

Daubert: The Process
By: Senior Judge David A. Demers

Objectives

1. Participants will better understand the changes in the law dealing with experts.
2. Participants will be able to more effectively present and argue matters dealing with experts.
3. Participants will be able to better follow the procedure for handling evidentiary issues concerning experts.

Authorities

- *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S.Ct. 2786 (1993).
- *General Electric Co. v. Joiner*, 118 S.Ct. 512 (1997).
- *Kumho Tire Co., LTD v. Carmichael*, 119 S.Ct. 1167 (1999).
- *Perez v. Bell South Telecommunications, Inc.* 138 So.3d 492 (Fla. 3d DCA 2014).
- *Giaimo v. Florida Autosport, Inc.*, 154 So.3d 385 (Fla. 1st DCA 2014).
- *State Farm Mut. Auto. Ins. Co. v. Thorne*, 110 So.3d 66 (Fla. 2d DCA 2013).

Authorities

- *Castillo v. E.I. Du Pont De Nemours & Co.*, 854 So.2d 1264 (Fla. 2003).
- *Hood v. Matrixx Initiatives, Inc.*, 50 So.3d 1166 (Fla. 4th DCA 2010).
- *Andries v. Royal Caribbean Cruises, LTD*, 12 So.3d 260 (Fla. 3d 2009).
- *Marsh v. Valyou*, 977 So.2d 543 (Fla. 2007).
- *U.S. v. Avitia-Guillen*, 680 F.3d 1253 (10th Cir. 2012).

Authorities

- Reference Manual on Scientific Evidence (Federal Judicial Center 2011).
- Florida Practice Series, Erhardt

These two sites are old, but still useful:

- www.diamondmccarthy.com/files/howtosurvivedaubertin9easylessons.pdf
- www.daubertontheweb.com
- Thanks to Attorney Christian Myer.

Change In Law

- Before: *Frye* – General Acceptance.
- Before: relevant “Pure opinion” testimony was admissible without compliance with *Frye*.
Marsh v. Valyou.
- Now: *Daubert* applies.
- Now: “pure opinion” allowed by *Marsh* no longer admissible.
- But begin by looking at Florida Statute §90.702.

**90.702: Scientific, Technical, or other
Specialized Knowledge is Admissible, If**

1. Assists the trier of fact in understanding the evidence or in determining a fact in issue.
2. Witness is qualified by knowledge, skill, experience, training, or education.
3. Testimony based upon sufficient facts or data.
4. Testimony is the product of reliable principles and methods.
5. Witness has applied the principles and methods reliably to the facts of the case.

**Legislative Intent: Laws of Florida
§2013-107**

1. Adopt standards in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), *General Electric Co. v. Joiner*, 522 U.S. 136 (1997), and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999).
2. No longer apply *Frye v. United States*, 293 F.2d 1013 (D.C. Cir 1923).
3. Prohibit pure opinion testimony as provided in *Marsh v. Valyou*, 977 So.2d 543 (Fla. 2007).

Legislative Intent Continued

- Legislative purpose is to **tighten rules** for admissibility of expert testimony. (*Perez*)
- Party introducing opinion may not disclose inadmissible facts unless court determines that **“probative value in assisting the jury to evaluate the expert’s opinion substantially outweighs their prejudicial effect.”** 90.704.

Understanding “Pure Opinion”

- Status is unclear.
- Is it admissible at all?
- Is it admissible if there is compliance with *Daubert*?
- What is the problem?

Pure Opinion: Here is the Problem

- In *Perez* the case started out under *Frye*.
- Defense argued that the testimony was admissible pursuant to *Marsh v. Valyou*, 977 So.2d 543 (Fla.2007).
- That proved to be his undoing because the Legislature overruled *Marsh* and amended statute to eliminate pure opinion expert testimony.

Definition of Pure Opinion (*Hood*)

- Developed from inductive reasoning based on the experts' own experience, observation, or research.
- Not a conclusion reached by deduction, from applying new and novel scientific principle, formula, or procedure developed by others.
- Based solely on the expert's training and experience.

Definition of Pure Opinion (Marsh)

- Diagnosis based on an expert's opinion and experience, versus a specific scientific test.
- Opinion testimony based upon clinical experience.
- Did not rely on any study, test, procedure, or methodology that constituted new or novel scientific evidence.
- Instead, was based on an analysis of medical records and differential diagnosis.

Example of Pure Opinion (Perez)

- Child born prematurely brought negligence claim against mother's employer.
- Expert said the premature birth resulted from placental abruption, meaning the placenta became separated from the uterine wall.
- Expert opined that this was caused by work related stress.
- Court held that it did not meet *Daubert* test.

Examples of Pure Opinion

- Neurologist, based upon clinical experience alone, that the failure of physicians to perform a caesarian operation on a mother in labor caused brain damage to her child at birth.
- Ophthalmologist, based on experience and training, that the exposure of an eye to polychlorinated biphenyles causes cataracts.
- Medical experts recognized relationship or association between trauma and the onset of fibromyalgia, based on clinical experience.

More Pure Opinion (*Giamio*)

- Testimony of treating physician in workers' compensation case as to percentage of loss caused by pre-existing injury.
- The witness said that when he was asked to apportion the loss he thought about it and just came up with the stated figure.
- This did not meet the second and third prongs of *Daubert*.

More Pure Opinion (*Thorne*)

- Testimony that injuries to neck and knee could not have happened had Plaintiff been wearing her seatbelt based on experience and training.

More Pure Opinion (*Hood*)

- Testimony that use of an over the counter medication caused loss of smell.
- Based on review of medical history, clinical physical examinations, personal experience, published research and differential diagnosis.
- Did not include opinions based on experimentation.
- Multiple federal cases found that this same testimony did not meet *Daubert* test.

More Pure Opinion (*Andries*)

- Conflicting opinions that an infection could have caused a kidney disease.
- Widely accepted.
- Worthy of further investigation.
- Based on established principles and methods.
- Not new and novel.

More Pure Opinion (*Marsh*)

- Testimony causally linking trauma to fibromyalgia based on the experts' experience and training.
- Testimony that an individual is incompetent based on experience and training.

Other Examples of Pure Opinion

- An engineer's conclusion that a tire was defective. *Kumho*
- Police officer's opinion as to gang behavior.
- Expert's opinion as to person's competency.

Two options as to Pure Opinion

- It is never admissible.
- It is only admissible if the proponent shows compliance with *Daubert*.

Factors Suggesting Legislative Intent is to Allow Pure Opinion upon Compliance with *Daubert*

1. The Legislature barred pure opinion **as it was allowed in *Marsh*.**
2. In *Marsh* the Court only held that pure opinion did not have to comply with *Frye*, but it in fact found that the opinion in that case did comply with *Frye*.
3. The legislative thrust was to clearly require compliance with *Daubert*, *Joiner* and *Kumho*.

Look to Federal Law to Resolve Issue on Pure Opinion

- The U.S. Supreme Court has never ruled that pure opinion is inadmissible.
- In fact, they have never even used the term.
- Instead, the Court has distinguished between opinions based on testing and opinions based on experience.
- Opinions based on knowledge and experience if they comply with *Daubert* are admissible. (*Kumho*)
- In some cases, **“the relevant reliability concerns may focus upon personal knowledge or experience.”** (*Kumho*)

So What Will be the Court's Focus?

1. Relevance
2. Reliability
3. Even if the opinion tends to prove or disprove a material fact, the proponent must still meet the test of reliability **no matter what sort of expert we are talking about.**
4. And that is what *Daubert* is about.
5. There may also be a 403 issue.

Basic Daubert Factors

1. Testing
2. Peer Review
3. Error rates
4. General acceptance

But Most Importantly (*Kumho*)

- *Daubert* factors don't apply in all cases.
- They simply provide a rational method for determining the issue of reliability.
- Factors the court applies depend on the subject and the nature of the particular case.
- *Daubert* is critical because it established the gate-keeping function.
- In all three leading Supreme Court cases, the court ruled that the trial judge probably exercised its discretion in excluding the opinion.

Factors that apply to Non-Scientific or Experience Based Testimony

- *Daubert* question's may help.
- It may be appropriate to ask how often has the expert's experience-based methodology produced erroneous results.
- Or whether such method is generally accepted in the relevant community.
- It may be useful to ask whether the witness's preparation would be acceptable in his/her field.

Factors (*Kumho*)

- The trial judge must have considerable leeway in deciding how to go about determining whether particular expert testimony is reliable.
- The judge should consider the specific factors identified in *Daubert* where they are reasonable measures of the reliability of expert testimony.

Factors: (*Kumho*)

- Expert opinion is not admissible if it is connected to existing data only by the “ipse dixit of the expert.” (It is true because I say so)
- “Subjective belief and unsupported speculation are henceforth inadmissible.” (*Perez*)
- There may be other “reasonable reliability criteria” that apply.
- Judge has the discretion to determine reliability in light of the particular facts and circumstances of the case.

Some ideas on Gatekeeping (Kumho)

- **Opposing party must invoke** the court's gatekeeping function by sufficiently calling into question the factual basis, data, principles, methods, or applications upon which the opinion rests.
- That could be done by objection during trial.
- Objection to question calling for opinion for failure to establish foundation.
- Done by pretrial motions.

More ideas on the Gatekeeping Function (Erhardt)

- The gatekeeping function requires that the court determine that the party seeking to introduce the testimony show each of these 90.702 elements **by a preponderance of the evidence.**

General Caveats

- Make sure you have the experience, knowledge and training to deal with *Daubert* and the expert generally.
- If you don't, find help and/or associate a qualified attorney.
- Consider the OJ Simpson defense team approach, if you have the money.
- Make sure your experts understand 90.702 and *Daubert*.

Expert Depositions

- Review expert's reports in the frame work of 90.702 & *Daubert*.
- Incorporate questions based on that statute and *Daubert* into deposition.
- If necessary seek leave to depose expert on *Daubert* issues if a discovery deposition has already been done.
- Confer with your own expert in preparing for deposition.

Suggestions for Taking Deposition

- You may want to issue a subpoena duces tecum based on the 90.702 & *Daubert* factors.
- Make sure list is exhaustive.
- Get on the record the expert's opinion of what materials were relied on but not brought to the deposition.
- If you plan on using any books, guides, studies, etc. in the *Daubert* motion or hearing or during trial make sure the expert acknowledges that they are authoritative.

Suggestions for Taking Deposition

- Separate *Daubert* portion of deposition from general discovery.
- Be sure to set sufficient time.
- Make sure to ask straightforward questions about the methodology and all 90.702 & *Daubert* factors.

Suggestions for Taking Deposition

- If you do not get a clear and straight answer, repeat the question.
- If the witness is being evasive, politely point out that this transcript or video will be considered by a judge in evaluating the reliability of his/her testimony and repeat the question.
- Do not lose your temper!
- If it is your expert, should you ask questions at the deposition?

Preference for Pretrial Motion **(Erhardt)**

- Gives proponent fair opportunity to show admissibility.
- Avoids inconveniencing jury.
- Allows better development of issue.
- Allows court to spend sufficient time on matter.
- May enhance settlement possibilities.
- Downside: potential duplication of effort.
- Takes more time.

Form of Motion

- Motion must be specific.
- Should be concise and clear.
- May be denied because on its face it is vague and conclusory.
- Accompanied by expert depositions or reports, professional articles or other materials raising a significant issue concerning the relevancy or reliability of the testimony.
- Motion should really be a Motion and Memorandum or if not, you should seek leave to file a supporting memorandum.

How to find exemplars of Motions & Responses

1. Go to West Law Next.
2. Click on “trial court orders”.
3. Click on “Florida”.
4. Type in “Daubert”.
5. Click on the opinions you are interested in.
6. Click on “filings”.
7. Scroll down and select pleadings that may be helpful.

Alternative Method

1. Go to West Law Next
2. Make sure you are in the Florida database
3. Bring up the Florida cases cited here, like *Perez*.
4. Go to “citing references”/
5. Click on “trial court orders”
6. Click on “filings”.
7. Scroll through pleadings.

Matters Court May Consider

- Depositions, Interrogatories, Documents.
- Scholarly works and treatises.
- Live testimony.
- Affidavits.
- Decisions of other courts.
- May take judicial notice of scientific theory or principle.
- Anything that would tend to establish or dispute reliability under *Daubert*

Hearing

- Make sure you have reserved sufficient time.
- Give an opening.
- As you put on evidence, advise court of the sections of 90.702 and *Daubert* that evidence relates to.
- Argument should be structured based on factors in 90.702 and *Daubert*.

Hearing

- If your witness is the subject of *Daubert* motion, have the witness present if possible at the hearing.
- If you are making the *Daubert* Challenge and you want the opposing expert at hearing then subpoena them.
- Consider whether you should seek to have your witness present and if so, notice opposing attorney.

Opening

- Short, concise, simple and clear.
- Quickly tell the court what you want and why you should get it.
- Consider using power points and demonstratives during opening and the entire hearing.
- Frame the challenge, including the nature of the opinion.
- Give brief summary of the case.
- Why the opinion is important?

Pretrial Hearing may not be Required if No New and Novel Question is Presented

- See e.g. *U.S. v. Pena*, 586 F.3d 105 (1st Cir. 2009)(fingerprint evidence); *U.S. v. Nichols*, 169 F.3d 1255 (10th Cir. 1999)(expert testimony on type and size of a bomb).
- That was the rule under *Frye*.
- But what if it has never been considered pursuant to new rule – *Daubert*?
- What if there have been new developments since it was last considered? See National Academy of Sciences Report, Gertner, 27 Criminal Justice (ABA Spring 2012).

**Considerations in Deciding if Matter May be
Considered During Trial (Nichols)**

- Challenge is to matters that the jury would also have to consider in evaluating opinion.
- The foundation is heard before the opinion is allowed.
- If necessary, voir dire could be done during a recess.

**Considerations in Deciding if Matter May be
Considered During Trial (Nichols)**

- Avoids duplication.
- Evidence on preliminary questions, though not relevant to jury issues, may be heard by jury with no adverse effect.
- Hearing protocol followed by the witness may be the functional equivalent of a pretrial hearing.
- See also *U.S. v. McClusky*, 954 F. Supp. 2d 1224 (D. C. N.M. 2013).

Proper Exercise of Judicial Discretion

- To comply with gatekeeping function must make specific findings on the record.
- Judge must make some kind of reliability determination.
- The key inquiry is whether the appellate court can determine whether the district court “properly applied the relevant law.” *Nichols*, 169 F.3d at 1262.
- Relevant law is Rule 702.

Proper Exercise of Judicial Discretion

- Findings should address specific objection.
- Judge need not make explicit findings as to matters not objected to.
- If objection goes to qualifications, the trial judge fulfills task by finding that the witness is qualified based on her “training, education, background and experience.”
- If objection does not attack methodology, judge need not make explicit findings as to validity of the methodology.

Sample Questions (*Perez*)

- Q. Have there been any studies that you're aware of that have shown stress to be a factor in determining the likelihood of a placental abruption?
- A. Studies, no, but I have my opinion about that.

Sample Questions Continued

- Q. All right, and we've talked about that.
- A. Correct.
- Q. My question is have there been any, do you know of any studies that have shown a connection between stress and placental abruption?
- A. No, sir.

Sample Questions Continued

- Q. Do you know of any medical literature that shows a correlation between stress and placental abruption?
- A. No, sir.
- Q. Do you know of any individual in your field that has spoken at a medical meeting or society or convention and has stated that stress causes placental abruption?

Sample Questions Continued

- A. No, sir.
- Q. You taught at the University of Miami?
- A. Yes, sir. I did.
- Q. Medical school?

Sample Questions Continued

- A. During the residency program I was an attending physician and I taught the residents. Once in awhile [sic] we'd give a lecture to the medical students.
- Q. Okay. So the teaching you did was to?
- A. Residents.

Sample Questions Continued

- Q. Fellow residents?
- A. No, no, no. I had already graduated and I was the attending physician.
- Q. When you were giving those talks, did you ever give a talk where you said there's a correlation between stress and placental abruption?
- A. No, sir.

Sample Questions Continued

- Q. Have you ever heard of anybody making that statement?
- A. I don't recall.
- Q. Okay. You said you have an opinion?

Sample Questions Continued

- A. Yes, sir.
- Q. What is your opinion? This is your personal opinion?
- A. Yes, sir. It is; after 21 years of practice, absolutely. If stress can cause a cardiac arrest, causing your blood pressure to go up, to go high, I'm sure there may very well be a correlation between placental abruption and stress.

Standard of Review

- Standard of review is abuse of discretion.
Kumho Tire & Joiner.
- But standard of review for *Frye* was de novo.
Castillo.

The Beginning & The Ending: What does the Judge Want

- Keep it as short as you can.
- Avoid redundancy.
- Keep it simple & clear.
- Make it interesting.
- Make sure any materials are submitted to the judge and opposing in sufficient time for them to be considered.
- Professionalism & Civility.
- Remember this may well be the whole case.

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