted nearly 100 years ago. *Frye* evaluates whether the basis for the opinion "gained general acceptance in the particular field [to] which it belongs." [6] In 1993, the U.S. Supreme Court issued *Daubert*. *Daubert* involved children born with birth defects allegedly caused by the drug Bendectin. Defendant challenged the plaintiff's expert's opinion on grounds that it failed the "general acceptance" standard. There were no published studies that connected birth defects to Bendectin.[7] The district court granted summary judgment for defendant. The Ninth Circuit affirmed.

On appeal, the Supreme Court held that Federal Rule of Evidence 702 no longer used the "general acceptance" test. Instead, Rule 702 was meant to be flexible and broader than the *Frye* standard. The Court decided the trial court judge must focus on the principles and methodologies used by the expert and not on conclusions.[8] "General acceptance" was but one of multiple factors the court may analyze in deciding whether expert evidence is reliable. *Daubert* concluded that Rule 702 assigns 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."[9]

In *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999), the Supreme Court expanded the reach of *Daubert* to all expert testimony, not just scientific expert testimony.

In 2000, Fed. R. Evid. 702 was amended to codify the elements from *Daubert*. Rule 702 reads:

> *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 scientific, technical or other specialized knowledge will help the tryer 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.*[10]

In 2013, F.S. §90.702 was amended to mirror Fed. R. Evid. 702. The legislature's preamble "adopt[s]...*Daubert*...*Joiner*[11]...*and Kumho Tire*..." and states "...[we] intend to prohibit... pure opinion testimony as provided in *Marsh v. Valyou*, 977 So. 2d 543 (Fla. 2007)."[12] In

May 2019, any ambiguity as to whether Florida courts apply the *Daubert* standard or the *Frye* standard was resolved. Florida state courts now follow *Daubert*.

Daubert has been in use for nearly 30 years. There is a body of settled law relating to *Daubert* proceedings. From 2013 until *DeLisle*, Florida appellate courts also addressed the *Daubert* standard. Thus, there is an established body of commentary and criticism that addresses both strengths and weaknesses.

Standard of Review

The appellate standard of review for *Daubert* proceedings is usually abuse of discretion. Under Florida law, discretion in rejecting expert testimony cannot be exercised arbitrarily and requires some reasonable basis in the evidence.[13] De novo review is the appropriate standard where the trial court's *Daubert* determination involves questions of law,[14] when the decision is based on written evidence rather than live testimony,[15] general acceptance in the relevant community[16] and application of the Florida Evidence Code.[17]

"Under Florida law, 'exclusion of [expert] witness testimony is a drastic remedy that should be invoked only under the most compelling circumstances.'"[18] Under a *Daubert* analysis, the trial court errs if it relies on one version of disputed facts to exclude an expert's testimony. "In forming opinions, an expert is entitled to rely on any view of disputed facts the evidence will support."[19] All fact inferences must be found in favor of the nonmovant and the focus must be on whether there were sufficient facts and data.[20] A *Daubert* review "is not intended to authorize a trial court to exclude an expert's testimony on the ground that the court believes one version of the facts and not the other."[21]

A *Daubert* Challenge Must be Timely and Sufficient

The trial court has broad discretion in deciding how to manage its gatekeeper function.[22] However, a lawyer has an obligation to raise a *Daubert* challenge as soon as the party is reasonably aware of the basis for it.[23] For example, Florida courts have held that absent "exceptional circumstances," an untimely *Daubert* motion should not be considered.[24] After filing the motion, the party moving has an obligation to advance the motion by bringing it to the court's attention and timely seeking a hearing. The failure to do so is a waiver.[25]

The party providing expert testimony bears the burden to provide a proper foundation. However, a *Daubert* challenge may not begin until a timely, proper, and facially

sufficient motion is served. Once timely raised, "the gatekeeper must determine whether the objection was sufficient to put opposing counsel on notice so as to have the opportunity to address any perceived defect in the expert's testimony."[26]
A proper *Daubert* motion must identify the source, substance, and methodology of the challenged testimony.[27] The motion should be supported by conflicting expert testimony and literature. Otherwise, the court is justified in declining to hear the motion.[28] "*Daubert* objections must be directed to specific opinion testimony and 'state a basis for the objection beyond just stating [the party] was raising a *Daubert* objection, in order to allow the opposing counsel an opportunity to have the [expert] address the perceived defect in his testimony.'"[29]

Procedure for a Properly Framed *Daubert* Motion

If a party timely files a sufficient motion with the court, then the court has a duty to perform its gatekeeper function.[30] The court has discretion in whether a hearing is required and how to conduct any proceedings.[31] *Daubert* hearings are not required but may be helpful in complicated cases involving multiple expert witnesses.[32] A court should conduct a *Daubert* inquiry when the opposing party's motion is supported by conflicting medical literature and expert testimony.[33]

A trial judge has the discretion to conduct a paper review only, a hearing with argument, an evidentiary hearing, or defer ruling until the time of trial. In selecting the appropriate procedure, Florida law encourages the trial judge to proceed in a manner designed to "secure the just, speedy, and inexpensive determination of every action."[34]

In Florida, experts may consider inadmissible material in forming opinions.[35] In federal court, a *Daubert* hearing is not bound by the Rules of Evidence.[36] Presumably, Florida courts will follow the same process. The parties may provide the court with materials inadmissible to a jury, such as documents showing peer-reviewed articles, industry standards, affidavits from consulting experts, or any other relevant materials that assist the court in reaching a conclusion as to whether a proper predicate can be laid for the expert's testimony.[37]

Principles for Court Decision-Making in *Daubert* Hearings

The Florida Rules of Evidence approach relevant evidence with a presumption of admissibility.[38] *Daubert* was designed to admit testimony that was previously excluded under the narrower *Frye* standard. The *Frye* standard "[is] at odds with the 'liberal thrust' of the [evidence rules] and their 'general approach of relaxing the traditional barriers to

opinion testimony.'"[39] Florida courts recognize the *Daubert* standard was designed by the court to admit novel scientific evidence that *Frye* excluded, if reliable.[40] However, "*Daubert* attempts to strike a balance between a liberal admissibility standard for relevant evidence on the one hand and the need to exclude misleading 'junk science' on the other."[41]

Neither Rule 702 nor the decisional law flowing from *Daubert* are intended to provide an excuse for an automatic challenge to the testimony of every expert.[42] Regardless of the method for the hearing, Florida law views exclusion of expert testimony as "a drastic remedy that should be invoked only under the most compelling circumstances.'"[43] "A review of the case law after *Daubert* shows that the rejection of testimony is the exception rather than the rule. *Daubert* did not work a sea change over...evidence law."[44]

A precept of *Daubert* is that the gatekeeping function "is not intended to supplant the adversary system or the role of the jury: rigorous 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."[45] If a trial court finds that there is insufficient evidence to support a claim, then the court may direct a judgment or grant summary judgment.[46] The standard of review is different for a *Daubert* proceeding than for a decision based upon sufficiency of the evidence, so care must be used not to intermingle these proceedings.

Attacks on the expert's background, qualifications, use of accepted methodology, or lack of textural authority should be considered by the jury in assessing the weight to be accorded to the expert's testimony.[47] An alleged failure to independently verify components of the analytical framework also go to weight and credibility as opposed to admissibility of evidence.[48] Likewise, "[i]n most cases objections to the inadequacies of a study are more appropriately considered an objection going to the weight of evidence rather than its admissibility."[49] Challenges to the quality of the analysis done by an expert where they have used recognized methodologies goes to weight of the evidence, not admissibility.[50]

The court must examine the methods, not the conclusions. "The proponent of expert testimony does not have an obligation to show that the opinion is correct, but only that more likely than not the opinion is reliable."[51] When the attacks on the expert challenge the accuracy of results, but not the validity of the methods used, there is a question for the jury.[52] The U.S. Supreme Court does not view attacks on test model parameters as a

basis for exclusion of expert testimony. The court held that "'normally, failure to include variables will affect the analysis' probativeness, not its admissibility.'"[53] Nor may an expert be excluded for using one test, as opposed to another, if both tests are accepted and used reliably.[54]

When an expert witness relies upon information normally used within the field of specialty, they are not tasked with confirming the accuracy of underlying facts. The expert "is not a private investigator hired to investigate the accuracy of each report or document he uses in creating his report. Instead, the documents or data an expert witness utilizes must only be 'of the type reasonably relied upon by experts in the particular field informing opinions or inferences upon the subject.'"[55] An expert must know "facts which enable him to express a reasonably accurate conclusion instead of mere conjecture or speculation."[56] However, absolute certainty is not required.[57]

An expert must explain how they arrived at their opinions. Assurances that the expert has used generally accepted scientific methodology are insufficient without explanation.[58]

The *Daubert* Challenge

Generally, the challenge will focus on one or more of three major areas: qualifications/relevance/helpfulness, "fit," and reliability.[59] Since *Daubert* was adopted by the federal courts, most challenges are not directed at *Daubert/Frye* reliability issues. Most judges do not rely upon reliability for exclusion. Most *Daubert* challenges revolve around relevance, qualifications, helpfulness, or "fit."[60] Judges identified problems with general acceptance, peer review, and insufficient theory less than 8% of the time. Falsifiability and error rates were identified less than 2% of the time. In cases in which the reliability of the testimony was the basis, the judges rarely discussed specific *Daubert* criteria for assessing the reliability.[61]

Qualifications, Relevance, and Helpfulness

· *Qualifications* — The expert must demonstrate knowledge "beyond the understanding of the average person."[62] The knowledge can be based upon "knowledge, skill, experience, training, or education."[63] The standard for admission of expert testimony is liberal and broad.[64] Disputes over the strength of qualifications and credentials ordinarily go to the weight of the testimony and not to admissibility of the expert opinions.[65] A court may not exclude an expert because they are not the best qualified,

nor because the area of specialization is not the "most appropriate."[66] If an expert meets the liberal qualification standard for admissibility then it is the jury's role to assess credibility and weight.[67]

• *"Relevance" and "Helpfulness"* — The testimony is relevant if it will "help the trier of fact to understand the evidence or to determine a fact at issue."[68] Relevance and helpfulness closely track the standards of relevance and materiality in the evidence code. Expert testimony only assists the trier of fact when it addresses matters "beyond the understanding of the average person."[69] In *Daubert*, relevance and helpfulness dovetail with the "fit" part of the analysis.[70]

• *"Fit"* — Fit analyzes whether for each expert opinion the reliable methodology fits the facts and data in the case in a way that educates the jury on evidence or assists in deciding a disputed issue in the case. In sum, the court analyzes whether there is "too great an analytical gap between the data and the opinion proffered."[71] The court may not accept testimony only supported by ipse dixit of the expert (*i.e.*, "because I said so").[72] "[S]cientific validity for one purpose is not necessarily scientific validity for other, unrelated purposes.... Rule 702's 'helpfulness' standard requires a valid scientific connection to the pertinent inquiry as a precondition to admissibility."[73]

• *"Reliable Methodology"* — In *Daubert* the court explicitly stated, "many factors will bear on the inquiry, and...[we do] not presume to set out a definitive checklist or test."[74] In *Kumho*, the court stressed that the reliability review must be tailored to the issues in the case. The court recognized that *Daubert* factors are not always relevant even when an expert relies on scientific evidence. The U.S. Supreme Court explained that "too much depends on the particular circumstances of the particular case at issue."[75] Recently, courts focused on whether "an expert employs, in the courtroom, the same level of intellectual rigor that characterizes the practice of an expert in the relevant field."[76]

Since *Kumho* expanded the reach of *Daubert* proceedings to cover all types of expert testimony, many factors that are applicable to scientific evidence in *Daubert* do not apply to other types of testimony. Even if all the *Daubert* factors apply, the trial court is not required to weigh each factor equally or apply each factor in every case. There may be other factors that are more applicable depending upon the nature of the case.[77] *Daubert* made clear that the obligation of the court is to examine the methodology embraced by the expert and not to examine the conclusions.[78]

There are four nonexclusive factors considered in *Daubert*.[79] The Federal Rules of Evidence Advisory Committee outlined a lengthy nonexclusive list of additional possible reliability factors in the note to the Fed. R. Evid. 702. *The Federal Judicial Center Reference Manual on Scientific Evidence* (3d ed. 2011) is publicly available and is a helpful guide on these issues.[80]

The court may also consider whether the evidence is properly admissible under a rule or a statute. For instance, DNA evidence is statutorily admissible in some jurisdictions.[81] The court may take judicial notice of decisions of other courts regarding admissibility of certain types of evidence or that a specific witness was previously admitted in a certain field. The court still needs to analyze whether the prior ruling(s) were consistent in area and approach. In other words, does the prior ruling "fit" the issues presented?[82]

Expert Evidence Accepted as Admissable

Courts have concluded that certain types of expert testimony are admissible with a proper predicate under *Daubert*. Courts have allowed causation opinions, differential diagnosis opinions, biomechanical engineer opinions, physician opinions, psychological or sociological testimony, economist testimony, "pure opinion," and "standard of care" testimony.

For a court to allow a causation opinion, the injury causation analysis must support both general causation and specific causation.[83] However, *Etherton v. Owners Insurance Company*, 35 F. Supp. 3d 1360 (D. Colo. 2014), implies a third prong of temporal relationship should also be shown. "General causation is whether a substance [or event] is capable of causing a particular injury or condition in the general population and specific causation is whether a substance [or event] caused a particular individual's injury."[84] There can be no specific causation without general causation being shown first.[85] General and specific causation must be proven, but a causation opinion need not negate every alternative hypothesis to qualify as reliable.[86]
Courts recognize that a differential diagnosis is a valid method of proving specific causation when the methodology is reasonable.[87] An expert cannot establish reliability by discussing a differential diagnosis without explanation of the elements. The expert must apply the steps to the facts of the case. In general, differential diagnosis is not relevant to determining general causation, so a differential diagnosis analysis also needs explanation of general causation.[88]

> *A reliable differential diagnosis typically, though not invariably, is performed after... examinations,...medical histories, and...review of clinical tests,...' and generally is accomplished by determining the possible causes for the patient's symptoms and then eliminating each of these potential causes until reaching one that cannot be ruled out or determining which of those that cannot be excluded, is the most likely.*[89]

A physician does not have to perform a physical examination in order to reach a reliable differential diagnosis.[90] Further, a physician is not required to rule out all other causes.[91] "Courts regularly affirm the legitimacy of employing differential diagnostic methodology."[92] *Maines v. Fox*, 190 So. 3d 1135 (Fla. 1st DCA 2016), is instructive regarding areas of accepted testimony for both biomechanical engineers and physicians. In *Maines*, the First District reversed a trial judge for excluding testimony of a physician who also had a degree in biomechanical engineering. The court addressed causation testimony by physicians and biomechanical engineers.

It is commonplace for a biomechanical engineer to testify on general causation. However, a physician is required to testify on specific causation of the particular injury.[93] The court recognized that "biomechanical experts are not, however, allowed to render opinions that require medical expertise."[94] Accordingly, a biomechanical accident reconstructionist cannot testify as to the permanency of an injury.[95]

Courts agree that psychiatric, psychological, and sociological expert opinions are difficult to analyze under *Daubert*. However, *Daubert* employs a flexible approach, and there is a proper basis for admission of the testimony with a proper predicate.[96] In *Andrews v. State*, 181 So. 3d 526 (Fla. 5th DCA 2015), the court recognized that its task is not to engage in a "rigid checklist of proposed opinion testimony...."[97] The *Andrews* court concluded that the testimony of the experts was admissible. The experts laid a predicate that they reviewed multiple materials and engaged in activities generally used by specialists in the field.[98] The court held that because a review of these materials was customary in the field of evaluating sex offenders, a proper predicate was laid, and the opinions were appropriately admitted.[99] In its analysis, the court concluded that the "objective of *Daubert's* gate-keeping requirement is to make certain an expert employs, in the courtroom, the same level of intellectual rigor that characterizes the practice of an expert in the relevant field."[100] In *Jones and Laughlin Steel Corp. v. Pfeiffer*, 462 U.S. 523, 537 (1983), the court acknowledged that economist testimony regarding reduction of future damages to present value by use of a discount rate is an accepted methodology in the field.

The new Florida statutory standard excludes an expert's testimony based upon pure opinion. However, this does not mean that experts are precluded from testifying based upon "knowledge, skill, experience, training, or education" with a proper predicate.[101] In *Giaimo v. Florida Autosport Inc.*, 154 So. 3d 385 (Fla. 1st DCA 2014), the court reversed the admission of a physician's testimony based upon pure opinion because the expert gave an opinion without adequate explanation. When asked the basis for attributing a percentage of the injury to a pre-existing condition, the expert said, "when I was asked and thought about it, that is the answer that I came up with."[102] The court excluded the pure opinion because the testimony lacked explanation of principles or methods used to come to the conclusion.[103]

However, in *Booker v. Sumter County Sheriff's Office/North America Risk Services*, 166 So. 3d 189 (Fla. 1st DCA 2015), the First District explained proper opinion testimony. The predicate demonstrated the expert's familiarity with the appellant's medical history and condition. The expert also considered medical studies that were accepted within the medical community. The expert then used the studies and medical condition to reach the opinion on causation.[104] The district court held the trial court did not abuse its discretion in admitting the experts' pure opinion testimony based on reliable factors for experts of that type.[105]

The plain language of the *Daubert* statute expressly permits testimony based upon experience and knowledge. The committee notes to Fed. R. Evid. 702 are an informative resource. Within the notes, they state "nothing in this amendment is intended to suggest that experience alone — or experience in conjunction with other knowledge,... may not provide a sufficient foundation for expert testimony."[106] The Florida courts agree. The lesson of *Giaimo* and *Booker* is that it is not enough to have an expert testify that they reviewed the records and then render an opinion. That is pure opinion and is prohibited. The expert must "show their work" and explain what was in the records and how the opinion was reached based upon their experience, the facts, tests, analysis, or literature. The court is not authorized to accept the expert's opinion without explanation of the basis for the opinion.

Standard of care opinions do not fit a *Daubert* framework. Cases recognize that an expert qualified as competent under state substantive law may testify on standard of care.[107] If the doctor has experience in the area deemed proper under state substantive law, then it is an abuse of discretion to exclude the doctor's standard of care testimony.[108]

Finally, Florida courts have found that an expert may testify based on facts from either physical examination or medical records, but for the opinion to be considered reliable, the basis for the conclusions cannot be assumptions or speculation regarding facts not appearing in the case. In other words, if an expert makes up facts not in the case, that shows unreliability.[109]

Comment and Suggestions

Daubert will impose more demands and responsibility upon judges, more work for lawyers and experts, and the potential for increase in expense and delay for the judicial system. Commentators have identified concerns including disparity in application between criminal and civil cases; inconsistent results among trial courts, even with the same expert testimony; problems with crossing from predicate *Daubert* analysis into sufficiency of evidence analysis; and constitutional implications regarding the right to trial by jury when judges resolve fact disputes.

Efficient and appropriate management of the judicial system is the responsibility of the judiciary. The legislature has the right to impose substantive standards on our judicial system. It is then the responsibility of the judiciary to manage the new standards appropriately. As Florida embarks on managing the *Daubert* standard, the courts have a responsibility to ensure that people of the state maintain their constitutional rights to "access to courts" and to the right to "trial by jury." A fundamental tenant of our court system is "to secure the just, speedy and inexpensive determination" of each case. Managing *Daubert* will challenge some of these precepts.

The Need for Additional Rules

The court and related bodies should consider the need for additional rules. Fed. R. Evid. 104(a) provides that *Daubert* proceedings are not bound by the rules of evidence. Florida courts should consider a similar rule. In *Daubert* proceedings, judges must evaluate predicate and foundation materials, whether admissible at trial or not. Experts, in forming their opinions, are not limited to admissible materials.[110] Thus, a rule like Rule 104(a) is recommended to make the law clear.

Likewise, rules of procedure guiding management of *Daubert* proceedings will assist judges and lawyers, enhance efficiency, and promote timely handling of *Daubert* issues. Setting rules that promote reasonable time limits and appropriate handling of *Daubert* issues will provide basic standards for *Daubert* proceedings and will enhance consistency within our courts. Three of the most common criticisms of *Daubert* relate to

the impact on timely handling, increased expense, and inconsistency of result due to the abuse of discretion standard.[111] Well-crafted rules will assist in managing each of these problem areas.

First, a rule requiring a timely challenge when the issue arises, instead of waiting for deadlines just before trial, will provide time to respond without disrupting the trial schedule. This may also permit time to fix any identified foundation or predicate problems that can reasonably be fixed within the rules. *Daubert* should not be used to terminate cases when a party can reasonably fix any defects and has not abused the process or created unmanageable prejudice in the process.

Second, the court should evaluate creation of a rule like the summary judgment rule for management of *Daubert* issues. The proposed rule should require a timely *Daubert* challenge; specific identification of the witness(es) at issue; specific identification of any challenged testimony or opinion; the basis for the *Daubert* challenge, stated with specificity (*i.e.*, what areas are unreliable, new science, untested, not peer reviewed, not in accord with prior accepted cases, or whatever deficiency exists); a specific and detailed basis for the challenge including target citations to any differing expert testimony and target citations to authorities to be used, with copies of each; and all facts and law relied upon in the challenge, or it should not be allowed for use at any subsequent hearing. If a contested evidentiary hearing is requested, the party requesting the contested hearing should bear the burden of persuasion and should provide a basis for the request. The rule should provide a minimum time for the opponent to respond and require similar disclosures within the response.

There should be rules of reason designed to reduce costs and delays including a rule permitting the use of technology for any needed contested hearings (*i.e.*, permitting the use of telephone or video conference); allowing timely supplementation of the record with additional predicate opinion or materials, including supplemental affidavits, unless definitely negated in prior testimony; and allowing replacement of experts if done timely and not abused.

The courts should also consider a rule like Fla. R. Civ. P. 1.380(a)(4), which allows the award of fees and costs for motions, or opposition, brought without merit, or if the motion, or response, was designed to needlessly drive expense or delay. There is an existing body of caselaw under the discovery rule that can guide application of a rule for *Daubert* proceedings.

In addition to considering changes to Rules of Evidence and Procedure, the court should consider the creation of approved expert testimony templates. The court and related entities can follow the model for standard jury instructions or court approved forms. The templates would provide approved elements for expert testimony in common areas of expert testimony. The templates could provide a presumptive standard for admission of testimony that a court could automatically approve if the expert was qualified in the proper area and the testimony "fit" issues within the case.

The court should also consider case management standards for timely handling of *Daubert* proceedings to avoid protracting cases and increasing caseloads. This will also reduce costs. Case management considerations should include timely and proper enforcement of early fact discovery so that timely expert discovery can commence without delaying trial dates; and complete expert disclosures after fact discovery. Expert disclosures that provide little information about the basis and opinions of experts are commonplace. That is improper and should not be accepted. In addition, presumptive time standards for review of *Daubert* issues that permits cases to be decided on the merits without disrupting trial dates is needed.

There should be clear standards for courts to decide *Daubert* motions exclusively on predicate issues as contrasted with sufficiency evidence issues. Sufficiency issues make *Daubert* motions a substitute for summary judgment or directed verdict motions. The later motions are subject to a different standard of review. To protect the constitutional right to trial by jury, rigorous standards should be enforced.

Trial judges should be encouraged to distinguish between cases in which the live testimony of the witness(es) impacts the trial court's decision. Most *Daubert* proceedings can, and should, be conducted on a written record. In cases in which the trial judge is deciding issues based upon a written record, the appellate court applies the de novo review standard.

The abuse of discretion standard enhances the risk of inconsistent results from trial courts. Two trial courts can rule differently on the same testimony and both can be upheld on appeal due to the application of the more liberal abuse of discretion standard. [112] This adversely impacts the public perception of fairness, reduces confidence in the system, makes it more difficult for lawyers and experts to reliably prepare, and increases demand for hearings because inconsistent results encourages challenges. Further, there is not a consistent method for publishing or tracking trial-level orders within our state, reducing the ability of lawyers and parties to understand orders and development of the law. There would also be no reliable tracking of results.

The principle of stare decisis states that, "judges dealing with cases essentially alike should reach the same result." Inconsistent results associated with the abuse of discretion standard also may make justice more difficult for citizens without resources to reach, as compared to those with resources. Where appropriate, encouraging nonevidentiary *Daubert* hearings will enhance consistency of result because appellate courts will set standards under a de novo review, publish the opinions, and achieve standards that trial courts, lawyers, experts, and litigants will then understand and follow. Traditional reasons for following the abuse of discretion standard do not apply to *Daubert* proceedings without a contested evidentiary hearing. Contested *Daubert* hearings should only deal with foundation issues. If the information goes to the merits of the case, then the jury must decide the contested issue.

Conclusion

Just as "*Daubert* did not affect a sea change in the...law of evidence," it also did not change standards for judges to manage cases "to secure the just, speedy, and inexpensive determination" of each case. The courts need to assist in managing flaws in *Daubert* to avoid exploitation by either side, increased costs, delays, and demands for the system. Setting rules and clear and consistent standards for admission of expert testimony will allow attorneys and experts to better prepare their cases, reduce the demand for hearings, and reduce expense and the adverse perceptions accompanying inconsistent application of *Daubert*.

[1] *See In re Amendments to Florida Evidence Code*, 44 Fla. L. Weekly S170 (Fla. May 23, 2019).

[2] *Id.*

[3] *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

[4] *Id.*

[5] *Id.*

[6] *Frye*, 293 F. at 1014.

[7] *Daubert*, 509 U.S. at 582-85.

[8] *Id.* at 594-95.

[9] *Id.* at 597.

[10] See Fed. R. Evid. 702.

[11] *General Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997).

[12] Fla. Stat. §90.702 (Pmbl. 2013).

[13] *See SDI Quarry v. Gateway Estates Park Condo. Ass'n*, 249 So. 3d 1287, 1296 (Fla. 1st DCA 2018), *reh'g denied* (Aug. 7, 2018).

[14] Phillip J. Padovano, Florida Appellate Practice 369 (2019 ed.).

[15] *Redondo v. Jessup*, 426 So. 2d 1146 (Fla. 3d DCA 1983); *Savage-Hawk v. Premier Outdoor Products, Inc.*, 474 So. 2d 1242 (Fla. 2d DCA 1985).

[16] *Marsh*, 977 So. 2d at 547.

[17] *See Shands Teaching Hosp. & Clinics, Inc. v. Dunn*, 977 So. 2d 594 (Fla. 1st DCA 2007) (holding that an error in applying a provision of the evidence code is reviewable de novo as an issue of law); *McCray v. State*, 919 So. 2d 647 (Fla. 1st DCA 2006) (analyzing an error in applying the procedure for refreshing the recollection of a witness); *Heller v. Bank of America N.A.*, 209 So. 3d 641 (Fla. 2d DCA 2017).

[18] *Rojas v. Rodriguez*, 185 So. 3d 710, 711 (Fla. 3d DCA 2016) (citing *Clair v. Perry*, 66 So. 3d 1078, 1080 (Fla. 4th DCA 2011)).

[19] *Baan v. Columbia Cty.*, 180 So. 3d 1127, 1132 (Fla. 1st DCA 2015).

[20] *Id.*

[21] *Id.*

[22] *See Booker*, 166 So. 3d at 192 (Fla. 1st DCA 2015).

[23] *Id.*; *Rojas*, 185 So. 3d at 711-12 (noting that the trial judge reversed for excluding expert testimony when the objecting party did not raise the *Daubert* challenge timely).

[24] *Rojas*, 185 So. 3d at 712. *See also Feliciano Hill v. Principi*, 439 F.3d 18, 24 (1st Cir. 2006) (noting that parties are obligated to object to expert testimony in a timely fashion, so that the expert's proposed testimony can be evaluated with care); *Alfred v. Caterpillar Inc.*, 262 F.3d 1083, 1087 (10th Cir. 2001) (holding that because *Daubert* "contemplates a gatekeeping function, not a gotcha junction," untimely *Daubert* motions should be

considered only in rare circumstances); *Club Car Inc. v. Club Care (Quebec) Import, Inc.*, 362 F.3d 775, 780 (11th Cir. 2004) (explaining that a *Daubert* objection not raised before trial may be rejected as untimely).

[25] *Booker*, 166 So. 3d at 193.

[26] *See id.*; *Tanner v. Westbrooke*, 174 F.3d 542, 546 (5th Cir. 1999), *superseded in part by rule on other grounds in Mathias v. Exxon Corp.*, 302 F.3d 448, 459 n.16 (5th Cir. 2002).

[27] *Booker*, 166 So. 3d at 193.

[28] *Id.*; *see also Rushing v. Kansas City Ry.*, 185 F.3d 496, 506 (5th Cir. 1999), *superseded by statute on another ground as noted in Mathias*, 302 F.3d at 459 n.16.

[29] *Booker*, 166 So. 3d at 193.

[30] *Perry v. City of St. Petersburg*, 171 So. 3d 224, 225 (Fla. 1st DCA 2015).

[31] *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 152 (1999).

[32] *City of Tuscaloosa v. Harcros Chemicals, Inc.*, 158 F.3d 548, 564-65 n.21 (11th Cir. 1998); *U.S. v. Hansen*, 262 F.3d 1217 (11th Cir. 2001).

[33] *United States v. Scarpon*, No. 05-20419-CR, 2006 WL 5100541, at *1 (S.D. Fla. Sept. 12, 2006) (denying a motion for *Daubert* hearing on the ground that the defendant's objections were vague and conclusionary); *United States v. Sebbern*, No. 10 CR 87 SLT, 2012 WL 5989813, at *8 (E.D.N.Y. Nov. 30, 2012) (holding that a ballistic testimony hearing was not necessary).

[34] *See generally* Fla. R. Civ. P. 1.010; Fla. R. Crim. P. 3.020; Fla. R. Jud. Admin. 2.110.

[35] Fla. Stat. §90.704 ("If the facts or data are of a type reasonably relied upon by experts in the subject to support the opinion expressed, the facts or data need not be admissible in evidence.").

[36] Fed. R. Evid. 104.

[37] Fla. Stat. §90.704.

[38] *Id.*

[39] *Daubert*, 509 U.S. at 588.

[40] *Anderson v. State*, 220 So. 3d 1133, 1151 (Fla. 2017).

[41] *Best v. Lowe's Home Centers, Inc.*, 563 F.3d 171, 176-77 (6th Cir. 2009) (citing *Amorgianos v. Nat'l R.R. Passenger Corp.*, 303 F.3d 256, 267 (2d Cir. 2002)).

[42] *Id.*

[43] *Rojas*, 185 So. 3d at 710 (citing *Clair v. Perry*, 66 So. 3d 1078, 1080 (Fla. 4th DCA 2011)) (internal citation omitted).

[44] Fed. R. Evid. 702, advisory committee's note (2000).

[45] *United States v. 14.38 Acres of Land, More or Less Sit. in Leflore County, Miss.*, 80 F.3d 1074, 1078 (5th Cir. 1996).*Daubert*, 509 U.S. at 596; *Adams v. Lab. Corp. of America*, 760 F.3d 1322, 1334 (11th Cir. 2014) (including *United States v. Alabama Power Co.*, 730 F.3d 1228, 1282 (11th Cir. 2013)).

[46]*Daubert*, 509 U.S. at 596.

[47] *Kennedy v. Collagen Corp.*, 161 F.3d 1226, 1230 (9th Cir. 1998) (quoting *McCullock v. H.B. Fuller Co.*, 61 F.3d 1038, 1044 (2d Cir. 1995).

[48] *Id.*; *Advanced Body Care Solutions, LLC v. Thione Intern, Inc.*, 615 F.3d 1352, 1363-64 (11th Cir. 2010).

[49] *Rosenfeld v. Oceania Cruises, Inc.*, 654 F.3d 1190, 1193 (11th Cir. 2011) (quoting *Hemmings v. Tidyman's Inc.*, 285 F.3d 1174, 1188 (9th Cir. 2002).

[50] *Sabal Trail*, 2018 WL 3655556, at *5; *Columbia Gas Transmission, LLC v. 76 Acres*, 701 F. App'x 221, 229-30 (4th Cir. 2017).

[51] *See Allison v. McGhan Medical Corp.*, 184 F.3d 1300, 1312 (11th Cir. 1999).

[52] *Quiet Technology DC-8, Inc. v. Hurl-Dubois UK, Ltd.*, 326 F.3d 1333, 1345 (11th Cir. 2003).

[53] *Id.* at 1346 (quoting *Bazemore v. Friday*, 478 U.S. 385, 400 (1986)).

[54] *Heller v. Shaw Industries, Inc.*, 167 F.3d 146, 160 (3d Cir. 1999)

[55] *Platypus Wear, Inc. v. Clark Modet & Co.*, Case No. 06-200976-CIV, 2008 WL 453914, at *5 (S.D. Fla. October 7, 2008) (quoting Fed. R. Evid. 703).

[56] *Jones v. Otis Elevator Co.*, 861 F.2d 655, 662 (11th Cir. 1998) (citations omitted)

[57] *Jones*, 861 F.2d at 662.

[58] *McClain v. Metabolife Intern, Inc.*, 401 F.3d 1233, 1234 (11th Cir. 2005).

[59] *Adams*, 760 F.3d at 1328 (quoting *Kilpatrick v. Breg, Inc.*, 613 F.3d 1329, 1335 (11th Cir. 2010)).

[60] *See* A. Leah Vickers, Daubert, *Critique and Interpretation: What Empirical Studies Tell Us About the Application of* Daubert, 40 U.S.F. L. Rev. 109, 110, 132, 138; Fed. R. Evid. 702, advisory committee's note (2000).

[61] *See* Vickers, Daubert, *Critique and Interpretation: What Empirical Studies Tell Us About the Application of* Daubert, 40 U.S.F. L. Rev. 109, 110, 132, 138.

[62] 4 Weinstein's Federal Evidence §702.03(1).

[63] Fla. Stat. §90.702.

[64] *Schneider v. Fried*, 320 F.3d 396, 404 (3d Cir. 2003).

[65] Alice Nelson, *Clearinghouse Community*, 6.6 Expert Testimony, n.14 (2014).

[66] *Holbrook v. Lykes Bros. S.S. Co., Inc.*, 80 F.3d 777, 782 (3d Cir. 1996).

[67] *Kannankeril v. Terminix Intern. Inc.*, 128 F.3d 802, 809 (3d Cir. 1997).

[68] Fla. Stat. §90.702(a).

[69] 4 Weinstein's Federal Evidence §702.03(1).

[70] *Allison*, 184 F.3d at 1312.

[71] *See Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997).

[72] *Id.*

[73] *Daubert*, 509 U.S. at 591.

[74] *Id.* at 593.

[75] *Kumho Tire*, 526 U.S. at 150.

[76] *See Andrews v. State*, 181 So. 3d 526, 528 (Fla. 5th DCA 2015); *Sheehan v. Daily Racing Form, Inc.*, 104 F.3d 940, 942 (7th Cir. 1997) (explaining that *Daubert* requires the trial judge to be satisfied that the expert "is being as careful as he would be in his professional work outside his paid litigation consulting").

[77] *See Kumho Tire Company*, 526 U.S. at 151.

[78] *See Daubert*, 509 U.S. at 595.

[79] *Id.* at 593.

[80] Federal Judicial Center, Reference Manual on Scientific Evidence (3d ed. 2011), *available at* https://www.fjc.gov/sites/default/files/2015/SciMan3D01.pdf.

[81] Fed. R. Evid. 702, advisory committee's note (2000).

[82] *Id.*

[83] *Norris v. Baxter Healthcare Corp.*, 397 F.3d 878, 881 (10th Cir. 2005).

[84] *Id.*

[85] *Id.*

[86] Alice Nelson, *Clearinghouse Community*, 6.6 Expert Testimony, n.31 (2014).

[87] *See Kilpatrick v. Breg, Inc.*, 613 F.3d 1329 (11th Cir. 2010).

[88] *See McClain v. Metabolife Intern, Inc.*, 401 F.3d 1233 (11th Cir. 2005); *U.S. Sugar Corp. v. Henson*, 787 So. 2d 3 (Fla. 1st DCA 2000).

[89] *Westberry v. Gislaved Gummi AB*, 178 F.3d 257, 262 (4th Cir. 1999) (quoting *Kannankeril v. Terminix Int'l, Inc.*, 128 F.3d 802, 807 (3d Cir. 1997)).

[90] *Kannankeril*, 128 F.3d at 807.

[91] *See Guinn v. Astrazeneca Pharma, LP*, 602 F.3d 1245, 1253 (11th Cir. 2010); Fla. Std. Jury Instr. (Civ.) 401.12.

[92] Federal Judicial Center, Reference Manual on Scientific Evidence at 617 n.212 (3d ed. 2011); *Etherton v. Owners Ins. Co.*, 829 F.3d 1209 (10th Cir. 2016).

[93] *Maines*, 190 So. 3d at 1141.

[94] *Id.*

[95] *Id.*

[96] *See Andrews*, 181 So. 3d at 528; *Jenson v. Eveleth Taconite Company*, 130 F.3d 1287, 1297 (8th Cir. 1997).

[97] *Andrews*, 181 So. 3d at 528.

[98] *Id.* at 529.

[99] *Id.*

[100] *Id.* (citing *Kumho Tire*, 526 U.S. at 152).

[101] *See* Fla. Stat. §90.702.

[102] *Giaimo*, 154 So. 3d at 388.

[103] *Id.*

[104] *Booker*, 166 So. 3d at 195.

[105] *Id.*

[106] *See* Fed. R. Evid. 702, advisory committee's note (2000).

[107] *See McDowell v. Brown*, 392 F.3d 1283 (11th Cir. 2004).

[108] *Adams*, 760 F.3d at 1331. *See also* Mary Sue Henifin *et al.*, *Reference Guide on Medical Testimony*, Reference Manual on Scientific Evidence at 446 (2d ed. 2000), *available at* **https://www.fjc.gov/sites/default/files/2012/sciman00.pdf**. The third edition of the *Reference Manual on Scientific Evidence* was published in 2011 but is silent as to standard of care issues.

[109] *Sanchez v. Cinque*, 238 So. 3d 817, 824 (Fla. 4th DCA 2018).

[110] Fla. Stat. §90.704 ("If the facts or data are of a type reasonably relied upon by experts in the subject to support the opinion expressed, the facts or data need not be admissible in evidence.").

[111] Lloyd Dixon & Brian Gill, *Changes in the Standards for Admitting Expert Evidence in Federal Civil Cases Since the* Daubert *Decision*, RAND Institute for Civil Justice Report (2001); Jennifer L. Groscup *et al.*, *The Effects of Daubert on the Admissibility of Expert Testimony in State and Federal Criminal Cases*, 8 Psychol. Pub. Pol'y & L. 339 (2002) [hereinafter Groscup Study]; Carol Krafka *et al.*, *Judge and Attorney Experiences, Practices, and Concerns Regarding Expert Testimony in Federal Civil Trials*, 8 Psychol. Pub. Pol'y & L. 309 (2002); and A. Leah Vickers, Daubert, *Critique and Interpretation: What Empirical Studies Tell Us About the Application of* Daubert, 40 U.S.F. L. Rev. 109, 110, 132, 138.

[112] *See* the discussion of *Parlodel* cases in Allan Kanner & M. Ryan Casey, Daubert *and the Disappearing Jury Trial*, 69 Univ. of Pitt. L. Rev. 281, 319.

Thomas S. Edwards, Jr. *is the senior partner at Edwards & Ragatz, P.A., in Jacksonville. He is past Florida Bar Trial Lawyers Section* Daubert *chair and a past president of the Florida Justice Association, the Jacksonville Bar, Jacksonville ABOTA, and the Jacksonville Justice Association. Currently he serves on the national board for ABOTA and the International Academy of Trial Lawyers, as well as on the Florida Supreme Court Judicial Management Council and Florida Access to Civil Justice Commission.*

Jennie R. Edwards *is a law student at the University of Florida Levin College of Law in Gainesville. She is a member of the class of 2020.*