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# 10 YEARS OF *DAUBERT* IN FLORIDA: REFLECTIONS AND TIPS FROM A LITIGATOR

By Saray N. Ravelo



In 2013, the Florida legislature passed section 90.702, Florida Statutes, which amended the evidence statutes and adopted the *Daubert* standard for expert testimony. Following the Florida Supreme Court's rejection of the *Daubert* standard and

the decision in *DeLisle v. Crane*,<sup>1</sup> the Court eventually adopted *Daubert* as a procedural rule in 2019.<sup>2</sup> The underlying *Daubert* decision and its progeny sought to ensure an expert "employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field."<sup>3</sup> By adopting section 90.702, the Legislature sought to prohibit "pure opinion testimony."<sup>4</sup>

As a litigator, I often wonder if Florida's passage of *Daubert* has made a difference. One of the potential impacts raised in legislative analysis prior to the passage of *Daubert* was "the number of pre-trial hearings needed."<sup>5</sup> Further, the new standard would require that judges become more familiar with scientific principles.<sup>6</sup> From my perspective, I agree that section 90.702 has increased the amount of pre-trial motions and hearings, especially in complex medical malpractice matters. I have also argued *Daubert* motions, which required the court to sift through incredibly complicated medical studies and articles. Despite the required legwork and expended time, it has also kept experts "honest" in expressing opinions with no scientific support. Further, *Daubert* has compelled experts to produce medical literature that supports their opinions. In my experience, if there is medical literature to support the expert's opinions and the *Daubert* challenge, the court may be inclined to deny the motion.

Here are some tips and things to keep in mind while considering and/or preparing a *Daubert* motion or objection:

- Work with your expert to identify areas of inquiry at the opposing expert's deposition, including any weaknesses in the expert's opinion and applicable medical literature.
- If applicable, analyze the medical literature to understand any medical studies in the area of testimony. If the expert's opinions contradict or are not supported by the medical literature, cite to the specific studies within your motion.
- Ensure that any *Daubert* motions or objections are timely raised.<sup>7</sup> Please note, some trial orders specifically set the deadline for filing and/or hearing of *Daubert* motions before trial.
- The *Daubert* motion or objection "must be directed to specific opinion testimony and state a basis for the objection beyond just stating she was raising a *Daubert* objection in order to allow opposing counsel an opportunity to have the [expert] address the perceived defect in his testimony."<sup>8</sup>
- Based on the motion, a hearing may not be required—the trial court has broad discretion as the gatekeeper.<sup>9</sup>
- Provide any applicable medical literature or studies to the court for review.

As *Daubert* passes its ten-year anniversary, I hope that experts, litigators, and the courts continue to honor the intent of section 90.702 and ensure the reliability of presented expert testimony.

Saray is an associate at Carlton Fields in Tallahassee. She handles professional liability matters, including medical malpractice, and uses her nursing training and interest in health care in defending physicians, nurses, and clinical laboratories. She also handles employment and commercial litigation matters.

## Endnotes

<sup>1</sup> *DeLisle v. Crane*, 258 So. 3d 1219 (Fla. 2018).

<sup>2</sup> *In re Amends. to Fla. Evid. Code*, 275 So. 3d 551 (Fla. 2019).

<sup>3</sup> *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 152 (1999).

<sup>4</sup> *Booker v. Sumter Cnty. Sheriff's Off./N. Am. Risk Servs.*, 166 So. 3d 189, 193 (Fla. 1st DCA 2015).

<sup>5</sup> Fla. H.R., HB 7015 (2013) Final Bill Analysis 3 (May 16, 2013).

<sup>6</sup> *Id.*

<sup>7</sup> See *Booker*, 166 So. 3d at 193 ("The failure to timely raise a Daubert challenge may result in the court refusing to consider the untimely motion.").

<sup>8</sup> *Id.* (internal quotation marks omitted).

<sup>9</sup> See, e.g., *United States v. Hansen*, 262 F.3d 1217, 1234 (11th Cir. 2001).



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