



# THE *DAUBERT* STANDARD

# Purpose of Workshop

- ▶ “Qualifying a Witness as an Expert Using the *Daubert* Standard”
  - The focus is not about qualifications of expert
  - The focus is on the admissibility of the expert’s opinion



# Pronunciation of “Daubert”



- ▶ Michael H. Gottesman, Jason Daubert's attorney reports that Daubert and his family do not affect the French pronunciation, which would be sounded similar to "dough–bear" /doʊ'beər/. Rather, they pronounce their family name in the same manner as Dow–Burt/'daʊbɜrt/.
- ▶ The popular use of the French pronunciation may have arisen from Gottesman refraining from correcting the justices during oral argument before the Supreme Court.

# The *Daubert* Standard



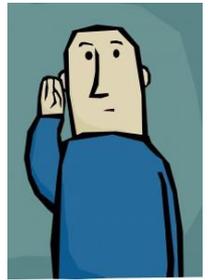
- ▶ On July 1, 2013, Florida Rule of Evidence 90.702 was amended to reflect Federal Rule of Evidence 702.
- ▶ This is referred to as the “Daubert standard,” following the United States Supreme Court Case *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

Ta-da!  
Here's my  
opinion.

Daubert liberalized  
the admission of expert  
opinions, but that doesn't  
mean you can pull your  
opinion out of  
thin air.



# Florida Rule of Evidence 90.702



- ▶ The language of Florida Rule of Evidence 90.702 (2013) is as follows:
- ▶ 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

# Breakdown:

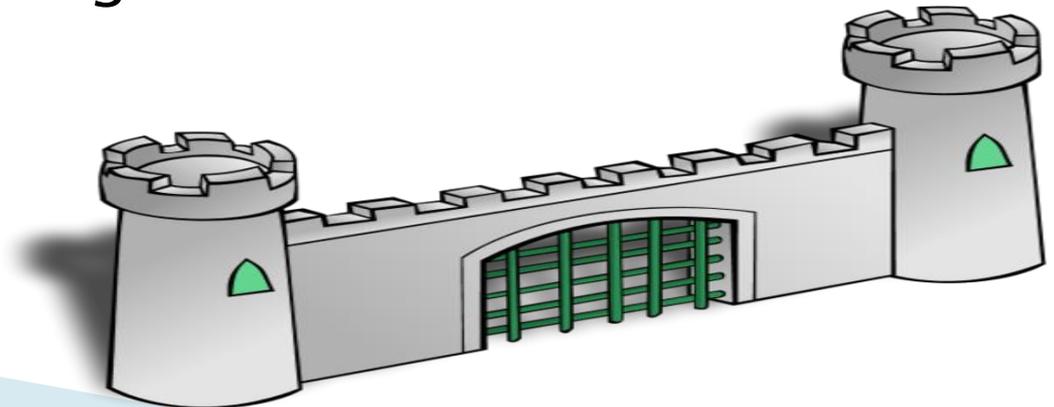
## General Questions to Keep in Mind

- ▶ Is there a principle? What is it?
  - Theories, Origins, Reliability of principle
- ▶ Is there a method? What is it?
- ▶ Did you use that method?
- ▶ How does one apply the method?
- ▶ How did you apply the method to this case?
  - Facts and data



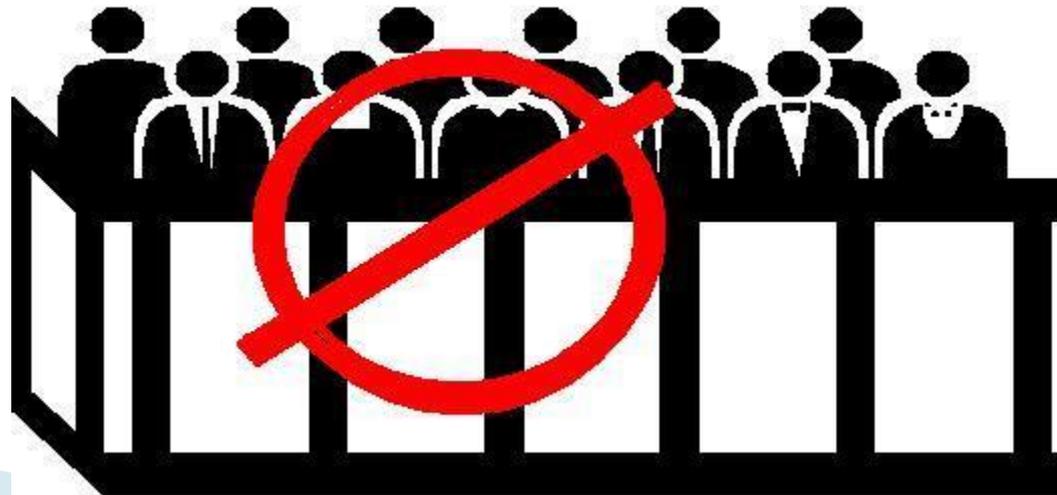
# The Gatekeeper

- ▶ *Daubert* essentially charged trial court judges with the duty as gatekeepers to keep out unreliable expert testimony and was concerned with scientific testimony.
- ▶ *Daubert* provided a four prong test for trial courts to use in assessing the reliability of scientific expert testimony, though it is not an exclusive list.



# Jury Trials versus Bench Trials

- ▶ Those barriers are even more relaxed in a bench trial situation, where the judge is serving as factfinder and we are not concerned about “dumping a barrage of questionable scientific evidence on a jury.” *Allison v. McGhan Med. Corp.*, 184 F.3d 1300, 1310 (11th Cir.1999); *see also id.* (recognizing that the jury “would likely be even less equipped than the judge to make reliability and relevance determinations and more likely than the judge to be awestruck by the expert’s mystique”). There is less need for the gatekeeper to keep the gate when the gatekeeper is keeping the gate only for himself [sic].



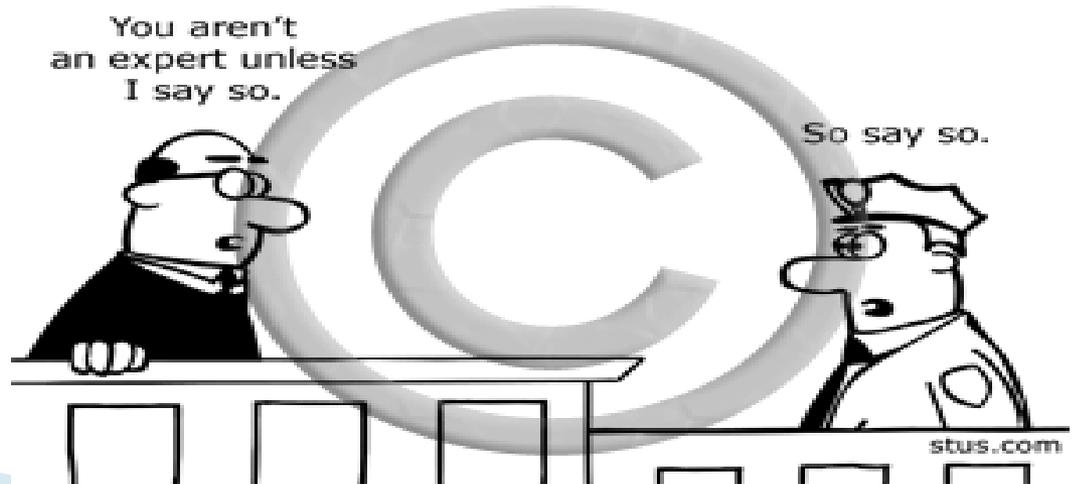
# The Bench

- ▶ A fundamental aspect of the *Daubert* test is the “gatekeeper” role of the Judge in deciding what evidence is to be presented as to not prejudice the trier of fact. When there is no jury and the Court itself is the trier of fact, Courts are to “relax *Daubert’s* application” *David E. Watson, P.C. v. US*, 668 F.3d 1008, 1015 (8<sup>th</sup> Cir.2012).



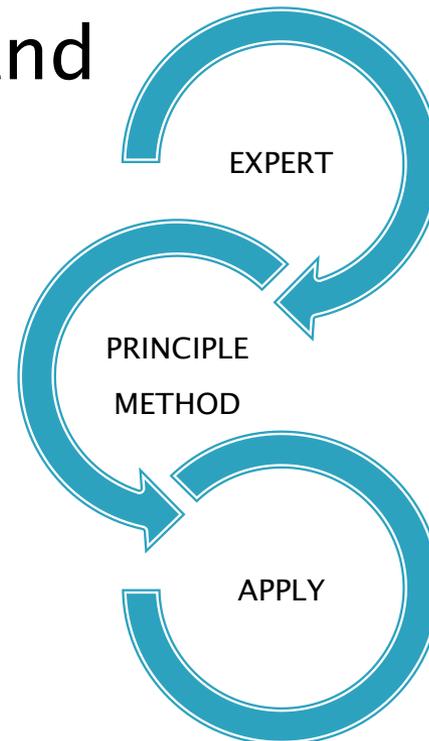
# The Purpose of the Standard

- ▶ What *Daubert* and other federal cases are most concerned about is an expert who expresses an opinion and supports it primarily with “I know it when I see it.”
- ▶ That is not a reliable basis for expert testimony
- ▶ The trial court's gatekeeping function requires more than simply “taking the expert's word for it.” Fed R. Evid. 702.



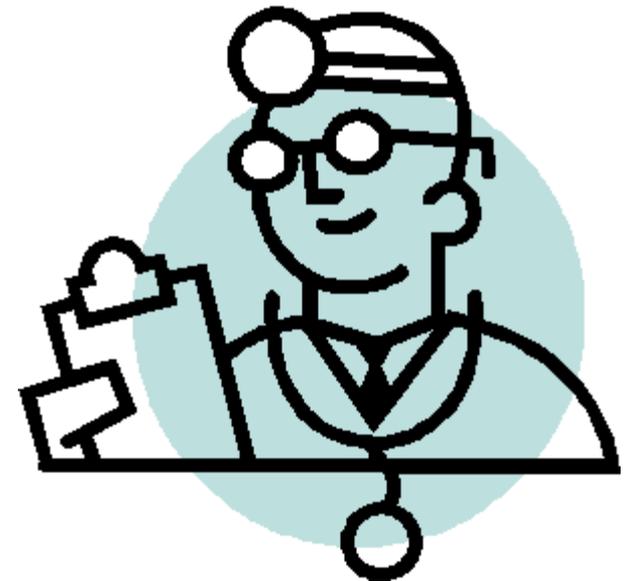
# In other words...

- ▶ Step 1 is show they are an expert, but to meet the *Daubert* standard, we must go on to Step 2 the application of the expertise
- ▶ An EXPERT must explain the PRINCIPLE, METHOD and the APPLICATION of that method to the case at hand



# Example of an Expert Who Did NOT Pass the *Daubert* Test

- ▶ *Perez v. Bell South Telecommunications, Inc.*, 2014 WL 1613654 (Fla.App. 3 Dist.)
  - In *Perez*, the treating physician was unable to explain the basis of his opinion, explaining that there was no literature or study to back up his opinion, and admitted there was no way of knowing the cause of injury to the patient.



# Flexible and Nuanced Approach

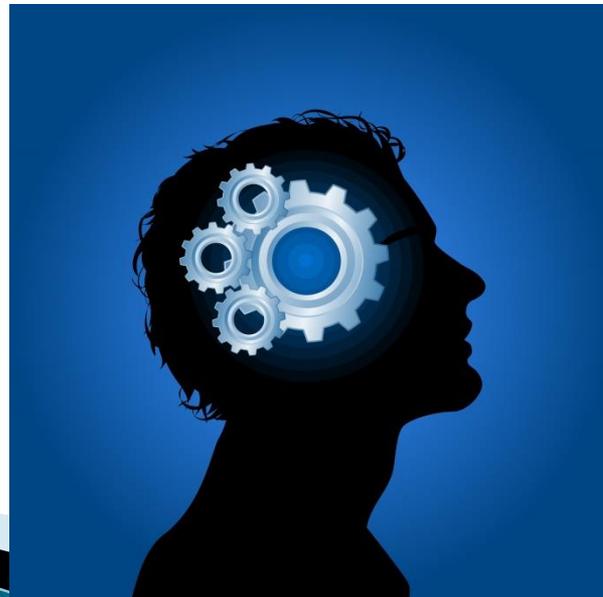


- ▶ The standard of review regarding each element of the *Daubert* test has often been misinterpreted to create a draconian, set list of criterion which must be met in some capacity by the witness and the evidence presented by the witness in order for the testimony to be admissible expert testimony.

**WRONG!**

# Flexible and Nuanced Approach

- ▶ The U.S. Supreme Court explained, when it expanded the *Daubert* principal to all areas of expertise in *Kumho Tire Co., Ltd. v. Carmichael*, 526 US 137, 150 (1999), that a **flexible and nuanced** approach to the requirements detailed in *Daubert* is necessary.



# KUMHO:

## FLEXIBLE & NUANCED APPROACH

- ▶ In *Kumho*, the Court clarified that satisfaction of all four *Daubert* factors is not required, and the scope of the requirements has clearly been expanded to include disciplines not of a scientific nature.
- ▶ The Court in *Kumho* held that these factors might also be applicable in assessing the reliability of nonscientific expert testimony, depending upon “the particular circumstances of the particular case.” *Kumho Tire Co., Ltd. v. Carmichael*, 526 US 137, 150 (1999).

# What about experience?

- ▶ Courts have further found that in certain fields, experience is the predominant, if not sole, basis for a great deal of reliable expert testimony.



# Experience:

- ▶ The *Daubert* court notes that if the witness is relying solely or primarily on experience, then the witness 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.

# HARD v. “Soft/social” Sciences

- ▶ In *Tyus v. Urban Search Mgmt*, 102 F.3d 256, 263 (7th Cir. 1996)., the Court of Appeals for the Seventh Circuit stated:

*Daubert’s* “framework for assessing expert testimony is applicable to social science experts, just as it applies to experts in the hard sciences.”

# People Business



- ▶ We are in the people business, so we tend to deal with **social sciences** more than **hard sciences**.
  - **SOFT/SOCIAL SCIENCE EXPERT EXAMPLES:**
    - Mental Health
    - Domestic Violence Evaluators
    - Sex Offender Evaluators
  - **HARD SCIENCE EXPERT EXAMPLES:**
    - Lab technician (drug screens)

# Soft/Social Sciences

- ▶ Courts have acknowledged that it can be troubling to apply these standards to fields of social science.
- ▶ “Notwithstanding these difficulties, however, social science testimony is an integral part of many cases, ranging from employment discrimination actions, to family law matters, to criminal proceedings. As such, whether it is hard to do or not, courts must apply the rules of evidence to these experts as faithfully as they can.” *United States v. Hall*, 93 F.3d 1337, 1343 (7th Cir. 1996)

# Is peer review required?

- ▶ *NO – peer review is NOT required*
  - *Kumho* relaxed the peer review standard by holding that the court needs to approach each situation relating to each specialization.



# Practical Application

- ▶ Fact pattern
- ▶ How to qualify the expert?
- ▶ How to disqualify the expert?



# HYPOTHETICAL #1

- ▶ David (age 2) is placed with a foster family who now wish to adopt him. The Department brought a petition to terminate parental rights. However, the mother signed consents to an adoption entity and selected a different adoptive family. The adoption entity has been permitted to intervene in the child's dependency case based on the consent and a favorable home study of the family selected by the mother.
- ▶ One of the factors the trial court must consider under the statute is "the child's bonding with any prospective adoptive home the child resides in."
- ▶ A psychologist, Dr. Vivian Wise, conducted a bonding assessment: she obtained a history and observed the child with the foster family and determined that the child is attached to the foster parents and that it would be harmful to his mental and emotional health and development to remove him from their care.
- ▶ At the best interest hearing, the adoption entity's attorney stipulate to Dr. Wise's expertise as a psychologist but asserts the methods she employed are not reliable under the *Daubert* standard.

# HYPOTHETICAL #1 - EXPERT IN BONDING ASSESSMENTS

- ▶ PRINCIPLE:
- ▶ METHODS:
- ▶ APPLICATION:



**E X P E R T**

# HYPOTHETICAL #2

- ▶ A petition has been filed to terminate the parental rights of five-year-old Carla's father, Michael Smith. Carla came into care and was adjudicated dependent based on being exposed to domestic violence between her parents, with her father being the perpetrator.
- ▶ Mr. Smith received a DV certificate of completion, but, from the point of view of the instructor, he did not learn how to apply the tools taught by the program in order to prevent further domestic violence.
- ▶ The TPR petition lists grounds that the father failed to substantially comply with the case plan to the extent the circumstances which caused the creation of the case plan have been significantly remedied to the extent that the well-being and safety of the child will not be endangered upon the child's remaining with or being returned to the child's parent.
- ▶ The DV instructor is called as an expert.

# HYPTHETICAL #2 – DV EXPERT

- ▶ PRINCIPLES
- ▶ METHODS
- ▶ APPLICATION



# Reliability

- ▶ “All evidentiary decisions are reviewed under an abuse-of-discretion standard”, *Gen. Elec. Co. v. Joiner*, 522 US 136, 141 (1997).



# How to meet the reliability part of the standard?

- ▶ The court in *Brown v. Crown Equip. Corp.*, 181 S.W.3d 268, 275 (Tenn. 2005) held:

“A trial court... may conclude that an expert's opinions are reliable 'if the expert's conclusions are sufficiently straightforward and supported by a 'rational explanation which reasonable [persons] could accept as more correct than not correct.’”



# Take home message:

- ▶ *Daubert* objections require a great deal of **witness preparation**
  - The witness knows the information, but needs to be prepared to explain the principle, method, and application.
    - Is there a principle? What is it?
      - Theories, Origins, Reliability of principle
    - Is there a method? What is it?
    - Did you use that method?
    - How does one apply the method?
    - How did you apply the method to this case?
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