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Is It Time For Florida to Adopt Daubert and Reject Frye?

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Witnesses called to testify as "experts" are cloaked with prestige and authority, and positioned to exert heavy influence on juries. This is accentuated with areas of expert testimony that are highly technical or specialized. The U.S. Supreme Court recognized in *Daubert v. Merrell Dow Pharmaceuticals, Inc*., 509 U.S. 579, 595 (1993), that "[e]xpert evidence can be both powerful and quite misleading because of the difficulty in evaluating it."

In *Daubert*, the United States Supreme Court created a seismic shift in the test for the admissibility of expert testimony. *Daubert* held that Congress' adoption of the Federal Rules of Evidence displaces the general acceptance test and requires the federal trial judge to ensure that any expert testimony admitted is both reliable *and* relevant. The Court has also clarified that an expert's conclusions are not beyond the reach of the relevance/reliability test, and that the relevance/reliability test is not limited to the "scientific" and applies to all expert testimony. The Court has therefore given federal trial court judges the important responsibility of ensuring that expert testimony is based on reliable methodology and fits the facts of the case.

Florida, on the other hand, is among a shrinking minority of states still clinging to the antiquated *Frye* test. *See Frye v. United States*, 293 F. 1013, 1013-14 (D.C. Cir. 1923). This test does not provide trial judges with the legal tools for ensuring that "expert" witnesses are qualified and that their testimony is relevant, reliable and appropriate for a jury. Instead, the "test" is nothing more than a determination whether an expert's methodology is "generally accepted." This nebulous standard of "general acceptance" is not an adequate check on the integrity of expert evidence. The problem is compounded by Florida Supreme Court precedent holding that the *Frye* test applies only to a minority of cases involving expert testimony – those involving "new science." If an expert's testimony is based on science that the court does not deem "new" or derived from a field that is not traditionally "science," then the test is not even triggered. So-called "pure opinion" testimony purportedly based on an expert's overall experience is also beyond the reach of the *Frye* test.

This shortcoming in Florida jurisprudence undermines the integrity of the court system and quality of justice dispensed by trial courts. It also threatens to diminish the State's many advantages in attracting business, particularly in light of the fact that most states in the Southeast have already modernized their laws governing the admissibility of expert evidence, including Georgia by legislation enacted in 2005 and North Carolina by legislation effective as of October 1, 2011.

The Florida Legislature can and should solve this problem by statutorily adopting *Daubert* to place Florida on equal footing with most other jurisdictions and federal courts.

[Robert C. Weill has co-authored a full-length article advocating for the Florida Legislature's adoption of *Daubert* which will be published in the Nova Law Review in February 2012.]