

~~Event~~ S.D. Fla.
Bench Bar
Conference
2014

**A-6 CIVIL: EXPERT WITNESSES
DISCLOSURE, DAUBERT & USE AT TRIAL PRIMER**
(Session -- 10:30-11:45 a.m.)

Federal Rules of Civil Procedure

Rule 26(a)(2) -- Required Disclosures -- Disclosure of Expert Testimony

Rule 26(b)(4) -- Trial Preparation: Experts

Rule 26(e)(2) -- Supplementing Expert Witness Disclosures

Federal Rules of Evidence

Rule 701. Opinion Testimony by Lay Witness

Rule 702. Testimony by Expert Witness

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's scientific, technical, or other specialized knowledge will help the trier 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.

Rule 703. Bases of an Expert's Opinion Testimony

An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.

Rule 704. Opinion on an Ultimate Issue

- (a) IN GENERAL -- NOT AUTOMATICALLY OBJECTIONABLE. An opinion is not objectionable just because it embraces an ultimate issue.
- (b) ...

Rule 705. Disclosing the Facts or Data Underlying an Expert's Opinion

Unless the court orders otherwise, an expert may state an opinion -- and give the reasons for it -- without first testifying to the underlying facts or data. But the expert may be required to disclose those facts or data on cross-examination.

Rule 706. Court-Appointed Expert Witnesses

- (a) APPOINTMENT PROCESS. On a party's motion or on its own, the court may order the parties to show cause why expert witnesses should not be appointed and may ask the parties to submit nominations. The court may appoint any expert that the parties agree on and any of its own choosing. But the court may only appoint someone who consents to act.

(b) EXPERT'S ROLE. The court must inform the expert of the expert's duties. The court may do so in writing and have a copy filed with the clerk or may do so orally at a conference in which the parties have an opportunity to participate. The expert:

- (1) must advise the parties of any findings the expert makes;
- (2) may be deposed by any party;
- (3) may be called to testify by the court or any party; and
- (4) may be cross-examined by any party, including the party that called the expert.

(c) COMPENSATION. The expert is entitled to a reasonable compensation, as set by the court. The compensation is payable as follows:

- (1) in a criminal case or in a civil case involving just compensation under the Fifth Amendment, from any funds that are provided by law; and
- (2) in any other civil case, by the parties in the proportion and at the time that the court directs—and the compensation is then charged like other costs.

(d) DISCLOSING THE APPOINTMENT TO THE JURY. The court may authorize disclosure to the jury that the court appointed the expert.

(e) PARTIES' CHOICE OF THEIR OWN EXPERTS. This rule does not limit a party in calling its own experts.

Recent Eleventh Circuit Cases on *Daubert*

***Cooper v. Marten Transp., Ltd.*, 539 F. App'x 963, 964-65 (11th Cir. 2013):**

Daubert requires district courts to perform a gatekeeping function in assessing the reliability and consequent admissibility of an expert witness's testimony. In performing this function, the district court must conduct a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue. The *Daubert* Court enumerated several factors the district court may use to assess the reliability of proffered scientific testimony, including:

- (1) whether the theory or technique can be (and has been) tested, (2) whether the theory or technique has been subjected to peer review and publication, (3) in the case of a particular scientific technique, the known or potential rate of error, and (4) whether the theory or technique is generally accepted by the relevant scientific community.

This list, however, is not exhaustive, and district courts have substantial discretion in deciding how to test an expert's reliability.

(citations and quotations omitted).

***Winn-Dixie Stores, Inc. v. Dolgencorp, LLC*, 2014 WL 842949, *13 (11th Cir. Mar. 5, 2014):**

Rule 702 further requires that the evidence or testimony "assist the trier of fact to understand the evidence or to determine a fact in issue." This condition goes primarily to relevance. "Expert testimony which does not relate to any issue in the case is not relevant and, ergo, nonhelpful." The consideration has been aptly described by Judge Becker as one of "fit." "Fit" is not always obvious, and scientific validity for one purpose is not necessarily scientific validity for other, unrelated purposes. The study of the phases of the moon, for example, may provide valid scientific "knowledge" about whether a certain night was dark, and if darkness is a fact in issue, the knowledge will assist the trier of fact. However (absent creditable grounds supporting such a link), evidence that the moon was full on a certain night will not assist the trier of fact in determining whether an individual was unusually likely to have behaved irrationally on that night. Rule 702's "helpfulness" standard requires a valid scientific connection to the pertinent inquiry as a precondition to admissibility.

(citations omitted).

United States v. Ala. Power, 730 F.3d 1278 (11th Cir. 2014)
Tampa Bay Water v. HDR 2

- reverse
exclusion
aff'd adm
as relevant