DRAFT WHITE PAPER
ON
DAUBERT/FRYE
THE FLORIDA BAR
TRIAL LAWYERS SECTION
OCTOBER 26, 2015

NOTE: The Trial Lawyers Section has not taken a position as of this date.
The Florida Bar
Trial Lawyer's Section
Frye/Daubert Analysis

I. Introduction

The Trial Lawyers Section of the Florida Bar has approximately 7,000 members who devote a substantial portion of their practice to trial work. Section members practice in a variety of areas including plaintiff, defense and commercial litigation. The Section’s Executive Council is evenly divided among these groups. The Section is devoted to preserving access to courts and to judicial independence. The Section also addresses matters which impact trial practice in Florida. The Section monitors the rules of evidence relating to admissibility of expert testimony in Florida Courts, and noted the recent legislative change from the Frye standard to Daubert with regard to admission of expert evidence. This paper is intended to explore this legislative change, and its practical impact on Florida trial lawyers, courts and litigants.

Some background on the way in which evidence and expert evidence are used in Florida courts is useful. In general, the role of the trial judge is to rule on what disputed evidence is to be considered by the trier of fact based on whether the evidence is relevant to material issues in the dispute (relevant evidence is evidence tending to prove or disprove a material fact. See s. 90.401, Fla. Stat.) The trial judge also considers issues of prejudice and confusion in marshalling relevant evidence and in determining whether the prejudice of certain evidence substantially outweighs its probative value. See s.90.403, Fla. Stat.

Trial judges play a particularly important role in the admission or exclusion of expert evidence. Experts are used in virtually every type of litigation including most civil, business, criminal, family law and juvenile cases. Historically, in Florida, expert evidence was admissible “If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue ...”. See s.90.701, Fla. Stat. The Florida Supreme Court said “it is the function of the court to not permit cases to be resolved on the basis of evidence for which a predicate of reliability has not been established,” and “we will not permit factual issues to be resolved on the basis of opinions which have yet to achieve general acceptance in the relevant scientific community.” Hadden v. State, 690 So.2d 573, 578 (Fla. 1997). Thus, Florida courts are to allow expert evidence that is reliable and useful to determine the facts, and exclude evidence that is not reliable and useful.

II. History of the Frye and Daubert

Several important developments in American law provide the legal reasoning and standards for admissibility of expert evidence. In 1923, Frye v. United States, 293 F. 1013 (D.C. Cir. 1923) established the standard for admissibility of expert witness testimony in Federal courts. The decision explained that while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs. Id. at 1014. In Frye, the District Court determined that “the systolic blood pressure deception test (lie detector test) had not yet gained such standing and
scientific recognition among physiological and psychological authorities as would justify the
courts in admitting expert testimony “founded on such results.” Id. at 1014.

Florida adopted this Frye standard in 1985 in Bundy v. State, 431 So.2d 9 (Fla. 1985). In
echoing opinions of other jurisdictions, the Florida Supreme Court stated that “the concerns
surrounding the reliability of hypnosis warrant a holding that the mechanism, like polygraph and
truth serum results, has not been proven sufficiently reliable by experts in the field to justify its
validity as competent evidence in a criminal trial.” Id. at 18.

Frye became the standard in Florida trial courts. The Frye test only applied to expert
opinions based upon new or novel scientific techniques. U.S. Sugar Corp. v. Henson, 823 So.2d
104, 109 (Fla. 2002). In applying the Frye test, a court was to examine expert testimony,
scientific and legal writings, as well as judicial opinions to determine whether the new or novel
scientific techniques had gained the requisite general acceptance in the field. Flanagan v. State,
625 So.2d 827, 828 (Fla. 1993).

While Florida adopted the Frye standard, Federal Rule of Evidence 702 was amended in
1975, to apply a different evidentiary standard in Federal courts. The amended rule provided
that if scientific, technical, or other specialized knowledge will assist the trier of fact to
understand the evidence or to determine a fact in issue, then a witness qualified as an expert by
knowledge, skill, experience, training or education, may testify thereto in the form of an opinion.

Florida courts continued to rely on Frye, and developed a body of case law for its use and
application. Meanwhile, Federal courts fleshed out the meaning of Rule 702. In 1993, the
United States Supreme Court made it clear in Daubert v. Merrell Dow Pharmaceutical, Inc., 509
U.S. 579 (1993) that the Frye standard no longer applied in Federal Courts, having been
superseded by the amended Federal Rule of Evidence 702 in 1975. Daubert set forth a non-
exclusive list for assessing the reliability of expert testimony. Pursuant to Daubert, courts were
to examine (1) whether the technique or theory can be or has been tested, (2) whether there has
been peer review and publication of the technique or theory, (3) the technique’s rate of error, (4)
the existence and maintenance of standards and controls, and (5) whether the scientific
community has generally accepted the technique or theory.

In response to the Daubert decision, Federal Rule of Evidence 702 was changed again in
2000, and now provides that a witness qualified as an expert may give expert testimony if (1) it
will assist the trier of fact, (2) is based on sufficient facts or data, (3) is the product of reliable
principles and methods, and (4) the expert has reliably applied the principles and methods to the
facts of the case.

The Florida Supreme Court repeatedly declined to adopt Daubert, and has maintained the
Frye standard despite Evidence Code provisions that did not explicitly acknowledge the Frye
standard:

Our specific adoption of that test [Frye] after the enactment of the
evidence code manifests our intent to use the Frye test as the proper
standard for admitting novel scientific evidence in Florida, even though
the Frye test is not set forth in the evidence code.

Hadden v. State, 690 So.2d 573, 578 (Fla. 1997).

In Hadden, the Court acknowledged the adoption of evidence code standards on the
subject and recited the Federal adoption of the Daubert standard. Regardless of these
developments, the Florida Supreme Court maintained the Frye test for admissibility of expert
testimony and declined to adopt Daubert or any codified standards.

Again in Marsh v. Valyou, 977 So. 2d 543, 547 (Fla. 2007) the court declined to follow
the statutory language in the Florida Evidence Code and declined to adopt Daubert.1 Instead,
the Court followed Frye and explained that to determine whether scientific techniques were
generally accepted, courts were to review sources such as expert testimony, legal and scientific
publications, and judicial opinions for indicia of general acceptance. See also Ramirez v. State,
810 So. 2d 836, 844 (Fla. 2001). The Court emphasized that the Frye standard was to apply to
new or novel scientific evidence only. Marsh, 977 So. 2d at 547. Marsh also addressed the
admissibility of pure opinion testimony based on an expert’s experience in the field:

[P]ure opinion testimony, such as an expert's opinion that a defendant is
incompetent, does not have to meet Frye, because this type of testimony is
based on the expert's personal experience and training. While cloaked with
the credibility of the expert, this testimony is analyzed by the jury as it
analyzes any other personal opinion or factual testimony by a witness.
[U]nder Frye, the inquiry must focus only on the general acceptance of the
scientific principles and methodologies upon which an expert relies in
rendering his or her opinion. Certainly the opinion of the testifying expert
need not be generally accepted as well. Otherwise, the utility of expert
testimony would be entirely erased, and “opinion” testimony would not be
opinion at all—it would simply be the recitation of recognized scientific
principles to the fact finder. Id. at 548-549.

The Court expressly warned against intruding on the province of the jury in evaluating
expert conclusions and hearing disputed facts.

The Court reaffirmed the use of the Frye standard in Gosciminski v. State, 132 So.3d 678
(Fla. 2013), addressing the admissibility of polygraph evidence to support expert testimony. The
Gosciminski Court went through a detailed Frye analysis instead of applying Daubert. Id. at 702.
The Court looked only at the methods behind the testimony and not the conclusions made by the
experts. The Court declined to infringe on the role of the jury in assessing the expert’s credibility
and the conclusions he had drawn.

The Florida Supreme Court historically followed the Frye rule despite acknowledging the
use of Daubert in other jurisdictions, and despite the Evidence Code language that arguably
supported different admissibility standards. In following this Rule, the court acknowledged the

1 See the concurring opinion of J. Anstead at Marsh, 977 S.2d at 571.
role of the jury in weighing testimony and evaluating credibility once a basic standard of reliability was established based upon objective review of materials by the judge. See Marsh, 977 S.2d at 549 (“We reaffirm our dedication to the principle that once the Frye test is satisfied through proof of general acceptance of the basis of an opinion, the expert's opinions are to be evaluated by the finder of fact and are properly assessed as a matter of weight, not admissibility.”).

Beginning in 2006 an effort to mandate a change from Frye to Daubert was undertaken within the Florida Legislature. Changing to a Daubert standard was widely supported by tort reform proponents, and widely opposed by those advocating for plaintiffs personal injury and access to courts. Florida prosecutors also opposed adoption of Daubert. After seven years, a Daubert bill passed in 2013. See 2013 HB 7015 EXHIBIT “A”. The bill tracks verbatim Federal Rule of Evidence 402. However, notably, the “whereas” clauses include a legislative statement of intent to overrule Marsh v. Valyou, 977 So. 2d 543 (Fla. 2007). The Legislature thereby seeks to prohibit “pure opinion” testimony. This language is not in the actual text of the statute. The bill was signed by Governor Rick Scott on June 4, 2013 and became effective July 1, 2013. Florida Courts have begun using the new standard, pending Florida Supreme Court review.

III. The New Florida Standard

Although the new statute has already become operative in Florida Courts, it is not yet reflected in the Florida Rules of Evidence. This is because the Florida Supreme Court ultimately determines rules of evidence under the Florida Constitution. See Art. V, Sec. 2. The Court is currently considering adoption of an evidence rule to reflect the new statute.

In the meantime, Florida trial courts have begun to implement the Daubert standard. Florida courts are now required to evaluate expert evidence upon the motion of a party challenging the evidence. The non-exclusive review by the court must determine whether (1) the technique or theory can be or has been tested, (2) whether there has been any peer review and publication of the technique or theory, (3) the techniques rate of error, (4) the existence and maintenance of standards and controls with regard to this science, (5) whether the scientific community has generally accepted the technique or theory.

OPPONENT POSITION

This new standard has a number of practical implications for Florida trial courts and Florida trial lawyers. Anecdotally, there has been an increase in motions challenging experts. Florida trial judges are being taught how to conduct hearings and how to evaluate such challenges under the new standard.

Significant legal and procedural changes now confront Florida courts. Under the Frye standard a judge was only obligated to conduct evidentiary hearings to evaluate an expert’s testimony if the expert is advancing “new science”. The review could be based upon peer reviewed materials, accepted texts, case law or other recognized industry materials.
Under *Daubert*, the court is expected to serve in the role of gatekeeper as to any experts upon a motion challenging that expert. The review conducted contains additional areas of analysis and relates to methodology and application of the method to the facts in reaching the ultimate opinions advanced. *Flanagan v. State*, 625 So.2d 827, 828 (Fla. 1993).

To the extent the new standard results in more motions challenging expert testimony it could be an additional burden on Florida Courts. The adoption of *Daubert* in Florida could result in increased delays and financial costs. Under *Frye*, if the expert’s methodology is generally accepted in the industry, the court must admit the expert’s testimony. The court does not examine the expert’s application of that methodology to the case or the ultimate opinion. Any errors in the application of the methodology go to the weight of the expert’s testimony, not its admissibility. *Marsh*, 977 So.2d at 549. Courts are not required to conduct lengthy *Frye* analyses of the “vast majority” of experts, only those applying new or novel techniques. *U.S. Sugar*, 823 So.2d at 109.

The *Daubert* standard addresses all expert testimony, not just those offering testimony based on new and novel science. *Kumho Tire*, 526 U.S. at 147–49 (1999); Fed. R. Evid. 702. Further, because the *Daubert* inquiry is designed to cover more areas and to be more flexible, with a multi-factorial analysis, the areas subject to challenge are greatly expanded and the hearings are more time consuming and demanding. Thus, parties in federal cases governed by *Daubert* may, and frequently do, move to strike all the experts offered by the other side. See, e.g., *Hendrix v. Evenflo Co., Inc.*, 255 F.R.D. 568, 575, n.4 (N.D. Fla. 2009) (54-page *Daubert* opinion on twelve experts where the record “was voluminous, filling 23 binders . . . comprising literally thousands of pages”). *Daubert* challenges have even been brought (and granted) against the testimony of treating physicians not hired in connection with litigation. See, e.g., *Gass v. Marriott Hotel Servs., Inc.*, 558 F.3d 419, 426 (6th Cir. 2009).

It is not uncommon for federal courts to have to conduct multi-day *Daubert* hearings at substantial cost in time and money. See, e.g., *Finestone v. Florida Power & Light Co.*, No. 03–14040–CIV, 2006 WL 267330, at *4 (S.D. Fla. Jan. 6, 2006) (four-day Daubert hearing); *Allapattah Servs., Inc. v. Exxon Corp.*, 61 F. Supp.2d 1335, 1341, n.10 (S.D. Fla. 1999) (six-day hearing). The need to schedule and conduct these hearings and then write lengthy *Daubert* opinions can impose delay on litigants and consume scarce judicial resources.

For litigants, it can be more expensive to offer expert testimony under *Daubert*. Having to proffer a lengthy expert report, have an expert witness prepare to testify at a *Daubert* hearing, and then defend a *Daubert* motion can be an expensive proposition that raises the cost of litigation, a prospect that benefits mainly wealthy litigants. In settings outside the personal injury arena, spouses with superior assets can overwhelm their opposition in family law disputes. Better funded prosecutors could do the same to criminal defendants.

A paper frequently cited by the business community, informally known as the “Delaware Study,”2 acknowledged the legal gamesmanship available to wealthier parties under *Daubert*.3

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2 The paper was largely funded by pharmaceutical companies and the business community.
The Delaware Study examined a limited number of civil and criminal case files after Daubert was adopted in the state. Its non-lawyer authors interviewed a non-random sample of practicing Delaware attorneys and judges. The stated goal was to determine the impact of Daubert on litigation.

The study acknowledged that “[t]he plaintiffs’ bar experienced the brunt of the impact of Daubert. Yet defense attorneys in Delaware did not complain of frequently encountering proffered ‘junk science.’” In large part, the civil defense attorneys challenged experts as a tactical maneuver.” Id. at 21. The study went on to state, “Daubert motions are used effectively as leverage in civil disputes.” According to one participant, Daubert “has become a ‘sword not a shield’” in the “game of litigation.” Id. at 21–22. It remains to be seen whether similar developments will occur in Florida.

The financial expense of Daubert challenges are not just visited on parties and their counsel. It is also borne by the judicial system itself. There could be increased costs for prosecutors, criminal defense counsel, and others in the criminal justice system. In family law, guardianship and juvenile cases, parties must participate in Daubert hearings or give up their rights because of the lack of resources to fund these evidentiary fights.

The issues relating to Daubert hearings are not limited to personal injury civil cases, but instead reach across all litigation. As there is increased time demand for court review of expert testimony there will be increased expense, delay of cases in court and there will be more expense associated with bringing cases. In the contingency setting, some cases will not be brought due to increased expense associated with use of experts. In hourly rate cases, many may be unable to afford to litigate, or unable to afford the expense of Daubert hearings.

In an era of budget cuts for Florida courts, expense and the use of resources are very real concerns. Florida state judges simply do not have the same level of resources as their federal counterparts. Adopting the Daubert procedure could exacerbate this resource crunch.

Ultimately, the Florida Supreme Court must resolve whether to take on more burden and expense for the system and for litigants, when there has been no showing of a problem, no need for a different standard, nor an outcry relating to cases flooding the system with ‘junk science’.

There is also a change in the review of expert evidentiary decisions by appellate courts. Appellate review under Frye was de novo. See Brim v. State, 695 So.2d 268, 274 (Fla. 1997). Thus, an appellate court reviewed a trial court's ruling as a matter of law, rather than under an abuse of discretion standard. Brim at 274; Hadden v. State, 690 So.2d 573, 579 (Fla. 1997).

The review of Daubert determinations is deferential and thus an abuse of discretion standard, because the court is rendering fact findings. General Electric C. v. Joiner, 522 U.S.

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This difference in approach to appellate review brings into focuses a Constitutional problem. *Frye* is de novo review because the court’s involvement is limited to legal determinations. *Daubert* encompasses a discretionary review because the Judge must engage in fact finding and resolve disputed issues of fact. This enhanced involvement of Judges in determining disputed facts potentially runs afool of the Florida Constitution. Florida vests in the jury the right to determined disputed facts, when a party asks for a jury trial. *Florida Constitution*, Art. I, s. 22, Right To Trial by Jury (“The right of trial by jury shall be secure to all and remain inviolate.”). This constitutional right may be infringed by the fact finding required for *Daubert*.

An additional concern is the potential for inconsistency in appellate review. In *Daubert*, Chief Justice William Rehnquist expressed a concern that courts would be unable to implement the *Daubert* standard with consistency, because judges lack the necessary scientific training. He noted that *Daubert* would incorrectly impose on judges “the obligation [and] the authority to become amateur scientists.” *Daubert*, 509 U.S. at 600–01 (Rehnquist, C.J., dissenting) Referring to his colleagues, he wrote that “our reach can so easily exceed our grasp.” *Daubert*, 509 U.S. at 599 (Rehnquist, C.J., dissenting). He went on to add, “questions will surely arise when hundreds of district judges try to apply its teaching,” anticipating the eventual certain inconsistency among courts. Id. at 600. Some suggest that this has happened. This also highlights the fact that Judges must become finders of fact under the *Daubert* standard.

The leading treatise on federal civil procedure, Federal Practice and Procedure, refers to *Daubert* as the Supreme Court’s “Neo-Frye doctrine.” Wright & Graham, *Federal Practice and Procedure: Evidence* § 5168.1 (2011). The authors describe the standard as unworkable. Id. The treatise suggests that “‘flexible’ tests of the sort announced in *Daubert* are more likely to produce arbitrary results than they are to produce nuanced treatment of complex questions of admissibility.” Id.

In recent years statutory changes required the use of experts in some types of civil cases. For example, “No Fault” auto cases require a plaintiff to prove a permanent injury in order to recover. See s. 727.730 Fla. Stat. et seq., This requires an expert. In medical malpractice actions the plaintiff must advance expert testimony to start the case and to advance to a jury. See Ch. 766. In other areas of litigation experts are commonplace (e.g., pathologists and DNA experts in criminal cases, psychologists in child custody disputes, and juvenile cases). Experts are part and parcel of our justice system.

The adoption of *Daubert* will almost certainly require more time and resources from Florida courts. It will likely also increase the length of time for litigation and its expense. It also likely will encounter constitutional challenge on a number of fronts.

**PROONENT POSITION**

The proponents believe the *Daubert* standard promises benefits for Florida trial courts in carrying out their duty to properly evaluate and admit only reliable evidence. This stems from the broader applicability of the *Daubert* standard, and the tools available under *Daubert* to separate “junk science” from reliable expert testimony.
One feature of the *Daubert* standard that is most emphasized by proponents is its usefulness in excluding such “junk science.” *Frye* required that “the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.” *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923). The *Frye* test looked no further than whether an expert’s testimony on a new or novel scientific technique was generally accepted within the particular discipline of the expert. No weight was given to whether or not the particular discipline is one that is generally accepted as reliable in society.

Under *Daubert* the judge acts as the gatekeeper to review different factors, in addition to acceptability within the particular discipline to decide whether the expert’s testimony is reliable and relevant. The *Daubert* analysis allows the court to evaluate “testing, peer review, error rates and acceptability in the relevant scientific community, some or all of which might prove helpful in determining reliability…”. Supporters contend that the *Daubert* test does a better job of ensuring that only truly reliable expert testimony can be presented to a jury.

Proponents of *Daubert* also argue that its implementation does not cause near the burden on courts and litigants that critics of *Daubert* predict. The experience in Federal courts in using *Daubert* for over a decade, and anecdotal evidence from Florida courts since its implementation in Florida may support this contention.

Federal courts and litigants routinely address *Daubert* motions in an efficient and practical way. Many *Daubert* motions are addressed by the court simply on the written papers, obviating the need for a lengthy evidentiary proceedings and hearings. Federal courts have emphasized that it is within a trial judge’s discretion to decide *Daubert* motions on briefing and argument alone, without the need for evidentiary proceedings. See *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 E3d 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. Sebbern*, 2012 WL 5989813 (ED NY 2012) (In challenge to ballistics testimony Daubert hearing was not necessary). This discretion provides wide latitude for trial judges to efficiently deal with common place *Daubert* motions in a way that it does not bog down litigants, or cause extraordinary expense and burden on courts.

Since its implementation in Florida, trial courts are working through the same practical problems of application on a case by case basis. Florida appellate courts have not yet had an opportunity to weigh in on the parameters of trial court discretion in deciding *Daubert* motions, and the amount of discretion Florida judges will have with regard to the need for evidentiary hearings. Anecdotal evidence suggests that Florida trial judges are taking varying approaches, with some following the Federal court lead of denying full evidentiary hearings for motions that are perceived to be weak, while other Florida courts are granting such evidentiary hearings as a matter of right. It will remain for Florida appellate courts to sort through proper procedures to
ensure that trial judges are not over burdened, while at the same time affording litigants their due process right to have motions attacking expert evidence heard in a full and fair manner.

If Florida courts can implement Daubert in a way that is not overly burdensome by separating weak motions from strong, and according them appropriate resources and treatment, Daubert should not overburden the Florida court system or cause delay and extraordinary expense to litigants. But this will take years to fairly evaluate.

Another perceived advantage of Daubert is its application to all expert testimony, not just new or novel science. Frye only applies when an expert attempts to render an opinion that is based upon new or novel scientific techniques. Marsh v. Valyou, 977 So. 2d 543, 547 (Fla. 2007) citing U.S. Sugar Corp. v. Henson, 823 So.2d 104, 109 (Fla. 2002). The Court in U.S. Sugar recognized that Frye is inapplicable in the “vast majority” of cases. Id. see also Rickgauer v. Sarkar, 804 So.2d 502, 504 (Fla. 5th DCA 2001) (“Most expert testimony is not subject to the Frye test.”) The Florida Supreme Court has repeatedly declared that pure opinion testimony is not subject to the Frye test. See Flanagan v. State, 625 So. 2d 827, 828 (Fla. 1993) (Commenting that pure opinion testimony does not have to meet Frye, because this type of testimony is based on the expert's personal experience and training.); Marsh v. Valyou, 977 So. 2d 543, 548 (Fla. 2007) (It is well-established that Frye is inapplicable to “pure opinion” testimony.) The pure opinion exception provides that so long as an expert’s opinion relies on the expert’s personal experience and training and avoids discussion of any scientific method, then the testimony is admissible without judicial scrutiny. In Flanagan, the Court stated that “while cloaked with the credibility of the expert, this testimony is analyzed by the jury as it analyzes any other personal opinion or factual testimony by a witness.” Flanagan at 828.

Daubert is applicable to not only “scientific” testimony, but to all expert testimony. Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999). Daubert imposes a gatekeeping requirement on judges to ensure the reliability and relevancy of expert testimony. Id. at 152. “It is to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.” Id. Daubert's reliability standards require more than merely “taking the expert’s word for it.” Fed. R. of Evidence 702, Advisory Committee Notes. Daubert allows for greater scrutiny of all expert testimony and it gives judges the tools needed to ensure that jury panels are not inundated with junk science or radical and unreliable opinion testimony.

Implementation of Daubert is also thought to decrease the frequency of forum shopping. The Frye standard provides incentive for tactical lawyers motivated by different rules for the admissibility of expert testimony to attempt to move litigation to Florida. Forum shopping by parties from other jurisdictions could create a strain on the Florida court system. Use of the Daubert standard likely reduces this risk.

The use of Daubert is also thought to reduce the potential for a “cultural lag” that is created under the “general acceptance” requirement of Frye for the admissibility of newer scientific techniques.
Under Frye, scientific results that were obtained using principles and methods which were too new to become generally accepted in the particular scientific field, but were nonetheless able to produce precise and consistent results, were excluded. In 1983, the Florida’s First District Court of Appeal stated that “a rigid application of Frye would require a court to await the passage of time until such time as a new test or procedure has been developed to the point that the test or procedure has been developed to the point that the test or procedure has become generally accepted.” Brown v. State, 426 So. 2d 76, 88 (Fla. 1st DCA 1983) disapproved of on other grounds by Bundy v. State, 471 So. 2d 9 (Fla. 1985). The First District noted that “this creates a ‘cultural lag’ during the technique's development, requiring that relevant evidence which might be demonstrated to be completely reliable must be excluded from consideration.” Brown at 88.

This concept was most powerfully discussed by Judge Mann in his concurring opinion in Coppolino v. State, 223 So. 2d 68 (Fla. 2nd DCA 1968). Coppolino was a homicide prosecution where the defendant was an anesthesiologist who allegedly murdered his wife by injecting her with succinylcholine chloride, a muscle relaxant that causes cessation of breath. Id. at 75. Judge Mann discussed how the tests used by the medical examiner to determine whether the death was caused by succinylcholine chloride were novel and devised specifically for the case. Id. He further opined that this should not render the evidence inadmissible. Judge Mann succinctly summed up the cultural lag problems that Frye created by commenting that “[s]ociety need not tolerate homicide until there develops a body of medical literature about some particular lethal agent.” Id.

Frye came out over 90 years ago in 1923. The Florida Supreme Court appears to have adopted the Frye “general acceptance” test over 50 years ago in 1952 in Kaminski et. al. v. State, 63 So.2d 399 (1952). Scientific methods and technology are changing rapidly. Simply because a new scientific method is not generally accepted in a particular scientific field does not mean that is not reliable and consistent. While Daubert gives some weight to “general acceptance” to determine reliability, the admissibility of expert evidence turns on relevance and actual reliability. Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 594 (1993). As such, it is contended that the Frye test is antiquated and creates a cultural lag during the time it takes for a scientific technique to develop into a method that is generally accepted. Daubert recognizes science in a more rapid and efficient way.

IV. Pure opinion Issue

Some who oppose the Daubert legislation point to language in the preamble of the bill as a threat to the admission of pure opinion testimony in Florida Courts. Florida Courts have long allowed “pure opinion” testimony based upon witnesses’ “training and experience”:

Experts routinely "form medical causation opinions based on their experience and training. See, e.g., Cordoba v. Rodriguez, 939 So.2d 319, 322 (Fla. 4th DCA 2006) ("Medical expert testimony concerning the causation of a medical condition will be considered pure opinion testimony and admissible when it is based solely on the expert's training and experience."); … Fla. Power & Light Co. v. Tursi, 729
So.2d 995, 996 (Fla. 4th DCA 1999) (finding Frye inapplicable where the physician was qualified to testify about the cause of a cataract based on his knowledge and experience). Id. (emphasis supplied)

The Preamble to the Daubert bill states, in part:

WHEREAS, by amending s. 90.702, Florida Statutes, the Florida Legislature intends to prohibit in the courts of this state pure opinion testimony as provided in Marsh v. Valyou, 977 So.2d 543 (Fla. 2007)

Marsh, 977 So.2d at 547-549.

It has been suggested that the language in this Preamble will limit or prohibit the admissibility of pure opinion testimony. But the evidence code adopted by the Legislature expressly contradicts the language from the Preamble. The new statute permits testimony based exclusively upon “skill” or “experience” and provides:

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. S.90.702, Fla. Stat. (emphasis supplied)

Thus, the new Florida (and the existing federal) Evidence Code actually permit testimony based upon “experience”, which is “pure opinion” testimony. The proponent of the testimony must provide a basis that establishes the reliability of the testimony. One of the purposes of Daubert is to “make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.” Kumho Tire Co., 526 U.S. at 152. Daubert does not exclude expert opinion based upon experience, id. at 157 (“[N]o one denies that an expert might draw a conclusion from a set of observations based on extensive and specialized experience.”), but Daubert and Kumho require the opinion to be “reliable”. Furthermore, the reliability standard requires more than “taking the expert’s word for it.” Id.; Kumho Tire Co., 526 U.S. at 151.

The “notes” to the Federal Rules of Evidence speak to the right to present “pure opinion” testimony from experts. An expert who relies on “experience” must explain “how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts.” Fed. R. Evid. 702 Advisory
Committee Notes. 6. This supports the continued admission of pure opinion testimony in Florida Courts, when a proper predicate is laid, despite the statements in the Preamble.

Florida law is clear that a preamble to a statute may not change clear language in the statute. It is well settled that such “prefatory language” cannot expand or restrict the otherwise unambiguous language of a statute. “[T]he preamble is no part of the act, and cannot enlarge or confer powers nor control the words of the act, unless they are doubtful or ambiguous.” Yazoo & Mississippi Valley Railroad v. Thomas, 132 U.S. 174, 188, 10 S.Ct. 68, 73, 33 L. Ed. 302 (1889). Dorsey v. State, 402 So.2d 1178, 1180-81 (Fla. 1981). Though the Legislature voiced an intention to go beyond Daubert and sought to eliminate all “pure opinion” testimony, the plain language of the statute permits testimony based upon “skill” or “experience” and the Daubert analytical framework does not prohibit pure opinion testimony. The use of the disjunctive “or” makes clear that testimony based upon any one of the enumerated bases (education, skill, experience, etc.) will qualify an expert if a proper predicate of reliability is laid.

IV. Conclusion

The Executive Council of the Florida Bar Trial Lawyer’s Section perceives that, like the Florida Bar Evidence Committee, there is a close split in its membership between those favoring adoption of the legislation by the Court and those who oppose it. This paper is designed to identify the primary positions of each of the sides.

On the issue of pure opinion testimony, there is substantial agreement that the right, and need, to present “pure opinion” testimony remains intact in Florida courts regardless of which standard the Court adopts, though the Daubert standard may require as a foundation certain predicate testimony for admission of the “pure opinion”.