HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 661 Expert Testimony
SPONSOR(S): Weinstein and others
TIED BILLS: **IDEN./SIM. BILLS:** SB 1220

	REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1)	Civil Justice & Courts Policy Committee		Crocker	De La Paz
2)	Criminal & Civil Justice Policy Council			
3)				
4)				
5)				

SUMMARY ANALYSIS

An expert witness is a person who has developed skills or knowledge in a particular subject, such that he or she may form an opinion that will assist the fact-finder. In evaluating whether testimony of a particular expert witness regarding new or novel scientific evidence will be admitted in a Florida court, the court looks to whether the underlying basic principles of the evidence are generally accepted within the scientific community. This standard is colloquially known as the *Frye* standard.

This bill rejects the current *Frye* standard and provides a three-part test to determine whether the expert testimony will be admitted in a particular case. This standard is commonly referred to as the *Daubert* standard (so named after the United States Supreme Court Case *Daubert v. Merrell Dow Pharmaceuticals*).

This bill may have a negative fiscal impact on state government expenditures. This bill does not appear to have a fiscal impact on local governments.

This bill takes effect on July 1, 2009.

HOUSE PRINCIPLES

Members are encouraged to evaluate proposed legislation in light of the following guiding principles of the House of Representatives

- Balance the state budget.
- Create a legal and regulatory environment that fosters economic growth and job creation.
- Lower the tax burden on families and businesses.
- Reverse or restrain the growth of government.
- Promote public safety.
- Promote educational accountability, excellence, and choice.
- Foster respect for the family and for innocent human life.
- Protect Florida's natural beauty.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Introduction

An expert witness is a person who, through education or experience, has developed skills or knowledge in a particular subject, so that he or she may form an opinion that will assist the fact-finder.[1] Prior to 1993, both Federal and Florida courts used the standard regarding the admissibility of scientific evidence in legal proceedings established in *Frye v. United States*[2] that provides "in order to introduce expert testimony deduced from a scientific principle or discovery, the principle or discovery must be sufficiently established to have gained general acceptance in the particular field in which it belongs."

The *Frye* General Acceptance Standard

In 1923, the District of Columbia Court of Appeals refused to allow into evidence a primitive lie detector test because it had not gained "general acceptance in the particular field in which it belong[ed]."[3] The court held that "in order to introduce expert testimony deduced from a scientific principle or discovery, the principle or discovery must be sufficiently established to have gained general acceptance in the particular field in which it belongs."[4] If the evidence is not deemed to be generally accepted, the court will not allow it into evidence, as it would be considered unreliable. This so-called "general acceptance" test eventually became the predominant method for allowing (or disallowing) scientific expert testimony into evidence until the U.S. Supreme Court rejected the *Frye* standard in *Daubert v. Merrill Dow Pharmaceuticals* in 1993.[5]

Federal Rules of Evidence

The Federal Rules of Evidence were formally promulgated in 1975. The Rules provide in relevant part that:

[1] Black's Law Dictionary, Eighth Edition (West Publishing Co. 2004).
[2] 293 F. 1013 (D.C. Cir.1923).
[3] *293 F.* at 1014.
[4] *Id.*
[5] 509 U.S. 579.

> 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, 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*.[6] (Emphasis added).

The emphasized language above was added to the rule in 2000 to reflect the Court's *Daubert* decision (and its progeny).

The *Daubert* Standard

The U.S. Supreme Court held in *Daubert* that Congress had changed the expert testimony admissibility standard in federal courts when it adopted the Federal Evidence Code in 1976.

In 1993, the United States Supreme Court decided *Daubert v. Merrell Dow Pharmaceuticals*.[7] The Court agreed with the contention that "the *Frye* test was superseded by the adoption of the Federal Rules of Evidence."[8] Throughout the case, the Court referred to various factors that could or should be used when determining the admissibility of scientific evidence. Among these are: Whether it has been empirically tested, whether it has been subjected to peer review and publication, its error rate, and its general acceptance (though the Court notes that this list is not all inclusive). This three part test is colloquially known as the *Daubert* standard.

Daubert is binding only on the Federal courts since it is an interpretation of the Federal Evidence Code. As such, it was up to the states to determine, individually, whether to adopt the "*Daubert* standard." The majority of states have chosen to become *Daubert* states, however, most of the larger populated states (where most litigation occurs) (e.g., Florida, California, New York) have continued to utilize the *Frye* standard.

Following *Daubert*, the Court further expanded on the new standard in two cases: *General Electric Co. v. Joiner*[9] and *Kuhmo Tire Co. v. Carmichael*[10]. In *Joiner*, the Court held that the proper standard of review for a *Daubert* issue was abuse of discretion, while in *Kuhmo Tire Co.*, the Court held that Rule 702[11] does not just apply to scientific evidence, rather it applies to all expert testimony. These three cases (*Daubert*, *Joiner*, and *Kuhmo Tire Co.* are colloquially known as the "*Daubert* Trilogy").

In 2000, the Supreme Court decided *Weisgram v. Marley*.[12] *Weisgram* reaffirmed the idea that an appellate or trial court judge could terminate litigation where essential expert testimony has been deemed to have been erroneously admitted. In *Weisgram*, the appellate court had directed a verdict in favor of the defendant, when the plaintiff's expert's testimony had been deemed to have been erroneously admitted. The plaintiff wanted the Court to order that the appellate court remand the case back to the trial court. Ginsberg, writing for a unanimous Court, stated:

> Since *Daubert*, moreover, parties relying on expert evidence have had notice of the exacting standards of reliability such evidence must meet. [Citations omitted]. It is implausible to suggest, post-*Daubert*, that parties will initially present less than their best expert evidence in the expectation of a second

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[6] Rule 702, Fed. R. Evid.
[7] 509 U.S. 579.
[8] *Id.* at 587.
[9] 522 U.S. 136 (1997).
[10] 526 U.S. 137 (1999).
[11] 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, 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*.[11] (Emphasis added). Rule 702, Fed. R. Evid.
[12] 528 U.S. 440 (2000).

> chance should their first try fail. We therefore find unconvincing Weisgram's fears that allowing courts of appeals to direct the entry of judgment for defendants will punish plaintiffs who could have shored up their cases by other means had they known their expert testimony would be found inadmissible.[13]

Florida Evidence Code

The Florida Evidence Code was established in 1979 and was patterned after the Federal Rules of Evidence. Section 90.102, F.S., provides that the Florida Evidence Code replaces and supersedes existing statutory or common law in conflict with its provisions. Section 90.702, F.S., relates to the admissibility of expert witness testimony and provides that:

> 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; however, the opinion is admissible only if it can be applied to evidence at trial.[14] [15]

The evidence code applies in both civil and criminal cases.

Florida Remains a *Frye* State

Florida's status as a "*Frye* state" has been unequivocally and consistently asserted by the Supreme Court.[16] This is so even after the promulgation and ultimate adoption of the Florida Evidence Code in the late 1970s. Florida's first Supreme Court case, post-*Daubert*, was *Flanagan v. State*,[17] wherein the Court noted that they were "mindful" of *Daubert* (and its holding that Fed. R. Evid. 702 superseded *Frye*), but that "Florida continues to adhere to the *Frye* test for the admissibility of scientific opinions."[18] Multiple opinions by the Court following *Flanagan* have reiterated this stance.[19]

In 2007, the Court decided *Marsh v. Valyou*,[20] its most recent ruling on the matter. In *Marsh*, the Court reaffirmed Florida's adherence to Frye, but held that *Frye* did not apply to the case at hand because the expert testimony at issue was not new or novel. The Court stated that "the Frye standard only applies when an expert attempts to render an opinion that is based upon new or novel scientific techniques. . . Therefore, we have recognized that Frye is inapplicable in the 'vast majority' of cases."[21]

In the concurring opinion of M*arsh*, written by Justice Anstead and joined by Justice Pariente, the justices agree with the majority that the expert testimony was admissible in the case before them. However, Justice Anstead states that "the *Frye* standard did not survive the adoption of Florida's Evidence Code."[22] He was concerned with the fact that the Court had never explained how *Frye* survived the adoption of the Evidence Code, and believes that the Evidence Code superseded *Frye*.[23] According to Justice Anstead the Code "was intended to apply a straightforward relevancy test to expert evidence and, in essence, to establish a rule favoring admissibility once relevancy was established, while leaving it to the fact-finder to determine the credibility and weight of such evidence."[24]

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[13] 528 U.S. at 455-456.
[14] Section 90.702, F.S.; Cf. to Rule 702, Fed. R. Evid.
[15] While the current code is not identical to the current federal rule, at the time the *Daubert* decision was handed down, the two were virtually indistinguishable.
[16] *See Marsh v. Valyou*, 977 So.2d 543 (Fla. 2007); *Ibar v. State*, 938 So.2d 451 (Fla. 2006); *Castillo v. E.I. Du Pont De Nemours & Co., Inc.*, 854 So.2d 1264 (Fla. 2003); *Spann v. State*, 857 So.2d 845 (Fla. 2003); *Murray v. State*, 692 So.2d 157 (Fla. 1997); *Hadden v. State*, 690 So.2d 573 (Fla. 1997); *Brim v. State*, 695 So.2d 268 (Fla. 1997); *Flanagan v. State*, 625 So.2d 827 (Fla. 1993).
[17] 625 So.2d 827 (Fla. 1993).
[18] *Id.* at 829, n. 2.
[19] *See supra*, note 15.
[20] 977 So.2d 543 (Fla. 2007).
[21] *Id.* at 547.
[22] *Id.* at 551 (Anstead, J. concurring).
[23] *Id.*
[24] *Id.*

Given that this is a concurring opinion with a total of two justices signing on to it, it has no binding authority.

Thus, as the law stands today, Florida uses the *Frye* general acceptance test for expert witness testimony. The Court's decisions, and consequently Florida's standard, can be summarized as follows:

- The proponent of the evidence bears the burden;
- The testimony must be shown, by a preponderance of the evidence, to be generally accepted in the relevant field;
- The standard only applies to new or novel scientific evidence;
- The standard does not apply to pure opinion testimony of an expert;
- The standard does not apply to the raw data used by the experts in reaching their conclusion; and
- The appellate standard of review of a *Frye* issue is de novo.

Effect of Bill

Expert Testimony Standard

The bill provides a standard that is more closely related to *Daubert* and the Federal Rules of Evidence than the current *Frye* standard utilized in Florida. The bill specifically provides a three part, conjunctive test to determine whether or not an expert may testify. An expert will be allowed to testify if all of the following three factors are satisfied:

- The testimony is based upon sufficient facts or data;
- The testimony is the product of reliable principles and method; and
- The witness has applied the principles and methods reliably to the fact of the case.

The bill also provides that the courts shall interpret and apply the above requirements, as well as s. 90.704, F.S., in accordance with the Federal *Daubert* test set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.* and its ilk.[25]

The effect of following *Daubert* would change, *inter alia*, the standard of review that appellate courts will use to determine an expert testimony issue (from de novo to abuse of discretion), the scope of what will be covered under a review (from only new or novel scientific evidence to all expert testimony), and the "pure opinion" exception to *Frye*.

Effective Date

This bill provides an effective date of July 1, 2009.

B. SECTION DIRECTORY:

Section 1 amends s. 90.702, F.S., relating to testimony by experts.

Section 2 provides an effective date of July 1, 2009.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

This bill does not appear to have a fiscal impact of state revenues.

[25] *General Electric Co. v. Joiner*, 522 U.S. 136 (1997); *Kuhmo Tire Co., Ltd. v. Carmichael* 526 U.S. 137 (1999); and *Weisgram v. Marley Co.*, 528 U.S. 440 (2000).

2. Expenditures:

The impact of this bill is indeterminate at this time. According to the State Courts Administrator, the fiscal impact of this legislation cannot be accurately determined due to the unavailability of data needed to establish the increase in judicial time resulting from the addition of new determinations the court must make related to expert testimony and opinions. (*See also* D. FISCAL COMMENTS, *infra*).

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

This bill does not appear to have a fiscal impact on local revenues.

2. Expenditures:

This bill does not appear to have a fiscal impact on local expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

This bill does not appear to have a fiscal impact on the private sector.

D. FISCAL COMMENTS:

Interested parties have expressed their belief that this new standard will result in an increase in judicial time for the required pre-trial hearing to hear and rule on whether to admit or exclude expert testimony and to set forth the findings of fact and conclusions on which the order is based.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not appear to require counties or municipalities to take any action requiring expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

The Florida Supreme Court has, on numerous occasions, adopted legislation, revisions, and amendments regarding the Florida Evidence Code.[26]

IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES

[26] See *In re Fla. Evidence Code*, 372 So. 2d 1369 (Fla. 1979) (adopting Evidence Code to the extent it is procedural), clarified, *In re Florida Evidence Code*, 376 So. 2d 1161 (Fla 1979); see also *Florida Bar re Amendment of Fla. Evidence Code*, 404 So. 2d 743 (Fla. 1981); *In re Amendment of Fla. Evidence Code*, 497 So. 2d 239 (Fla. 1986) (adopting amendments to Code to the extent they are procedural); *In re Florida Evidence Code*, 638 So. 2d 920 (Fla. 1993) (same); *In re Florida Evidence Code*, 675 So. 2d 584 (Fla. 1996) (same).