Expert testimony in Florida: Welcome Back, Daubert!

Palermo Outline: March 2, 2020

The purpose of this outline is to provide answers to basic questions about Florida Statute Section 90.702. Because this evidentiary rule is relatively new in Florida, most of the relevant legal authority is persuasive, not binding, and is either federal or from one of the other states that have adopted Fed.R.Evid. 702.

I. A quick look at expert testimony in federal and Florida courts

1923: *Frye v. United States*, 293 Fed. 1013 (D.C. Cir. 1923)

The *Frye* opinion is remarkable for three reasons: (1) it's a page, maybe a page-and-a-half long; (2) it includes not one single legal citation; but (3) it does include this one galvanizing sentence:

> [W]hile 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.

Frye's "general acceptance" standard was adopted by most federal and state courts as the test for admissibility of expert testimony

About 50 years later, in 1975, the Federal Rules of Evidence

- prescribed by SCOTUS and enacted by Congress
- purpose was to create a uniform body of rules emphasizing the admissibility of evidence
- binding on every federal court in the country
- included Rule 702—"Testimony by Expert Witnesses"

Fed.R.Evid. 702 (circa 1975):

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert

by knowledge, skill, experience, training, or education,
may testify thereto in the form of an opinion or otherwise.

The creation of the Federal Rules of Evidence created a dilemma: how should the courts reconcile the common law rule that evolved from *Frye* with Rule 702?

The U.S. Supreme Court got around to answering that about 20 years later in 1993, with *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993):

Answer: You don't. The Rules of Evidence superseded common law. *Daubert* went on to explicitly reject "general acceptance" as "an absolute prerequisite to admissibility" and instead requires trial judge, as gatekeeper, to ensure that testimony will be "relevant and reliable."

Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137 (1999), expressly extended *Daubert* to testimony based on "technical" and "other specialized" knowledge. *Kumho* also emphasized the flexibility of *Daubert's* reliability test.

2000: in response to *Daubert*, Rule 702 was amended to account for the requirements of "relevance and reliability."

Over time, more and more states joined the feds in implementing their version of § 702 and following *Daubert*. By now, more than ¾ of states are on the *Daubert*/702 bandwagon.

Florida was late to the party, and it took us two tries to get there:

In 2013, the Florida legislature amended § 90.702 to follow Fed. R. Evid. 702.

DeLisle v. Crane Co., 258 So. 3d 1219 (Fla. 2018): The Florida Supreme Court held that § 90.702 was purely procedural in that it "solely regulate[d] the action of litigants in court proceedings." Therefore, the legislature had no authority to amend it, and without adoption by the Florida Supreme Court, the amendment was unconstitutional. Unconvinced that switching to *Daubert* was a good idea, the Florida Supreme Court refused to adopt the amendment.

But then…after a change in the composition of the court…

The Florida Supreme Court flipped and adopted Ch. 2013-107, §§ 1, 2, Laws of Florida, which amended both §§ 90.702 and 90.704, as "procedural rules of evidence." *In re Amendments to Florida Evidence Code*, 44 Fla. L. Weekly S170 (Fla. May 23, 2019).

The amendments will, among other things, "create consistency between the state and federal courts with respect to the admissibility of expert testimony and will promote fairness and predictability in the legal system, as well as help lessen forum shopping."

So now here we are…

II. Fla. Stat. § 90.702 governs the admissibility of certain expert testimony.

On May 23, 2019, Florida became the 37th state to adopt essentially Federal Rule of Evidence 702. Specifically, Florida adopted Florida Statute Section 90.702, which states:

> 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:
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> (1) the testimony is based upon sufficient facts or data;
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> (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.

The federal rule is substantively the same but written a little differently (perhaps more clearly):

> 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.

Summing it all up: as a gatekeeper applying Fla. Stat. § 90.702, the trial court must make sure that expert testimony is reliable. For reliability, the court must "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. v. Carmichael*, 526 U.S. 137, 152 (1999). Personal knowledge and experience of the expert may be taken into account. *United States v. McPhilomy*, 270 F.3d 1302, 1313 (10th Cir. 2001). Although the U.S. Supreme Court eschewed "a definitive checklist or test," *Daubert v. Merrell Dow Pharmaceuticals Inc.*, 509 U.S. 579, 593 (1993), the Court suggested factors to consider, including whether the theory or technique has been tested, whether it "has been subjected to peer review and publication," "the known or potential rate of error," and "the existence and maintenance of standards controlling the technique's operation." *Id*. at 593–94. "Finally, 'general acceptance' can yet have a bearing on the inquiry." *Id*. at 594. However, the Court cautioned, the inquiry is "a flexible one." *Id*. "The focus ... must be solely on principles and methodology, not on the conclusions that they generate." *Id*. at 595. To make its determination, courts are not required to hold a separate hearing. *See United States v. Williams*, 506 F.3d 151, 161 (2d Cir. 2007), cert. denied, 552 U.S. 1223 (2008).

III. How did the federal courts get here?

The Federal Rules of Evidence took effect on July 1, 1975. Prior to their taking effect, the admission of expert testimony was governed by the 1923 D.C. Court of Appeals case *Frye v. United States*, 293 F. 1013 (1923), which adopted a "general acceptance" test. It took roughly 17 years from the date the Rule took effect to sort out what controlled the admission of expert testimony, Rule 702 or *Frye*. The answer came in 1993.

In *Daubert v. Merrell Dow Pharmaceuticals Inc.*, 509 U.S. 579 (1993), the U.S. Supreme Court resolved the conflict, holding that *Frye*'s "general acceptance" test was superseded by the 1975 enactment of Federal Rules of Evidence 702. The U.S. Supreme Court in *Daubert* included non-exhaustive additional factors that the Court could consider in determining the admissibility of expert testimony.

In 1997, the U.S. Supreme Court clarified *Daubert*, explaining that "conclusions and methodology are not entirely distinct from one another." *General Electric Co. v. Joiner*, 522 U.S. 136, 146 (1997). "[N]othing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert." *Id*. Thus, "[a] court may conclude that there is simply too great an analytical gap between the data and the opinion proffered." *Id*.

In 1999, in *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147 (1999), the U.S. Supreme Court held that Rule 702 to all expert testimony, not just scientific testimony. In *Kumho*, the U.S. Supreme Court further explained that the "test of reliability is 'flexible,' and *Daubert's* list of specific factors neither necessarily nor exclusively applies to all experts or in every case. Rather, the law grants a district court the same broad latitude when it decides how to determine reliability as it enjoys in respect to its ultimate reliability determination." *Id*. at 141–42, 119 S.Ct. 1167.

Courts still struggled with the meaning of *Daubert*. To resolve conflicts in its meaning, Federal Rule of Evidence 702 was amended in 2000. The amendment took into account *Daubert*, *Joiner*, and *Kumho*. The amendment added to the rule what are now paragraphs (b), (c), and (d). The three main issues under Fed.R.Evid. 702 became (1) the factual foundation, (2) reliability of expert methodology, and (3) application of methodology to facts. This is effectively what Florida adopted.

IV. What is the point of Fla. Stat. § 90.702?

The point is that the trial judge must apply Fla. Stat. § 90.702 in ruling on admissibility, acting as a "gatekeeper." The focus is primarily on the reliability of the expert's methodology and the application of that methodology to the facts. The trial judge must determine if an expert's methodology is reliable enough to protect the trier of fact from hearing contrived conclusions under the false label of "expert" testimony. *See General Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997). This does not

mean that the court agrees with the opinions being offered but, instead, is merely a determination that the expert's methodology is on solid grounds. Questions of credibility and persuasiveness remain the province of the jury, clarified through the direct examination, vigorous cross-examination, and even the testimony of competing experts. *See Quiet Technology DC–8, Inc. v. Hurel–Dubois UK LTD.*, 326 F.3d 1333, 1341–42 (11th Cir. 2003).

V. The Burden of Proof: Proponent and Preponderance

The proponent of expert testimony bears the burden of establishing each requirement by a preponderance of the evidence. *Cook ex rel. Estate of Tessier v. Sheriff of Monroe County, Fla.*, 402 F.3d 1092, 1107 (11th Cir. 2005).

VI. Does the burden of proof ever shift?

It can. There are times when the expert opinion has already been considered by an appellate court. If the appellate court deemed it reliable, a trial judge can take judicial notice of that appellate court's determination. *Booker v. Sumter Cty. Sheriff's Office/N. Am. Risk Servs.*, 166 So. 3d 189, 194–95 (Fla. 1st DCA 2015) (citation omitted). This shifts to the opponent of the evidence the burden to prove that such evidence is no longer reliable. The proponent, on the other hand, may either rest on the judicially noticed fact or introduce additional extrinsic evidence in support or in rebuttal to the evidence offered by whomever is opposing the expert's testimony.

VII. When can a Fla. Stat. § 90.702 motion be raised?

These motions are typically raised pretrial but can even be raised during a trial. Just because they can be raised any time does not mean they will be heard any time. Put another way, the right time to raise a challenge under Fla. Stat. § 90.702 is pretrial and promptly. Promptly can mean after an expert's report is received or after the expert's deposition is taken. Failing to raise the issue well in advance of a trial may result in the court refusing to consider an untimely motion. *See Booker v. Sumter Cty. Sheriff's Office/N. Am. Risk Servs.*, 166 So. 3d 189, 192–93 (Fla. 1st DCA 2015) (citation omitted). Courts have pithily written: "*Daubert* generally contemplates a 'gatekeeping' function, not a 'gotcha' junction." *Alfred v. Caterpillar*, Inc., 262 F.3d 1083, 1087 (10th Cir. 2001). If a party is raising an untimely challenge, e.g., during a trial, the party raising the challenge should be prepared to show "exceptional circumstances existed to merit consideration of the defendant's untimely objection." *Rojas v. Rodriguez,* 185 So.3d 710, 712 (Fla. 3d DCA 2016).

How serious is timeliness? The Third DCA reversed a trial court's granting a motion for new trial based on *Daubert* because the defendant's *Daubert* challenge had been untimely. . In an automobile accident case, the defendant admitted liability and the case was tried on the issue of whether the plaintiff's herniated disc was caused by the accident. The plaintiff's sole causation witness was a neurosurgeon. Objections were made, including during the trial, but none were *Daubert* objections. The plaintiff won. The defendant then filed a "motion for mistrial/ new trial and remittitur," asserting that the neurosurgeon's testimony was outside his area of expertise and trial by ambush, and for the first time, raising *Daubert*. The trial court held a hearing and granted the defendant's motion. The Third DCA found that the entire appeal "hinge[d] on whether the defendant's post-trial Daubert objection was timely so as to warrant the exclusion of the neurosurgeon's testimony." *Rojas*, 185 So.2d at 711. The panel noted that it was "undisputed that the defendant failed to raise a *Daubert* objection or request a *Daubert* hearing prior to the conclusion of trial." *Id*. In sum, [t]his failure is fatal to the defendant's case, particularly in light of the fact that the defendant was on notice that the neurosurgeon would be an expert witness as early as December 11, 2013, when the plaintiff filed his expert witness list, over ten months before the October 27, 2014 start of trial. Despite this disclosure, the defendant took no steps to discover the basis of the neurosurgeon's opinion." *Id*. Without a timely *Daubert* objection or the defendant offering any exceptional circumstances, the Third DCA found that the "trial court erred in granting the defendant's motion. Accordingly, we reverse the order on appeal and remand so that the trial court may reinstitute the jury's verdict." *Id*. at 712. Raising an untimely *Daubert* challenge can lead to a summary denial by the trial court and, even if an untimely claim is granted by the trial court, a reversal on appeal.

Finally, it is also worth remembering some of the history of *Daubert* and *Kumbo*. Middle District of Florida Bankruptcy Judge Michael Williamson published an article, *Daubert in Bankruptcy Practice: Dispelling Some Common but Questionable Working Assumptions*, in which he explained:

> Contrary to this working assumption, the gatekeeper function of a trial court does not depend on whether the case will be tried before a jury. In many instances, the issue may arise in a pre-trial procedural posture. In fact, the *Daubert* case itself was decided on summary judgment. The plaintiffs sought damages for birth defects allegedly caused by Bendectin, a prescription anti-nausea drug

> marketed by the defendant. The defendant moved for summary judgment supported by an affidavit of "a well credentialed expert on the risks from exposure to various chemical substances." The plaintiffs responded with the deposition testimony of eight equally credentialed experts of their own. The district court concluded that the plaintiff's scientific evidence was not admissible, and in the absence of such evidence, entered summary judgment for the defendant.
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> Similarly, *Kumho* was decided on summary judgment. The trial judge excluded, because of a lack of reliability, the expert's testimony of the plaintiff in a deposition filed in opposition to a motion for summary judgment. The court then granted the defendant's motion for summary judgment in the absence of evidence supporting the plaintiff's case.
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> The trial court's gatekeeping function under *Daubert* and Rule 702 has contributed to an effective litigation technique useful against a party whose case depends on expert testimony.

2002 Ann. Surv. of Bankr.Law 10 (citations omitted). For those raising a legitimate § 90.702 challenge, not raising it pre-trial can be giving up a meaningful opportunity to prevail in the litigation. It is just bad practice to wait too long to file a meaningful challenge.

VIII. Raising a legally sufficient challenge

It is not enough to raise a perfunctory challenge. A trial judge has to determine whether the challenge was sufficient to put opposing counsel on notice so that she will have the opportunity to address any perceived defect in the expert's testimony. *Booker v. Sumter Cty. Sheriff's Office/N. Am. Risk Servs.*, 166 So. 3d 189, 93 (Fla. 1st DCA 2015). If the party raising a challenge files a motion that is legally insufficient, it should be summarily denied.

An objection under Fla. Stat. § 90.702 cannot be general. A legally sufficient challenge is more than unsubstantiated facts, suspicions, or theoretical questions

regarding the expert's qualifications. *Id.* (citation omitted). The objections must be directed to specific opinion testimony and give opposing counsel a reasonable way to understand and address any defects in the proposed testimony. *Id.* Depending on the specific basis for the challenge, the objection could include, for instance, citations to "conflicting medical literature and expert testimony." *Id.* (citation omitted). Ethical issues can also arise when counsel file frivolous or form objections. So to can sanctions…

IX. Can you be sanctioned for bad experts?

Yes. If a Fla. Stat. § 90.702 challenge reveals that your expert is bad, quickly withdraw the expert. An attorney offering a bad 702 expert can be sanctioned, at least in federal court and probably in a Florida court. *See, e.g., In re Silica Products Liability Litigation,* 398 F.Supp.2d 563, 574-76 (S.D. Tex. 2005)(no good faith belief that expert could meet burden and "insistence upon the Daubert hearings multiplied the proceedings unreasonably and vexatiously.").

X. Can you be sanctioned for bad Fla. Stat. § 90.702 challenges?

Yes. Frivolous challenges are subject to not simply summary denials but also the possibility of sanctions. *See, e.g., LML Patent Corp. v. Telecheck Services, Inc.*, 2006 WL 839377 (D. Del. 2006) (denying motion to exclude expert witness, finding it a frivolous motion where it asserted that "the opinion of an expert witness must be based entirely on his/her own personal knowledge, as opposed to accepting certain assumptions and/or facts related through other reliable sources," and sanctioning challenger by ordering the challenger to reimburse the opposing party for costs in responding to the motion).

There is also an intangible cost. Judges remember and judges talk to each other.

XI. How bad can it get?

There is a danger that you could have your Bar license suspended and maybe even be disbarred. Consider a case currently pending before the Florida Supreme Court, *Becher v. State*, SC No. SC18-999. Counsel filed more than 150 motions to quash in 68 cases. The motions were mostly redundant. Each contained a broad allegation and failed to address a key underlying factual question or the particular facts of each case. One judge found that the filing was "brought in bad faith."

Another judge found that the motions were filed "by means calculated to delay, thereby turning due process on its head. This conduct cannot and should not be judicially sanctioned or permitted to continue." After orders were entered, counsel continued filing the same motions. The attorney's conduct violated Florida Bar Rules 3.4-3; 4-3.1; 4-8.4(d); and 4-3.3. The recommendation was for a 3-year suspension. The Florida Bar Petition for Review is requesting Disbarment.

XII. Who can raise a challenge under Fla. Stat. § 90.702?

Anyone can raise a challenge, including a *sua sponte* challenge by the court.

XIII. Does it matter what kind of proceeding?

Yes. These challenges are meant for jury trials. "The purpose of *Daubert* was to require courts to serve as gatekeepers so that unreliable expert testimony does not carry too much weight with the jury." *United States v. Ozuna*, 561 F.3d 728, 737 (7th Cir. 2009). For example, no hearing was required before considering expert testimony offered in bench trials, *see, e.g., In re Salem*, 465 F.3d 767, 776-77 (7th Cir. 2006), in suppression hearings, *Ozuna*, 561 F.3d at 736-37, or in sentencing hearings. *United States v. Malone*, 828 F.3d 331, 337 (5th Cir. 2015).

XIV. Does the Court have to hold a hearing?

No. Sometimes a trial judge will conduct a formal hearing, sometimes the judge will act more summarily, and on other occasions (particularly in federal court) the judge will rule on the briefs without formal argument. Courts need not hold hearings on untimely challenges, legally insufficient challenges, of for proceedings that do not involve juries. A court can also take judicial notice of the reliability and scientific validity of the general theory and techniques, and proceed without a *Daubert* hearing. *See United States v. John*, 597 F.3d 263, 274-75 (5th Cir. 2010) (fingerprints).

The determination might even like any other evidentiary determination, i.e., during the course of the hearing or trial. For example, in *Larocca v. State*, No. 4D18-1824, 2020 WL 218299 (Fla. 4th DCA Jan. 15, 2020): the Fourth DCA held that trial court did not abuse its discretion in failing to conduct a formal *Daubert* hearing before permitting a toxicologist to testify that it was impossible to tell whether alcohol found in victim's body was from consumption of alcohol or from the process of the body decomposing; the trial court nonetheless satisfied its gatekeeping

function because "[p]rior to rendering his opinion, the toxicologist discussed his relevant education, training, and experience as a toxicologist and medical examiner as well as the science supporting his opinion."

XV. *Frye* v. *Daubert*

Unlike *Frye*, which applied only to expert-opinion testimony based on new or novel scientific evidence, *Daubert* applies to all expert testimony. Theoretically, this broadens the scope of potential challenges to which Fla. Stat. § 90.702 applies.

While some have argued that *Daubert* limits the admission of evidence, others have concluded the opposite. For example, in *Motorola Inc. v. Murray*, 147 A.3d 751, 756 (D.C. 2016), the D.C. Court of Appeals found *Daubert* and its progeny "relax the initial barriers to the admission of expert testimony, but at the same time emphasize the trial judge's robust gatekeeping function."

XVI. Not just opinion testimony: "… or otherwise"

Fla. Stat. § 90.702 permits a witness qualified as an expert by knowledge, skill, experience, training, or education to "testify about it in the form of an opinion or otherwise." The "or otherwise" can be important. First, there are times when an expert's testimony can be used to explain, for example, a process or system that is the foundation for admitting records or to make a process or system understandable to a jury. This testimony can be properly admissible testimony under the rule without the expert ever offering an opinion. Rule 702 "recognizes that an expert on the stand may give a dissertation or exposition of scientific or other principles relevant to the case, leaving the trier of fact to apply them to the facts …. It seems wise to recognize that opinions are not indispensable and to encourage the use of expert testimony in non-opinion form when Counsel believes the trier can itself draw the requisite inference." Fed.R.Evid. 702 advisory committee note (1972).

XVII. *Daubert* factors

In *Daubert*, the U.S. Supreme Court set forth certain factors to consider in determining the reliability of an expert's testimony, but, in *Kuhmo Tire*, it clarified that this list was not exhaustive. *Kuhmo Tire*, 526 U.S. at 150. These *Daubert* factors include

(1) whether the expert's theory or technique can be (and has been) tested;

(2) whether it has been subjected to peer review and publication;

(3) what its known or potential rate of error is, and whether standards controlling its operation exist; and

(4) whether it is generally accepted in the field.

Daubert, 509 U.S. at 593–94. These factors do not have to be present for a court to admit evidence. *See, e.g., United States v. Brown*, 415 F.3d 1257, 1269 (11th Cir. 2005) (the court did not abuse its discretion in admitting two expert witnesses even though specific *Daubert* factors, such as testability and peer review, were not present). The Court's evaluation of the reliability of expert testimony thus does not depend upon a rigid checklist of factors designed to test the foundation of that testimony. Rather, the gatekeeping inquiry must be tailored to the facts of the case and the type of expert testimony at issue. *See Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 150 (1999).

XVIII. What was the Florida legislature trying to do?

The § 90.702 amendment states that it is an "[a]ct relating to expert testimony ... requiring the courts of this state to interpret and apply the principles of expert testimony in conformity with specified United States Supreme Court decisions" and "subjecting pure opinion testimony to such requirements." *See Navigating Florida's Changing Daubert Tide in Business Cases*, 93-OCT Fla. B.J. 26. The Florida Legislature expressed its intent "to adopt the standards for expert testimony in the courts of this state as provided *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)," and "to prohibit in the courts of this state pure opinion testimony as provided in *Marsh v. Valyou*, 977 So. 2d 543 (Fla. 2007)." *Id*.

XIX. Experts aren't just academic or scientific.

Fed.R.Evid. 702 "does not rank academic training over demonstrated practical experience." *United States v. Roach*, 644 F.3d 763, 764 (8th Cir. 2011). That being said, an expert with unimpressive credentials is not likely to be permitted to testify. Practical experience can be sufficiently impressive.

Post-*Kumho*, under Fed.R.Evid. 702, an expert could opine even if it is not scientific evidence. *See United States v. Herrera*, 704 F.3d 480, 486 (7th Cir. 2013) (fingerprints). There are plenty of times when the *Daubert* factors (peer review,

publication, potential error rate, etc.) are simply inapplicable. *See, e.g., United States v. Hankey*, 203 F.3d 1160, 1169 (9th Cir. 2000) (gang expert); *United States v. Holmes*, 751 F.3d 846, 850 (8th Cir. 2014) (narcotics iconography expert).

XX. The best source of persuasive authority at the moment is…

There is an enormous and rich body of persuasive legal authority available to counsel and the courts. The first and probably best place to look for that authority is rich body of authority found in federal law. The second-best place is the other 36 states that have essentially adopted Fed.R.Evid. 702.

Many issues have likely already been addressed. Here some random examples, mostly relevant to criminal cases:

- Fingerprint and handwriting analysis are both in. *United States v. Crisp*, 324 F.3d 261 (4th Cir.), cert. denied, 540 U.S. 888 (2003) (collecting cases).
- Polygraph evidence is out. *United States v. Call*, 129 F.3d 1402 (10th Cir. 1997).
- Testimony on matters of law is out. *United States v. Crockett*, 435 F.3d 1305, 1314 (10th Cir. 2006).
- Criminal practices testimony by law enforcement and cooperating witnesses is in. *See, e.g., United States v. Garza*, 566 F.3d 1194, 1199 (10th Cir. 2009) (guns in the drug trade).
- Expert testimony on narcotics distribution organizations is in. *United States v. Patterson*, 819 F.2d 1495 (9th Cir. 1987).
- Limited expert opinion on who sex offenders are was in. *United States v. Batton*, 602 F.3d 1191, 1200-1202 (10th Cir. 2010).
- International narcotics trafficking is in. *United States v. Reyes-Garcia*, 2019 WL 6893716 (11th Cir. 2019) (per curiam).
- Expert opinion on the unreliability of eyewitness identification is in. *United States v. Rincon*, 28 F.3d 921,926 (9th Cir. 1994).
- Opining on the credibility of witnesses is out. *United States v. Charley*, 189 F.3d 1251, 1267 (10th Cir. 1999), cert. denied, 528 U.S. 1098 (2000).
- Fantasy and role playing in online sexual communications is out. *United States v. Gillis*, 938 F.3d 1181 (11th Circ. 2019). As is "not attracted to prepubescent girls." *Id*.

Florida courts are being persuaded by federal opinions. For example, in *Poole v. State*, 284 So. 3d 604 (Fla. 5th DCA 2019), the Fifth DCA relied on federal law to conclude that trial court did not abuse its discretion in admitting law enforcement officer's expert testimony "on human trafficking and the sex worker subculture;" holding that such testimony "can assist the trier of fact on subjects not within an ordinary juror's understanding or experience" and noting specific reasons why the testimony was helpful in that case but acknowledging that "expert testimony may not assist the jury in every case involving commercial sex activity."

XXI. Binding Authority is Growing in Florida

Binding authority is growing. For example:

- *Hedvall v. State*, 283 So. 3d 901 (Fla. 3d DCA 2019): holding that trial court did not abuse its discretion in admitting detective's expert opinion testimony as to the angle of blood spatter and his conclusion that the trajectory indicated that the victim had been low to the ground when struck; detective testified "that he had taken a crime scene reconstruction course with 20 or more hours devoted to blood pattern analysis, had training at the medical examiner's office with 12 hours devoted to blood pattern analysis, and had taken a DNA course with 20 hours of blood pattern analysis . . . [and] that he had been trained in the mathematical formulas on which blood pattern analysis is based and that he has completed 60 to 75 blood stain pattern analyses."
- *Vitiello v. State*, 281 So. 3d 554 (Fla. 5th DCA 2019): holding, as a matter of first impression, that toxicology expert's testimony on defendant's blood alcohol content (BAC) at time of crash was admissible; defendant "[did] not challenge the science of retrograde extrapolation in a general sense," and to the extent that expert's opinion was based on certain factual assumptions that may or may not be true, that concern went to the weight of evidence rather than its admissibility.
- *MasTec North America, Inc. v. Morakis*, No. 4D18-1321, 2019 WL 4850130 (Fla. 4th DCA Oct. 2, 2019): trial court abused its discretion in allowing plaintiff's accident reconstruction expert to give testimony that could have been interpreted as related to whether plaintiff had been impaired before or at time of impact; expert did not have sufficient information to opine that plaintiff's normal faculties had not been impaired.

XXII. Bench trials

§ 90.702 errors are not usually a major concern in bench trials. There's a "rebuttable presumption that in non-jury cases, trial judges base their decisions upon admissible evidence and have disregarded inadmissible evidence." *Petion v. State*, 48 So. 3d 726 (Fla. 2010). A judge hearing inadmissible evidence presumably disregards improper evidence, and exposure is harmless. That presumption can be rebutted through admission of improper evidence, express reliance on the improper evidence, or actual reliance on it. This also suggests why having a pre-bench trial *Daubert* hearing is probably not necessary.

XXIII. Methodology

If you are seeking to exclude an expert's testimony, pay attention to the expert's methodology. The inquiry for the Court is not whether the expert is correct, but whether the proponent of expert testimony has established by a preponderance of the evidence that the testimony is reliable **in the context of the methodologies or techniques applied within the appropriate field**. *See Allison v. McGhan Medical Corp.*, 184 F.3d 1300, 1312 (11th Cir. 1999). The Court's objective is to make sure that the expert "employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 152 (1999).

XXIV. Things to Consider on Appeal

A. What law applies?

Per Florida's "pipeline rule," the disposition of a case on appeal should be made in accord with the law in effect at the time of the appellate court's decision rather than the law in effect at the time judgment was entered. *See Kemp v. State*, 2019 WL 3436887, *5 (Fla. 4th DCA July 31, 2019) ("[A]s an appellate court, we are required to follow the law in effect at the time of our decision. Therefore, . . . we apply the requirements of *Daubert* and section 90.702 to this appeal.").

As a practical matter, though, if the federal cases are any indication, what's good for the goose is typically good for the gander.

In most cases in which evidence was admissible under *Frye*, the courts of appeals concluded that it was also admissible under *Daubert* because, at least in theory, Rule 702 is a more liberal standard.

In most cases in which evidence was excludable under *Frye*, the courts concluded that it was also excludable under *Daubert* because *Daubert's* "reliability" component still requires the court to act as a gatekeeper.

If it's truly impossible to apply *Daubert* on the existing record, the court may vacate and remand for a new *Daubert* determination, and, if the outcome is the same, direct reinstatement of the judgment.

B. What's the standard of review for a preserved *Daubert* objection?

General Electric Co. v. Joiner, 522 U.S. 136 (1997): held that a trial court's decision to admit or exclude expert testimony under *Daubert* is reviewed for an abuse of discretion, just like any other evidentiary ruling.

Kumho Tire (1999): clarified that the abuse of discretion standard applies as much to the trial court's decisions about how to determine reliability as to its ultimate conclusion."

C. Preservation

As with any evidentiary error, you're going to have a hard row to hoe if all you're left with arguing is fundamental error, so, obviously, you have to object at the trial level (or the administrative level, *see SDI Quarry v. Gateway Estates Park Condominium Assoc.*, 249 So. 3d 1287 (Fla. 1st DCA 2018)).

"This Court has repeatedly held that absent a proper objection from the offended party, it is not an error for a trial court to admit evidence without a *Frye* hearing." *Taylor v. State*, 62 So. 3d 1101, 1118 (Fla. 2011) (and cases cited therein).

But even if you do object, you have to make sure you're making the right objection. *See United States v. Diaz*, 300 F. 3d 66, 75–76 (1st Cir. 2002) (reviewing for plain error defendant's challenge on appeal to the reliability of the experts' methodology when, at trial, he objected only to the experts' qualifications).

As with any motion in limine, if you object via motion in limine and the trial court initially defers ruling, make sure you make a contemporaneous objection at trial. *See Philip Morris USA Inc. v. Gore*, 238 So. 3d 828, 830 (Fla. 4th DCA 2018) (concluding that *Daubert* challenge was not preserved for appellate review because trial court deferred ruling on pretrial motion in limine and defendants failed to contemporaneously object to challenged testimony at trial).

Even if you manage to sneak in a late objection in the trial court, DCA might treat it as unpreserved. *See Rojas v. Rodriguez*, 185 So. 3d 710, 711–12 (Fla. 3d DCA 2016) (reversing trial court's grant of new trial based on post-trial *Daubert* objection and remanding for reinstatement of verdict after refusing to consider merits of objection).

XXV. Special Thanks

This outline was originally prepared for a presentation to the Hillsborough County Bar Association's 2019 Bench Bar conference. The presenters at the conference were 13th Circuit Judge Thomas N. Palermo, 2d DCA Judge Susan H. Rothstein-Youakim, and Middle District of Florida Bankruptcy Judge Catherine P. McEwen. Credit for helpful information in this outline belongs to the three of them. Errors belong to Judge Palermo.

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Finally, as part of her program for the William Reece Smith, Jr., Inn of Court program on February 25, 2020, Judge Rothstein-Youakim prepared an update on the latest Florida and Eleventh Circuit authority on the topic. Judge Palermo incorporated those cases into this updated version of the outline. Credit for the resulting improvements belong to her.

Judge Palermo is on the Thirteenth Judicial Circuit. His contact information and profile can be found on the Thirteenth Circuit's public website in its Judicial Directory (https://www.fljud13.org/JudicialDirectory.aspx).