Florida's New Expert Opinion Law:

Who Should Care and Does It Really Matter?

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INTRODUCTION

An expert can make or break a case. While education and an impressive resume may bring an expert to court, the testimony will not necessarily be heard or believed by the jury. This is because expert testimony is not itself an exact science. Florida's recent expert testimony reform and amendment of section 90.702, Florida Statutes, effective as of July 1, 2013 (the "new Rule"), equips Florida courts with the *Daubert* standard instead of the *Frye* standard in an effort to provide a more exacting standard for admissibility of expert testimony. Under *Frye*, "general acceptance" in the scientific community could be considered, but it was not a requirement and "junk science" and "pure opinion" testimony were often allowed. The new Rule narrows the "too great analytical gap" which often existed between the underlying science and the expert's opinion allowed by *Frye*. Although this law may be new to Florida courts, Federal courts and a majority of state courts have applied the *Daubert* standard for over ten years. Florida was one of the few states which clung to the *Frye* standard.

I. Will It Make a Difference?

Yes, the new Rule makes a difference to the doctrinal standard. The new Rule adopts different elements and allows expert testimony:

> If scientific, technical, or other specialize 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. 2013-104, Laws of Florida

(emphasis added). The chart below illustrates the changes to Rule 90.702:

Section 90.702 (prior to July 1, 2013)	Section 90.702 (effective as of July 1, 2013)
1) Expert testimony will assist the jury;	1) Expert testimony must assist the trier of fact to understand fact or evidence at issue;
2) Testimony is based on scientific principles that gained "general acceptance" in the scientific community;	2) Testimony is based upon sufficient facts or data;
3) Witness must be qualified to give the testimony; and	3) Testimony is the product of reliable principles and methods; and
4) If the above are met, then the expert may render his/her testimony.	4) The witness has applied the principles and methods reliably to the facts of the case.

Mainly, the trial judge must ensure that an expert's testimony is based on a reliable foundation and that it is relevant to the subject matter of the case. In determining if the expert's testimony is based on a reliable foundation, the trial court must consider *Daubert's* factors: falsifiability; peer review; error rates; and acceptability. *Weill,* at 16 (citing *Daubert v. Merrel Dow Pharm., Inc*., 509 U.S. 579, 593-4 (1993)); *Gulf South Pipeline Co., LP v. Pitre*, 35 So. 3d 494 (Miss. 2010) (holding that testimony of expert appraiser as to diminution of the remainder lacked reliability and thus excluded). Its "helpfulness" standard also requires a valid scientific connection to the pertinent inquiry as a precondition to admissibility. *Daubert v. Merrel Dow Pharm., Inc*., 509 U.S. 579, 591 (1993). This Rule further empowers the trial judge as the "gate keeper" of expert testimony by allowing them broad discretion in addressing the reliability and relevance of expert testimony. The adoption of *Daubert* also establishes uniformity among Florida courts and Federal courts, which may influence an attorney and their clients' removal determinations.

It will also make a difference in that the standard will apply to all expert cases unlike Frye. *Frye's* "general acceptance" test did not properly check the creditability of the expert testimony because it was inapplicable to a "vast majority" of cases. *March v. Valyou*, 977 So. 2d 543, 547-48 (2007). *Frye* only applied to cases where an expert relied upon "new science." It did not apply its "general acceptance" test to an expert's reasoning or conclusions. Kenneth W. Waterway & Robert C. Weill, *A Plea for Legislative Reform: The Adoption of Daubert to Ensure the Reliability of Expert Evidence in Florida courts*, 36 NOVA L. REV. 1, 16 (2011). "Pure opinion" testimony was also beyond the reach of the *Frye* test. *March*, 977 So. 2d at 547-48. Therefore, if an expert's opinion was based on their "personal experience/training," the testimony was not subject to *Frye*. *Hood v. Matrixx Initiatives, Inc*., 50 So. 3d 1166, 1173 (Fla. 5th DCA 2010). *Frye* left far too many loopholes for attorneys to get around in presenting expert testimony.

The new Rule, in theory, eliminates these loopholes. Expert testimony will not bypass judicial scrutiny by being presented as 1) "pure opinion" testimony or 2) something other than "new or novel." *See e.g., Guinn v. AstraZeneca Pharmaceuticals LP*, 602 F.3d 1245, 18-19 (11th Cir. 2010)(quoting the Fourth Circuit in *Westberry v. Gislaved Gummi AB*, 178 F.3d 257 (4th Cir. 1999)(stating that a "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"); *Bowen v. Com.*, 2005 WL 2318967 (Ky. 2005)(holding testimony proposed by the expert that defendant did not exhibit any psychological signs of pedophilia lacked scientific basis and relevancy to the question of his guilt of the crime charged and therefore was inadmissible).

Even though the new standard may not necessarily have a practical impact on whether your expert's testimony will ultimately be admitted, every attorney must know the law in order to properly address the doctrinal standard in a Motion in Limine or a *Daubert* hearing. As such, these changes do make a difference to the way you as an attorney chooses an expert and presents their testimony.

II. Will Florida's New Standard Affect You?

The new Rule affects you and your client if you plan to have an expert testify in support of your case. This is mostly because all "new" rules are tested. Opposing counsel will hold your expert to the test, or you will seek to hold them to the test. Based on other jurisdictions already applying this standard, attorneys trying criminal cases will likely experience the most effects since the *Daubert* standard is more likely to arise and be tested in those cases. In reference to criminal cases, there are many: *U.S. v. Glover*, 479 F.3d 511, 517 (7th Cir. 2007)(finding that the trial court fulfilled its gatekeeping responsibility regarding expert testimony by conducting voir dire to determine whether the witness's fingerprint evidence should be admitted); *State v. Morales*, 45 P.3d 406 (N.M. Ct. App. 2002)(state failed to meet its burden to establish validity of scientific principles on which field drug test was based and its scientific reliability when the deputy offered opinion testimony about the meaning of his observations of the test, but admitted that he knew nothing about scientific bases underlying the test)(overruled on other grounds); *Newkirk v. Com.*, 937 S.W.2d 690 (Ky. 1996)(expert testimony regarding child abuse syndrome did not satisfy *Daubert*). However, be ready in all civil cases, and "test" your expert. *Daubert* may have strong pro-defendant effect in the civil context by empowering the defendants to exclude scientific evidence, and therefore improve the odds of summary judgment in their favor. Edward K. Cheng & Albert H. Yoon, *Does Frye or Daubert Matter? A Study of Scientific Admissibility Standards*, 91 Va.L.Rev. 471, 510 (2005).

III. Does the New Rule Retroactively Apply, and HOW Will It Apply?

This is a prescient issue that all counsel will want to answer. Although there is no authoritative ruling in Florida as to whether the new Rule will apply retroactively, in reviewing some other states that have adopted *Daubert*, I believe the answer is "yes."

Retroactive application concerns may arise where trial has been set and some expert depositions occurred prior to enactment and a party: files *Frye* motions to strike an expert; requests redeposing the expert to discover basis for striking the expert on *Daubert* grounds; files a *Frye* motion to strike an expert; or seeks to amend or substitute an expert to satisfy *Daubert*. Other non-Florida courts (transitioning to *Daubert*) have been tasked with determining whether *Daubert* should apply retroactively and held that it does apply retroactively. The new Rule modifies an existing procedural rule of evidence to require application of *Daubert* because the Rule is procedural in nature, and it thus warrants retroactive application. *See Twyman v. GHK Corp*., 2004 OK CIV APP 53, 93 P.3d 51, 55(holding that *Daubert* standard was procedural and applied retroactively); *Lear v. Fields*, 226 Ariz. 226, 245 P.3d 911, 918 (Ct. App. 2011), review denied (Sept. 20, 2011) (holding that the statute addressing the admissibility of expert opinion testimony was procedural); *State v. Coon*, 974 P.2d 386, 392 (Alaska 1999); *Young v. Logue*, 660 So. 2d 32, 55 (La. 4th Cir. 1995); *Mortimer v. State*, 100 So.3d 99 (Fla. 4th DCA 2012)(explaining that changes in the laws regarding admission of evidence, such as the creation of a new hearsay exception, are typically procedural and are "to be applied retrospectively" and "to be applied to pending cases").

CONCLUSION

Because the new Rule changes the doctrinal standard for admissibility of expert testimony, attorneys and their clients in both civil and criminal cases will need to be prepared to address the *Daubert* standard in all cases where an expert will testify. That includes those cases commencing prior to the enactment of the new Rule, but for which trial remains pending. If properly applied, each party as well as the presiding judge will be afforded the opportunity to test an expert's testimony, even if "pure opinion" or something other than "new or novel" against the *Daubert* standard.