



The Workers' Compensation Institute in Partnership with
The Florida State University College of Law Presents:

FLORIDA'S NEW EXPERT OPINION EVIDENCE STANDARD

Friday,
November 8, 2013
9:00 am to 12:00 pm

Florida State University
College of Law
Roberts Hall, Room 101
Tallahassee, Florida

The Workers' Compensation Institute
In Partnership with
Florida State University College of Law
Present

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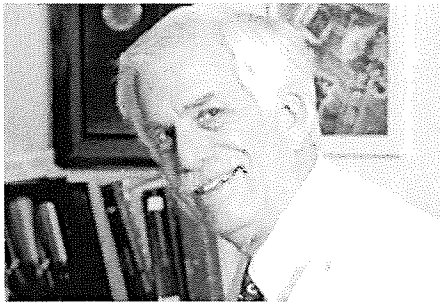
CHARLES W. EHRHARDT
LADD PROFESSOR EMERITUS
FLORIDA STATE UNIVERSITY COLLEGE OF LAW

Florida State University College of Law
Roberts Hall, Room 101
Tallahassee, Florida
Friday, November 8, 2013, 9:00 a.m. to 12:00 p.m.

Program Agenda

- 8:45 – 9:00 a.m.** **Late Registration**
- 9:00 – 9:05 a.m.** **Welcome**
*Donald J. Weidner, Dean and Alumni Centennial Professor,
Florida State University College of Law*
- 9:05 – 9:10 a.m.** **Introduction**
*Steven A. Rissman, Esq., Rissman, Barrett, Hurt, Donahue & McLain, P.A., Orlando,
and WCI Program Chair*
- 9:10 – 11:00 a.m.** **Lecture Presentation**
*Charles W. Ehrhardt, Emeritus Professor,
Florida State University College of Law*
- 11:00 – 11:15 a.m.** **Break**
- 11:15 – 12:00 p.m.** **Questions and Answers**
- 12:00 p.m.** **Adjourn**

Direct inquiries regarding continuing education to WCI – (850) 425-8156.



Charles W. Ehrhardt

Charles W. Ehrhardt, Ladd Professor Emeritus, Florida State University College of Law, Tallahassee, Florida. Professor Ehrhardt was law clerk to Martin D. VanOsterhout of the United States Court of Appeals for the Eighth Circuit and an Assistant United States Attorney for the Northern District of Iowa. Since 1967 he has been on the faculty of the Florida State University College of Law. In 1977 he was named the Mason Ladd professor of Evidence. He has been a visiting professor at the University of Georgia College of Law and the Wake Forest Law School. Professor Ehrhardt has taught state trial judges at the National Judicial College in Reno, Nevada, and United States District Judges for the Federal Judicial Center in Washington, D.C. Professor Ehrhardt has published widely in law reviews and has written an evidence book that has been cited over 500 times by the appellate courts. He also served as a Commissioner of the National Conference of Commissioners on Uniforms State Laws.

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EFFECTIVE DATE OF AMENDMENTS TO EVIDENCE CODE

Section 90.804(2) (f). Forfeiture of ability to object to hearsay.

Mortimer v. State, 100 So. 3d 99 (Fla. 4th DCA 2012) (Section 90.804(2) (f) is applicable in trials for crimes which occurred before the effective date of the statute, April 27, 2012)

DISCLOSURE ON DIRECT OF INADMISSIBLE EVIDENCE RELIED ON BY EXPERT

90.704 Basis of opinion testimony by experts.—the facts or data upon which an expert bases an opinion or inference may be those perceived by, or made known to, the expert at or before the trial. 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. Facts or data that are otherwise inadmissible may not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect. Ch. No. 2013-107, Laws of Florida.

“The amendment provides a presumption against disclosure to the jury of information used as the basis of the expert's opinion. . . .” Advisory Committee Note to 2000 Amendment to Federal Rule of Evidence 703

Linn v. Fossum, 946 So.2d 1032 (Fla. 2006) (Improper bolstering on direct)

Duss v. Garcia, 80 So.3d 358, 364-65 (Fla.1st DCA 2012) (No abuse of discretion in permitting expert on direct to discuss results of NIH study which he relied on but was never offered as an exhibit.)

Dufour v. State, 69 So. 3d 235, 255 (Fla. 2011) (No abuse of discretion to allow documents to be published on the screen which were relied on by expert in forming opinion, but not admitted into evidence. “[W]e hasten to remind attorneys and judges that the rules of evidence must be applied before the substance of any document may be admitted for consideration by the Trier of fact.”)

Miller v. State, 37 FLW D2780--- So.3d ----, 2012 WL 6028048 (Fla.4th DCA 2012) (Error to permit state's handwriting experts to describing peer review process used to confirm experts' handwriting analysis involving a second expert confirming the handwriting identification. The testimony was improper bolstering of experts' opinion with opinions of non-testifying expert.)

Tolbert v. State, 38 FLW D961,--- So.3d ----, 2013 WL 1810609 (Fla.4th DCA 2013) (Testimony of DNA analyst about a DNA match which then discussed initial DNA test results of vaginal swab taken from sexual assault victim years earlier obtained by non-testifying expert was inadmissible hearsay, when trial testimony was based on report of analyst who had conducted the initial DNA.)

DAUBERT

90.702 Testimony by experts.—If scientific, technical, or other specialized knowledge will assist the Trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion or otherwise, if:

- (1) The testimony is based upon sufficient facts or data;
- (2) The testimony is the product of reliable principles and methods; and
- (3) The witness has applied the principles and methods reliably to the facts of the case; however, the opinion is admissible only if it can be applied to evidence at trial. Ch. No. 2013-107, Laws of Florida

Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993) (Trial judge has a gatekeeping role and must screen such evidence to “ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable.” In the case of scientific evidence, trial judge must assess “whether the reasoning or methodology underlying the testimony is scientifically valid and . . . whether that reasoning or methodology properly can be applied to the facts in issue.” The factors that may be considered in making this determination include 1) whether the theory or technique can (and has been) tested, 2) whether the theory or technique has been subjected to peer review and publication, 3) the known or potential rate of error for the theory or technique, 4) the existence and maintenance of standards controlling the operation of the technique or test, and 5) whether the test or technique has been generally or widely accepted in scientific community.)

Kumho Tire Co. v. Carmichael, Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137 (1999) (Trial court’s gatekeeping function applies to all expert testimony offered under Federal Rule 702, even though the opinion is based on the expert’s personal experience rather than scientific knowledge. The factors listed in Daubert may not apply in all cases, and additional personal factors may be considered to make certain the expert “employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.”)

General Elec. Co. v. Joiner, 522 U.S. 136 (1997) (Judges may conclude that there is “too great an analytical gap” between the underlying science and the expert’s opinions.)

Research Manual on Scientific Evidence (3d ed. National Research Council and Federal Judicial Center).—(RMSCIEVID Westlaw data base)
Ehrhardt, Florida Evidence §702.4 (2013 edition)

RAISE BEFORE TRIAL—MOTION IN LIMINE

Feliciano–Hill v. Principi, 439 F.3d 18, 24–25 (1st Cir. 2006) (In suit by employee alleging employer failed to accommodate disability, plaintiff’s objection to admission of defense expert testimony was untimely where she waited until moments before that testimony to object even though she had received doctor’s report five months earlier; Daubert generally contemplates a gatekeeping function, not a “gotcha” function.)

Club Car, Inc., v. Club Car (Quebec) Import, Inc., 362 F.3d 775, 780 (11th Cir. 2004) (Daubert objection not raised before trial may be rejected as untimely but trial court has broad discretion in determining how to perform its gatekeeper function, and nothing prohibits it from hearing Daubert motion during trial.)

Alfred v. Caterpillar, Inc., 262 F.3d 1083, 1087 (10th Cir. 2001) (“Recognizing that the law traditionally does not reward ambush trial tactics . . . this Court correctly criticized the practice of filing Daubert motions at a late state in the adversarial process when there has been no motion in limine or concurrent objection to an expert’s participation. Counsel should not ‘sandbag’ Daubert concerns until the close of an opponent’s case, thereby placing opposing coun-

sel and the trial court at a severe disadvantage. . . . The truth seeking function of litigation is best served by an orderly progression, and because Daubert generally contemplates a 'gatekeeping' function, not a 'gotcha' function, [the district court may] reject as untimely Daubert motions raised late in the trial process)

HEARING NECESSARY?

U.S. v. Hansen, 262 F.3d 1217 (11th Cir.2001) ("Daubert hearings are not required, but may be helpful in `complicated cases involving multiple expert witnesses.' City of Tuscaloosa, 158 F.3d at 564–65 n. 21. A district court should conduct a Daubert inquiry when the opposing party's motion for a hearing is supported by "conflicting medical literature and expert testimony.") See US v. Scapon, 2006 WL 5100541 (SD Fla. 2006) (denying motion for Daubert hearing on ground that defendant's objections were vague and conclusory); US v. Sebborn, 2012 WL 5989813 (ED NY 2012) (In challenge to ballistics testimony Daubert hearing was not necessary).

VOIR DIRE OF EXPERT

U.S. v. Glover, 479 F.3d 511, 517 (7th Cir.2007) (Trial court fulfilled its gatekeeping responsibility regarding expert testimony by conducting voir dire to determine whether witness's fingerprint evidence should be admitted.)

BURDEN

Wagner v. Hesston Corp., 450 F.3d 756 (8th Cir, 2006) ("The burden is on the party offering the expert testimony to prove that it is reliable.")

CASE LAW

US v. Sebborn, 2013 WL 5989813 (ED NY 2012) (In ruling on motion to preclude expert testimony concerning firearms identification, court considered prior decisions as well as requiring the expert to set forth the foundation for the testimony which demonstrates a reliable methodology was employed. "While Williams holds that a separate Daubert hearing is unnecessary, it does not hold that district courts can rely solely on case law in discharging the gatekeeping function. The Court of Appeals implied that reliance on prior case law alone would be insufficient to satisfy Daubert. The Second Circuit also expressly cautioned against reading Williams "as saying that any proffered ballistic expert should be routinely admitted.")

US v. Prime, 220 F.Supp.2d 1203 (WD Wash. 2002) (In considering a motion in limine to exclude expert testimony regarding handwriting analysis, court considered prior decisions as well as the methodology used by the expert to reach her opinion.)

JUDICIAL NOTICE

Samaniego v. City of Kodiak, 80 P.3d 216, 220 (Alaska 2003) ("It was not an abuse of discretion for the trial court to take judicial notice of the admissibility of Dr. Raffle's psychiatric testimony. Because the Daubert/Coon factors are not mandatory, and because we have endorsed the trial court's ability to take judicial notice of the admissibility of expert testimony in well-known areas of expertise, we affirm the trial court's decision to admit Dr. Raffle's testimony concerning his diagnosis of Samaniego."); Owens v. Silvia, 838 A.2d 881, 892 (R.I. 2003) ("But when the scientific foundation for an expert's theory is so common and well understood that the proponent of the testimony can lay the foundation while qualifying the witness as an expert, the court may take judicial notice of the reliability of the knowledge or theory that undergirds the expert's proposed testimony. In such a case, a preliminary hearing may not even be necessary to establish the admissibility of the evidence. "); Taylor v. Abernethy, 149 N.C. App. 263, 560 S.E.2d 233,

240 (2002) (“Moreover, nothing in Daubert or Goode requires that the trial court re-determine in every case the reliability of a particular field of specialized knowledge consistently accepted as reliable by our courts, absent some new evidence calling that reliability into question.”); Hamilton v. Com., 293 S.W.3d 413, 419 (Ky. Ct. App. 2009) (“If a party is offering expert testimony in a field of scientific inquiry so well established that it has been previously deemed reliable by an appellate court, the trial court may take judicial notice of the evidence. This relieves the proponent of the evidence from the obligation to prove in court that which has been previously accepted as fact by the appropriate appellate court. It shifts to the opponent of the evidence the burden to prove to the satisfaction of the trial judge that such evidence is no longer deemed scientifically reliable. The proponent may either rest on the judicially noticed fact or introduce extrinsic evidence as additional support or in rebuttal.”)

TESTIMONY MEETING DAUBERT

Hickerson v. Pride Mobility Products Corp., 470 F.3d 1252 (8th Cir. 2006) (In products liability action against electric scooter manufacturer, Daubert warranted admission of fire investigator's expert testimony that electric scooter located in home was **origin of home fire**; investigator was qualified to testify about the fire's origin and cause and based his opinion on a sound and reliable methodology, which involved examination of burn patterns, smoke damage, and heat and fire damage, consideration of other witness testimony, and elimination of other possible sources of the fire.)

Hubbard ex rel. Hubbard v. McDonald's Corp., 41 So.3d 670 (Miss. 2010) (Error to exclude OBGYN expert as unreliable in case alleging that alleged employee's fall at work **caused** the premature birth of her child; expert's opinions were supported by and did not contradict employee's medical records, expert explained how a high leak of membrane fluid was consistent with employee's clinical picture, expert's opinions were based on his experience, training and expertise, and expert provided medical literature that supported his opinions.)

U.S. v. Wright, 215 F.3d 1020, 1027 (9th Cir. 2000) (**PCR and RFLP** of DNA testing both satisfy Daubert standard for the admissibility of scientific evidence).

U.S. v. Beverly, 369 F.3d 516, 530 (6th Cir. 2004) (Trial court did not abuse its discretion in admitting expert testimony that **less than 1% of population** would be expected to have mitochondrial deoxyribonucleic acid (mtDNA) pattern of hair found at crime scene, even though mtDNA is not as precise an identifier as nuclear DNA, where any issues going to conduct of tests were fully developed and subject to cross examination, testing was sufficiently reliable, and mathematical basis for evidentiary power of mtDNA evidence was carefully explained.)

US v. Herrera, 704 F.3d 480 (7th Cir. 2013) (Expert testimony that **latent fingerprints** were the defendant's met Daubert when expert relied on the ACE-V method of determining the fingerprints were from the same person. Good discussion of methodology.)

U.S. v. Prime, 431 F.3d 1147, 1153 (9th Cir. 2005) (Trial court properly admitted expert testimony of forensic document examiner that **handwriting** on counterfeit money orders and other documents was that of defendant; theory underlying handwriting analysis had been tested, with high degree of accuracy shown in identification of writers, there was extensive peer review in area, and handwriting similarity evidence had been generally accepted in courts for decades.)

U.S. v. Mahone, 453 F.3d 68, 71 (1st Cir. 2006) (In prosecution for attempted armed robbery and interstate transportation of stolen motor vehicle, district court did not abuse its discretion in ruling that analysis, comparison, evaluation and verification (ACE-V) method for assessing **footwear impressions** was a reliable method, for purposes of admissibility of expert testimony regarding footwear impression identification using ACE-V method; district court explicitly applied Daubert factors, ACE-V method was tested in published studies and was subject of widespread publication, expert witness testified that method had potential error rate of zero, since any error was attributable to examiners, and method was highly accepted in forensics field.)

U.S. v. Hicks, 389 F.3d 514, 526 (5th Cir. 2004) (**Ballistics** comparison testimony met Daubert. Standards controlling firearms comparison testing exist. As Beene testified at the Daubert hearing, he followed well-accepted methods

and scientific procedures in making his comparisons. He also testified that the Association of Firearm and Tool Mark Examiners produces literature about firearms comparison testing that he relied on and that is authoritative in the field of firearms and tool mark examination. Further buttressing the reliability of his methodology, Beene also testified that the error rate of firearms comparison testing is zero or near zero.)

TESTIMONY NOT MEETING DAUBERT

Guinn v. AstraZeneca Pharmaceuticals LP, 602 F.3d 1245, 18-19 (11th Cir. 2010) (While **differential diagnosis** can be a reliable methodology under Daubert, trial court did not abuse its discretion in excluding expert's testimony where expert failed to adequately consider possible alternative causes. Although a differential diagnosis of a plaintiff's injury need not rule out all possible alternative causes to be sufficiently reliable to permit admission of an expert's testimony on causation, it must at least consider other factors that could have been the sole cause of the plaintiff's injury. Differential diagnosis that fails to take serious account of other potential causes may be so lacking that it cannot provide a reliable basis for an opinion on causation.)

Smith v. Ingersoll-Rand Co., 214 F.3d 1235, 1245 (10th Cir. 2000) ("Attempts to quantify the value of human life have met considerable criticism in the literature of economics as well as in the federal court system. Troubled by the disparity of results reached in published value-of-life studies and skeptical of their underlying methodology, the federal courts which have considered expert testimony on **hedonic damages** in the wake of Daubert have unanimously held quantifications of such damages inadmissible.")

Gulf South Pipeline Co., LP v. Pitre, 35 So.3d 494 (Miss.2010) (**Appraiser's** testimony as to diminution of the remainder, in gas pipeline company's action to acquire right-of-way and easement by eminent domain, lacked reliability and should have been excluded; appraiser failed to use time-tested techniques, supported by peer review or publication, and/or industry standards when he failed to use comparable sales in his determination as to diminution of the remainder, and thus, his opinion was purely subjective, little more than rank speculation.)

U.S. v. Prince-Oyibo, 320 F.3d 494 (4th Cir. 2003) (per se ban against **polygraph** evidence). See U.S. v. Montgomery, 635 F.3d 1074 (8th Cir. 2011) (**Unilateral polygraph** results inadmissible under Rule 403. Not necessary to engage in a Rule 702 analysis.)

U.S. v. Bahena, 223 F.3d 797, 808–809 (8th Cir. 2000) (Trial court erred under Daubert in admitting expert testimony using voice spectrography to identify voices on tape recordings where expert had no formal training in the technology and used copies rather than original tapes; "Daubert does apply to criminal cases.")

Bowen v. Com., 2005 WL 2318967 (Ky. 2005) (Expert witness's proposed testimony was that the defendant did not manifest signs of **pedophilia** and therefore was unlikely to have committed the charged offense was inadmissible due to a lack of scientific basis and relevancy.)

U.S. v. White Horse, 316 F.3d 769 (8th Cir. 2003) (Testimony as to **the Abel Assessment** was not admissible under Federal Rule 702 since there were significant concerns about how well each part of the Abel Assessment fits the facts at issue in the instant case. The court pointed out that there was no evidence that part I of the Assessment had been tested with a statistically significant sample of Native Americans, and none of the slides contained any pictures of Native American adults or children. Dr. Abel's published study stated that incest-only cases, such as the charged offense, were excluded from the testing of two of the three predictive equations because incest offenders often acted for reasons other than sexual interest.)

State v. Griffin, 823 A.2d 419 (2003) (Testimony of clinical psychologist regarding test she used with defendant, which assessed a **juvenile's competency to understand Miranda warnings**, was inadmissible under Daubert. Psychologist's testimony about peer review of test was limited, psychologist cited no evidence, apart from her beliefs, that supported finding that test had gained widespread acceptance in relevant scientific community, and psychologist had administered test only once before to a juvenile and defendant's prosecution was first time she had testified about test in court.)

State v. Morales, 45 P.3d 406 (N.M. Ct. App. 2002) (Results of **field drug test** conducted by sheriff deputy were inadmissible in prosecution for possession of heroin and other offenses, as state failed to meet its burden to establish validity of scientific principles on which test was based and its scientific reliability. Deputy offered opinion testimony about meaning of his observations of test, but admitted that he knew nothing about chemical features of test or how it produced a certain color that identified heroin, and deputy had no scientific evidence about the percentage reliability of test.)

Newkirk v. Com., 937 S.W.2d 690 (Ky. 1996) (Expert testimony relating to **child abuse syndrome** failed to satisfy Daubert.)

State v. Streich, 658 A.2d 38 (1995)) (DNA population frequency statistics generated by the **unmodified product rule** method inadmissible because they did not satisfy the reliability criteria of Daubert.)

MATCH TESTIMONY

A few courts have allowed testimony about the similarities between handwriting samples without permitting the expert to testify to conclusions about authorship. See U.S. v. Rutherford, 104 F.Supp.2d 1190, 1193 (D.Neb.2000) (excluding testimony on the authorship of a document, although allowing uncontested evidence of the similarities and differences between two samples); U.S. v. Hines, 55 F.Supp.2d at 63–64, 68 (D.C.Mass. 1999) (allowing admission of testimony about similarities and differences but denying admission of testimony drawing conclusions about authorship and noting that a rigorous application of the Daubert standards to handwriting evidence would reveal “serious problems”).