

Expert Opinion Testimony in Florida – Navigating the Mine Field
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I – Introduction

The construction of a structure, even a relatively simple one, is an endeavor that brings together dozens of entities with widely disparate disciplines, each of which must share a common vision to accomplish the common goal. The developer, architect, civil, structural, mechanical, landscaping, lighting and low voltage engineers all must come together with the contractor and a dozen or more trade contractors to make real and tangible what the owner envisioned. Truly a fertile field for miscommunications, errors, fumbles, misunderstandings and disappointed expectations. Timely and cost sensitive projects depend on so many different talents being brought to bear in a coordinated fashion that disputes are hard to avoid.

Construction disputes arise in a number of circumstances: fights over the time and cost of the project as a whole, disconnections between the designers and the builders, conflict between a general contractor and one or more of its subcontractors or internecine battles among subcontractors. Even if all the construction professionals work well together and with the developer, a project where the developer is not the end user has still more areas for potential conflict. A unit owner controlled board of a condominium association or the public entity owner of a P3 project may have claims that unify the construction professionals or result in a complex web of finger-pointing. Latent defects, manifesting years after the project participants believe they've heard the last of a job, may call to the fore issues and concerns long since thought put to bed.

Construction, being such a complicated, lengthy and expensive undertaking, gives rise, in many instances, to disputes that are almost always technical to some extent. Plans, specifications, design criteria, shop drawings, erection drawings, schedules which compare planned and actual performances and voluminous contemporaneously created job records all enter into the resolution of construction disputes. Construction damage analysis, too, frequently involves analysis of turgid construction accounting documents, concepts and applications, subject to varying interpretations. Thus, more than most fields of commercial dispute resolution, construction related disputes inevitably involve expert investigation, analysis and testimony.

II – Expert Testimony

The successful presentation of a construction related dispute requires great forethought (and frequent re-evaluation) in identifying areas of the dispute which require expert testimony and, for those areas, the selection of the appropriate witness, their preparation, formulation of and basis of their opinions and qualification to testify. In reality, there are two distinct types of experts: the traditional retained expert – brought to the project for forensic rather than construction purposes and the project-affiliated person, who, because of their education, training and experience, can include in their testimony their lay opinion on subjects at issue.

Often, however, project personnel already on the job, have the expertise appropriate for the presentation of evidence. That superintendent, project manager, foreman or project executive may be qualified to offer lay opinion testimony critical for a favorable outcome. Being on the project, and having personally perceived the specific circumstances at issue may result in that person being allowed to testify in the form of opinion – despite any formal education, training or licensing in the pertinent discipline.

One may not need to retain an outside expert for some purposes. However, where project personnel do not have the skills necessary to evaluate and opine on certain evidence, a retained expert, appropriately qualified, will be allowed to opine on issues germane to the resolution of the dispute. Given the forensic nature of the retained expert's involvement, these retained experts are subject to challenge before their opinion may ever be uttered.

As such, caution is warranted, whether building a case around either the lay opinion witness or retained opinion witness. Where a challenge to the witness' qualifications, underlying data, testing methods or analytical techniques is sustained by the fact-finder, an entire case can crumble. Preparation for the threshold challenge that one must survive before the witness can opine begins when the case walks in the door – and does not end until the witness finally utters her opinion before the fact finder.

Most often, practitioners retain forensic experts, otherwise unconnected to the project, to opine on issues pertinent to the dispute. Authority for such testimony derives from Florida Statutes, Section 90.702: **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.

Distinct from opinions offered by retained experts are lay opinion, offered by project personnel knowledgeable about the subject matter of the dispute. Thus, Florida Statutes, Section

90.701, **Opinion Testimony of Lay Witnesses**, authorizes a lay witness to testify in the form of opinion where the testimony meets two important conditions:

(1) The witness cannot readily, and with equal accuracy and adequacy, communicate what he or she has perceived to the trier of fact without testifying in terms of inferences or opinions and the witness's use of inferences or opinions will not mislead the trier of fact to the prejudice of the objecting party; and

(2) The opinions and inferences do not require a special knowledge, skill, experience, or training.

III – Lay Opinion Testimony

A retained expert witness is different than a lay witness, including a lay witness permitted to provide opinion testimony, because an expert, qualified by “knowledge, skill, education or training” testifying from “sufficient facts” applying “reliable principles and methods” can rely on otherwise inadmissible facts or data to form his or her expert opinion. On the other end of the spectrum, a witness without specialized knowledge or training, may testify in the form of opinion or inference where communication by that witness would be more accurate or understandable when presented as opinion or inference. This is contrary to the general rule that a witness may testify only to the facts that they observed, and are prohibited from making inferences or opinions based upon those facts. *See Jones v. State*, 32 So. 793, 795 (Fla. 1902) (stating, “[i]t is the province of the jury to deduce its own conclusion from facts of common experience, uninfluenced by the opinion of any witness on those fact . . .”). Thus, lay opinion testimony is admissible where it is based on what the witness has personally perceived. *Fino v. Nodine*, 646 So. 2d 746, 748 (Fla. 4th DCA 1994) (citing § 90.701, Fla. Stat. (1991); *Nationwide Mut. Fire Ins. Co. v. Vosburgh*, 480 So. 2d 140 (Fla. 4th DCA 1985)). As a predicate, however, the witness must testify to the facts or perceptions upon which he or she will base the opinion or

inference. *Fino v. Nodine*, 646 So. 2d 746, 749 (Fla. 4th DCA 1994) (citing *Beck v. Gross*, 499 So. 2d 886, 889 (Fla. 2d DCA 1986), *rev. dismissed by* 503 So. 2d 327 (Fla. 1987)). The witness must have had sufficient time to perceive the facts upon which his or her opinion or inference is based. *Id.* (citing *Albers v. Dasho*, 335 So. 2d 150, 153 (Fla. 4th DCA 1978), *cert. denied*, 361 So. 2d 831 (Fla. 1978)). It must be “manifestly impossible” to communicate those facts or perceptions to the trier of fact without the use of an inference or opinion. *See Hughes v. Canal Ins. Co.*, 308 So. 2d 552, 554 (Fla. 3d DCA 1975) (quoting, “[t]hrough opinion evidence as a general rule is not admissible, still when the facts are such, that it is manifestly impossible to present them to the jury with the same force and clearness as they appeared to the observer, then opinion is admissible as to the conclusions and inferences to be drawn therefrom.” *Altvater v. Battocletti*, 300 F.2d 156 (4th Cir. 1962)). Additionally, the relevance of lay opinion testimony must outweigh, “the danger of unfair prejudice, confusion of issues, or misleading the jury” *Robinson v. State*, 982 So. 2d 1260, 1261 (Fla. 1st DCA 2008) (citing *State v. Meador*, 674 So. 2d 826, 836 (Fla. 4th DCA 1996)) (holding, ultimately, that the result of a horizontal gaze nystagmus test – administered to determine the extent of impaired faculties – is not be properly admitted as a lay observation because it is scientific evidence requiring the explanation of an expert).

Second, lay opinion testimony is inadmissible if it requires special knowledge, skill, experience, or training not possessed by the testifying lay witness. § 90.701(2), Fla. Stat. (2014). The Florida Supreme Court has interpreted this language: “[l]ay witness opinion testimony is admissible if it is within the ken of an intelligent person with a degree of experience.” *Floyd v. State*, 569 So. 2d 1225, 1232 (Fla. 1990) (citing *Peacock v. State*, 160 So. 2d 541, 542-43 (Fla. 1st DCA 1964)). Distilled further, lay opinion testimony must be, “within the permissible range

of lay observation and ordinary . . . experience.” *Reynolds v. State*, 99 So. 3d 459, 478 (Fla. 2012) (quoting *Floyd v. State*, 569 So. 2d 1225, 1232 (Fla. 1990)).

Of course, there is nothing that would preclude a lay witness, such as a project executive who happens to be a licensed engineer or such and who otherwise meets the requirements of § 90.702 from being qualified to testify in the form of opinion. She would not be disqualified from testifying simply by virtue of the fact that she worked on the project about which she is offering an opinion, so long as she applies appropriate principles to sufficient data.

IV – Distinctions between Experts and Other Witnesses

Experts cannot offer an opinion that is within the common knowledge and experience of a reasonable person. *See Mills v. Redwing Carriers, Inc.*, 127 So. 2d 453, 456 (Fla. 2d DCA 1961) (stating, “The opinion of an expert should be excluded where the facts testified to are of a kind that do not require any special knowledge or experience in order to form a conclusion, or are of such a nature that they may be presumed to be within the common experience of all men moving in ordinary walks of life.”). An expert may, “give an opinion on any disputed issue if the expert has specialized knowledge that will assist the trier of fact in resolving that issue.” *Linn v. Fossum*, 946 So. 2d 1032, 1036 (Fla. 2006).

Importantly, unlike other witnesses, retained experts are permitted to rely on otherwise inadmissible facts or data to form his or her opinion. *Linn v. Fossum*, 946 So. 2d 1032, 1036 (Fla. 2006) (citing § 90.704, Fla. Stat. (2005)). This is an evolution from the original rule that required that the opinion of an expert be based on facts in evidence, or within his knowledge. *See Linn v. Fossum*, 946 So. 2d 1032, 1037 (Fla. 2006) (citing *Cirack v. State*, 201 So. 2d 706, 709 (Fla. 1967)). Now the rule allows, “[i]f the facts or data are of a type reasonably relied upon by experts in the subject to support the opinion expressed, the facts or data need not be admissible in

evidence.” § 90.704, Fla. Stat. (2014). This expansion is intended to allow experts to rely upon generally accepted industry knowledge or, in certain instances discussed *infra*, even opinions of other experts with knowledge of the subject matter.

V – Circumstances Calling for Expert Testimony in Construction Cases

Unlike other types of civil litigation, construction disputes do not typically have a single discrete issue upon which the question of liability turns. Commonly, too, is the involvement of many parties. An owner whose project was delivered later than expected and over budget may assert a claim against its contractor. The contractor may, itself have claims for the added expense it incurred by being on the project longer and by incurring more costs than it anticipated. Both the owner and contractor may look to the architect, who may, in turn, look to its sub-consultant engineers. Subcontractors, sub-subcontractors and suppliers are often brought into the dispute and, with them, builders risk insurers, contractor default insurers, liability insurers and sureties. Sub-contractors may, themselves, have cross-claims. All of these parties need to sort through issues of direct and vicarious liability.

Even where the design and construction techniques are properly implemented, faulty construction administration can cause project participants to incur additional or unforeseen expenses. Delays in responding to Requests for Information, uncoordinated drawings of disciplines whose work must fit together, failure or refusal to consider change order requests and delayed or inadequate funding of construction draws can lead to disputes that require the specialized expertise of a construction professional to understand and explain to the lay fact finder.¹

¹ Where the forum for dispute resolution is arbitration before a single arbitrator or panel of arbitrators, the fact finder may have specialized expertise that may alter the calculus in deciding whether and which experts to call. Moreover, the rules of evidence (and the gate keeping

At the same time that theories of liability are being conceived, articulated, developed, tested and prepared for presentation, so, too, must practitioners look to proving or disproving claimed damages. Damages are, in many instances, the subject of contractual agreement, whether liquidating certain types of damages, waiving others or requiring indemnity on still others. Beyond the imposition of contractual provisions on the determination of the types of recoverable damages, is the calculation of those damages. Quite often, that calculation (and challenging that calculation) requires the fact finder to understand the fundamentals of construction accounting and the nuances which can dramatically impact a calculation. Concepts of direct and indirect damages arise in the context of construction disputes and must not only be explained, but identified, characterized and considered.

Even after sorting through the issues to determine which are legal (for which testimony, including opinion testimony is improper, as presenting a pure question of law for the Court), one must then determine which of the factual issues require expert testimony to assist the trier of fact in, first understanding the technical components of construction implicated by the dispute and then applying the construction principles to the underlying facts so as to reach a reasoned decision.

Expert testimony may assist the trier of fact in establishing whether a circumstance, which added time or cost to the completion of a project was the result of defective design, defective scheduling or sequencing of work, defective materials, defective construction, defective maintenance or some, all or none of these possibilities. “Scientific, technical, or other specialized knowledge” is, in those circumstances, quite necessary for “the trier of fact [to] understand[] the evidence or in determin[e] a fact in issue.”

obligation of a trial judge) may not pertain. Consideration of expert testimony in arbitration is therefore, beyond the scope of this discussion.

Expert testimony may assist in assigning and apportioning shared responsibility for a defect among multiple parties. It may provide insight into the standard of care in design or construction administration, the determination and pricing of an appropriate fix for a problem, as well as insight into potential mitigations of damage which either should have been undertaken or which would have limited otherwise recoverable damages. Disputes over the propriety, timing and pricing of disputes over change orders require the insight of construction professionals.

Standards of care and the responsibility of inspectors, whether governmental, private or statutory (special and threshold inspectors) can be implicated in the labyrinth of a construction dispute.

Claims for delay, whether by the project owner or the project participants who find themselves engaged in a job longer than anticipated are particularly difficult for a fact finder to determine without the benefit of expert testimony. Fundamentals of schedule analysis, impact of severe weather and identification and consideration of force majeure lend themselves to expert testimony.

Even projects without disputes over the quality or timing of the actual construction may devolve into battles over construction accounting requiring expert help. Many construction professionals, let alone lay fact finders, do not understand the calculus in a final accounting of a project where the basis of compensation is Cost Plus a Fee with a Guaranteed Maximum Price (“GMP”). An end-of-project audit must be completed which requires considerations of what is included and excluded in determining the Cost of the Work, what changes in scope and adjustments to the Fee are appropriate and which impact the initial GMP. Then the Cost of the

Work Plus Fee (as adjusted) must be compared to the Adjusted GMP to determine the amount the project owner must pay to the contractor.

Another fertile source of disagreement is the responsibility of a “construction manager” who is hired in lieu of a general contractor. What are the implications of the CM being “at risk” or “as agent” in the context of a problem job.

Construction is a complicated process that is not normally within a layman’s ordinary understanding. Clearly, a juror or judge without prior knowledge of construction needs to be educated, starting with the particular vocabulary of the concepts in dispute, proceeding through the most basic concepts to the engineering (whether design, construction, scheduling or accounting) so that the fact finder has a proper framework with which to receive, categorize and evaluate the evidence that will be presented. Beyond an attorney’s rudimentary introduction during opening statement, experts – both lay and retained – carry that burden.

Before the attorney congratulates herself on spotting, identifying and preparing to address the myriad issues in a construction dispute – and hiring experts to explain the most complicated concepts in the simplest and most convincing terms to an unsophisticated fact-finder, she must make sure that the opinions of those experts actually gets to be heard.

VI – The Gatekeeper

The most articulate, convincing expert is of little use if she is not permitted to testify. The outcome of an entire case can depend on whether the court permits an expert’s testimony. In 1993, the Supreme Court articulated the “gatekeeping” function of a trial judge when expert opinion testimony is offered. *Daubert v. Merrell Down Pharmaceuticals, Inc.*, 509 U.S. 579, 592-93 (1993). Unless the trial judge is satisfied that the expert testimony meets minimum standards of reliability and relevance, the expert will not be permitted to testify. In discharging

this “gatekeeping” function, the trial court is given broad discretion to determine the subject on which an expert may testify in a particular trial. *Angrand v. Key*, 657 So. 2d 1146, 1148 (Fla. 1995) (citing *Town of Palm Beach v. Palm Beach County*, 460 So. 2d 879 (Fla. 1984)). Unless the trial court is shown to have abused its discretion, its decision will not be disturbed on appeal. *See Angrand v. Key*, 657 So. 2d 1146, 1148 (Fla. 1995) (citing *Town of Palm Beach v. Palm Beach County*, 460 So. 2d 879, 882 (Fla. 1984)); *See also General Elec. Co. v. Joiner*, 522 U.S. 136, 141 (1996). Of course, the trial court’s discretion is not boundless; to maintain consistency with section 90.702, trial courts should admit only expert testimony that will assist the trier of fact in determining a factual issue. *See Angrand v. Key*, 657 So. 2d 1146, 1149 (Fla. 1995).

The threshold question in the trial court’s determination of the admissibility of expert testimony is whether the expert is qualified. The Florida Supreme Court has delineated expert qualification: “[an expert] must have acquired such special knowledge of the subject matter about which he is to testify, either by study of the recognized authorities on the subject or by practical experience, that he can give the jury assistance and guidance in solving a problem to which their equipment of good judgment and average knowledge is inadequate.” *Rowe v. State*, 163 So. 2d, 24 (Fla. 1935). As such, expert testimony is inadmissible unless the witness has expertise in the field about which he is testifying. *See Husky Industries, Inc. v. Black*, 434 So. 2d 988, 992 (Fla. 4th DCA 1983) (stating, “it is apodictic that expert testimony is not admissible at all unless the witness has expertise in the area in which his opinion is sought.”) (citing *Kelly v. Kinsey*, 362 So. 2d 402 (Fla. 1st DCA 1978)); *see also Upchurch v. Barnes*, 197 So. 2d 26 (Fla. 4th DCA 1967) (stating that an expert must show that he has acquired special knowledge of a given subject matter by either education, training, or experience, citing *Rowe v. State*, 163 So. 22

(Fla. 1935)); *Mills v. Redwing Carrier, Inc.*, 127 So. 2d 453, 456 (Fla. 2d DCA 1961) (stating that an expert must be skilled in the subject matter of the inquiry).

Once the trial court is satisfied with the expert's qualification, the court's next determination is the expert testimony's relevance to the factual issue before the court, and its reliability. *Daubert, supra.* at 592 (holding, "under the Rules the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable.")² First, the court assesses whether the expert's testimony can be properly applied to the facts at issue. *Daubert v. Merrell Down Pharmaceuticals, Inc.*, 509 U.S. 579, 593 (1993). An expert's testimony is relevant if it helps the trier of fact understand a factual issue. *Daubert v. Merrell Down Pharmaceuticals, Inc.*, 509 U.S. 579, 591 (1993) (stating, "Rule 702 further requires that the evidence or testimony 'assist the trier of fact to understand the evidence or to determine a fact in issue.' This condition goes primarily to relevance.")³

Second, the court assesses whether the theory underlying the testimony is scientifically valid. *Daubert v. Merrell Down Pharmaceuticals, Inc.*, 509 U.S. 579, 592-93 (1993). An expert's testimony must have a "reliable basis in the knowledge and experience of his discipline."

² The Supreme Court applies the basic gatekeeping obligation established in *Daubert* to all expert testimony, not just to "scientific" testimony. *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 147 (1999). The Court noted that there is, "no relevant distinction between 'scientific' knowledge and 'technical' or 'other specialized' knowledge." 526 U.S. 137, 147 (1999). Instead, the key to admissible expert testimony, "is to 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." 526 U.S. 137, 152 (1999).

³ It is important to note that Florida Statutes, Section 90.703 cautions that testimony in the form of an opinion or inference otherwise admissible is not objectionable because it includes an ultimate issue to be decided by the trier of fact. However, not all expert opinions including issues of material fact are admissible. *See Town of Palm Beach v. Palm Beach County*, 460 So. 2d 879, 882 (Fla. 1984) (stating, "section 90.703 does not imply the admissibility of all opinions. If the witness' conclusion tells the trier of fact how to decide the case, and does not assist it in determining what has occurred, then it is inadmissible.").

Daubert v. Merrell Down Pharmaceuticals, Inc., 509 U.S. 579, 592 (1993). The reliability analysis established by the court in *Daubert* is flexible and considers the following circumstances: (1) Can or has the theory underlying the testimony been tested? (2) Has the theory been subject to peer review or been published? (3) Are there standards that control the theory? (4) Is the theory “generally accepted?” *Daubert v. Merrell Down Pharmaceuticals, Inc.*, 509 U.S. 579, 593-94 (1993). The focus of this inquiry, as the *Daubert* court stressed, is on the principles and methodology used, not on the conclusions that they generate. *Daubert v. Merrell Down Pharmaceuticals, Inc.*, 509 U.S. 579, 595 (1993).

Although the Florida Supreme Court initially rejected applying *Daubert* in favor of *Frye* (See: *Marsh v. Valyou*, 977 So.2d. 543 (Fla. 2007), after the Florida legislature amended the Evidence Code, it has been made clear that *Daubert* does, in fact, apply in Florida. *Perez v. Bell South Telecommunications, Inc.*, 138 So.3d 492 (Fla. 3rd DCA 2014).

The *Daubert* factors differ from the original reliability inquiry, which was established in *Frye v. United States*, 293 F. 1013 (App. D.C. 1923). Prior to *Daubert* and the Federal Rules of Evidence, and under *Frye*, “scientific evidence is admissible only if the principle upon which it is based is sufficiently established to have general acceptance in the field to which it belongs.” *Frye v. United States*, 293 F. 1013, 1014 (App. D.C. 1923). Under *Frye*, pure opinion testimony was not objectionable. The new analysis, as codified in *Daubert*, is consistent with the Federal Rules of Evidence. Now, “general acceptance” is one factor to be considered among the many, but it is not dispositive. See *Daubert v. Merrell Down Pharmaceuticals, Inc.*, 509 U.S. 579, 594 (1993) (“A ‘reliability assessment does not require, although it does permit, explicit identification of a relevant scientific community and an express determination of a particular

degree of acceptance within that community.’” (citing *United States v. Downing*, 753 F.2d 1224, 1238 (3d Cir. 1985)).

The trial court is also given wide discretion in how it weighs the *Daubert* factors to determine the reliability of the expert’s theory. See *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 152 (1999) (stating, “the trial court must have the same kind of latitude in deciding *how* to test an expert’s reliability . . . as it enjoys when it decides *whether or not* that expert’s relevant testimony is reliable.” (emphasis in original)). The policy underlying the *Daubert* factors – which is, “to 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” – is integral to the court’s reliability analysis. *Daubert v. Merrell Down Pharmaceuticals, Inc.*, 509 U.S. 579, 592 (1993). However, as previously mentioned, the trial court’s discretion is not boundless and not every determination of admissibility requires analysis under the factors delineated in *Daubert*; the court is not forced to weigh the reliability of evidence under the *Daubert* factors. See *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 152 (1999) (“a trial court should consider the specific factors identified in *Daubert* where they are reasonable measures of the reliability of expert testimony.”).

VII – What does “scientifically valid” mean in the context of a construction case?

Construction techniques and processes are not readily susceptible to scientific testing, peer review or even a widely accepted body of literature. While there certainly are exceptions, it is often difficult to fit the type of expert called upon to explain the construction process at issue into a neat *Daubert*-type test. 1) Can or has the theory underlying the testimony been tested? Typically, the “testing” is in the field in other construction projects rather than in a controlled

experiment under laboratory conditions. (2) Has the theory been subject to peer review or been published? Many theories pertinent to construction expertise have been published, However, as to peer review, with the exception of highly technical fields, like fracture-critical analysis, calculation of loads or other precise engineering concepts, generally the answer is “no”. For example, there has yet to be developed a generally accepted, peer-reviewed technique for schedule analysis. Certainly there are recognized methods (measured-mile, window, collapsed as-built), each of these has their short comings and critics. (3) Are there standards that control the theory? Again, standards exist in certain segments of the industry (American Institute of Steel Construction, American Concrete Institute, OSHA, etc.), but there are no authoritative studies for construction means and methods, sequencing or submittal administration (4) Is the theory “generally accepted?” Doesn’t that depend, in our industry, on who you ask?

Thus, construction law practitioners are left to struggle to fit a square peg (a reliable expert who really does know a lot about which she is about to opine and whose opinions are based on a significant history of experience) into a round hole (a strict *Daubert* analysis). Thus, in the context of a construction case, “scientifically valid” must use “scientific” loosely. Was the expert’s methodology valid? The answer should be yes, so long as it is based on sound and accepted construction practices, which would certainly include appropriate investigation, testing, evaluation and analysis of the appropriate samples.

To get past the gate-keeper in a construction dispute, an expert intending to offer an opinion should be able to explain what she was asked to do, why she is qualified to accomplish that task, why the manner of how she went about the task was appropriate, why the data used in accomplishing her task was dependable and why her methodology of analyzing the data is

reliable. At that point, the gate-keeper should be satisfied that the opinion about to be rendered is reliable and based upon sound principles, even if not presented in a strict *Daubert* formula.

VIII – Limitations on Expert Witness Testimony

Hearsay

Section 90.704 Florida Statutes provides:

The facts or data upon which an expert bases an opinion or inference may be those perceived by, or made known to, the expert at or before the trial. If the facts or data are of a type reasonably relied upon by experts in the subject to support the opinion expressed, the facts or data need not be admissible in evidence. Facts or data that are otherwise inadmissible may not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

By this statute, an expert is entitled to rely on what would otherwise be hearsay. For example, a scheduling expert typically derives his opinion or inferences from reviewing contemporaneous project records. These records may include a daily report prepared by a project participant. The daily report may be hearsay, but because it is “of a type reasonably relied upon by experts in the subject”, it will be permitted to provide a basis for a testifying expert’s opinion. It must be noted that the daily report itself will not be admitted into evidence (without overcoming the hearsay nature, either through a hearsay exception – business record – or predicate such as testimony by its author).⁴ See also *Daubert*, 526 U.S. at 152; *Hungerford v. Mathews*, 511 So. 2d 1127, 1129

⁴ The 2013 amendment to Section 90.704 does not change this result. Indeed, it bolsters it. The amendment did not modify the second sentence which makes explicit that where: “facts or data are of a type reasonably relied upon by experts in the subject to support the opinion expressed, the facts or data need not be admissible in evidence.” Rather, the amendment added a third sentence which indicates that in a jury trial, the inadmissible facts or data themselves are, only in limited circumstances, received into evidence. This sentence, along with the retention of the

(Fla. 4th DCA 1987) (“An expert may render an opinion that is based upon facts and data that have not been admitted or are even inadmissible as hearsay, as long as ‘that kind of hearsay is relied upon during the practice of the experts themselves when not in court.’” (citing Ehrhardt, Florida Evidence, § 704.1, at 411-412 (2d ed. 1984))). Typically, a testifying surgeon may rely upon opinions of radiologists, pathologists and other specialists in forming her own opinion. Because surgeons routinely rely on the reports of these other physicians, their reliance in court in expressing their own opinion is not objectionable.

One Expert as Conduit for Another’s Opinion

An expert may not be used as a conduit for inadmissible evidence. More specifically, “‘where the expert’s actual opinion parallels that of the outside witness [or evidence], then the outside witness should be produced to testify directly.’” *Smithson v. V.M.S. Realty, Inc.*, 536 So. 2d 260, 262 (Fla. 2d DCA 1988) (quoting *Sikes v. Seaboard Coastline R.R.*, 429 So. 2d 1216, 1223 (Fla. 1st DCA 1983)). The expert cannot “‘serve merely as a conduit for the presentation of inadmissible evidence.’” *Smithson*, 536 So. 2d at 262; *see also Feldman v. Villa Regina Ass’n*, 89 So. 3d 970 (Fla. 3d DCA 2012) (holding that an appraiser who had no expertise or experience in construction contracting, and thus had no competency to analyze construction contracts, could not base his opinion upon a contractor’s cost estimate); *but see Gomez v. Couvertier*, 409 So. 2d 1174 (Fla. 3d DCA 1982) (where a general contractor was allowed to rely on the bids of its subcontractors in opining on a cost to correct defective work). In sum, the ultimate determination of whether an expert is acting as a conduit for inadmissible evidence parallels the determination of whether the evidence relied upon by the expert in the formation of an opinion is the type of information that is generally relied upon in the regular course of the expert’s business.

second sentence, makes clear that experts may opine from analyzing facts or data that is otherwise inadmissible.

A clear example of a testifying expert improperly attempting to act “bolter” or as a conduit for the opinion of a non-testifying expert occurs in a circumstance where a general contractor, testifying as to the cost to correct or complete a component of electrical work, but who has no expertise in the pricing of such work, simply inquired of an electrical contractor that electrical contractor’s opinion as to the cost. In such an instance, the testifying expert really has no opinion; rather, he is simply parroting the opinion he obtained from another. It should not be permitted.

A contrary example may be where an engineer opines on the cost to correct a defective condition. That engineer collects bids from a number of qualified specialty contractors for that defective work, analyzes them along with other industry pricing data and, thereafter, evaluates all the information obtained from all the sources, in formulating her own opinion as to cost. Her opinion would be admissible.

The key distinction in the two examples is that in the first instance, the testifying expert did not form an opinion, he simply recited the opinion of another. In the second example, the expert testified as to her own opinion.

Questions of Law

An expert cannot opine on questions of law because interpretation of the law is reserved for the court. For example, in *Seibert v. Bayport Beach and Tennis Club Ass’n, Inc.*, the District Court of Appeal for the Second District of Florida held that an expert should not be allowed to testify concerning questions of building code interpretation because such presented a question of law. 573 So. 2d 889, 891 (Fla. 2d DCA 1990). In *Seibert*, two experts presented conflicting opinions pertaining to building code interpretation in an effort to aid the jury in deciding whether specific means of egress were designed in compliance with the Standard Building Code. 573 So.

2d 889, 891 (Fla. 2d DCA 1990). The court agreed that expert testimony is permissible if scientific, technical, or other specialized knowledge will help the trier of fact understand the evidence or determine a factual issue. *Seibert v. Bayport Beach and Tennis Club Ass'n, Inc.*, 573 So. 2d 889, 891 (Fla. 2d DCA 1990). Additionally, the court found that expert testimony is, “allowed to explain the character of an object in order to determine if it complies with a statute, ordinance, or code.” *Seibert v. Bayport Beach and Tennis Club Ass'n, Inc.*, 573 So. 2d 889, 891 (Fla. 2d DCA 1990) (citing *Noa v. United Gas Pipeline Co.*, 305 So. 2d 182 (Fla. 1974); *Grand Union Co. v. Rocker*, 454 So. 2d 14 (Fla. 3d DCA 1984); *Chimeno v. Fontainebleau Hotel Corp.*, 251 So. 2d 351 (Fla. 3d DCA 1971)). However, the court found that the experts did not testify to the character of the exits, but instead offered opinions pertaining to the way in which the Standard Building Code should be interpreted, which amounted to reversible error. *See Seibert v. Bayport Beach and Tennis Club Ass'n, Inc.*, 573 So. 2d 889, 891 (Fla. 2d DCA 1990) (stating, “[i]t was the duty of the trial court to interpret the meaning of the code and instruct the jury concerning that meaning. Any conflicts in interpretation were for the court to resolve and their resolution was not a jury issue.”).

IX – The Daubert/Kumho Analysis Does Not Pertain to Lay Opinion Testimony

Lay opinion testimony is not as highly scrutinized as expert testimony. The *Daubert* Court quotes Judge Weinstein: “Expert evidence can be both powerful and quite misleading because of the difficulty in evaluating it. Because of this risk, the judge in weighing the possible prejudice against probative force under Rule 403 of the present rules exercises more control over experts than over lay witnesses.” 509 U.S. at 595 (citing Weinstein, 138 F.R.D. 632, 632 (1991)). This means that the trial judge enjoys a greater level of discretion as the gatekeeper of expert testimony because of the expert’s ability to prejudice the trier of fact, which is why the court in

Daubert proposed a four-factor analysis different than the analysis for the admissibility of lay opinion testimony.

The analysis for the determination of the admissibility of a lay opinion is incompatible with the threshold question in *Daubert*. In *Daubert*, the first question in the analysis is whether the expert will testify to scientific knowledge. Inversely, one condition necessary to the admissibility of a lay opinion is: “the opinions and inferences do *not* require a special knowledge, skill, experience, or training.” § 90.701, Fla. Stat. (2014). If the trial court determines that a lay witness’s testimony does not require special knowledge, skill, or training, then it is admissible as a lay opinion and an analysis under *Daubert* is unnecessary. An affirmative determination under section 90.701 precludes a *Daubert* analysis.

This makes sense as the lay witness is testifying from personal knowledge and involvement, not from the point of view of a forensic investigator. Permitting the lay witness to testify in the form of opinion is simply an accommodation in recognition of the fact that the knowledge the witness can impart can best be expressed in the form of opinion or inference. That witness, being part of the project is not subject to the same scrutiny as one hired by a party for the purpose of assisting the litigation over a dispute.

X – Case Management and Disclosure of Experts

If the circuit in which a particular construction dispute is being litigated has a division dedicated to complex business cases, more likely than not, construction cases will qualify and either be initially assigned to that division or certainly qualify to be transferred to that division. The number of parties, complexity of the subject matter, amount in controversy and discovery logistics all warrant special handling of this species of commercial litigation.

Whether or not the case is assigned to a Complex Business Division with its own rules of procedure (which typically track the federal rules), the careful construction practitioner should be

mindful of requirements, whether set forth in a standing rule or case management order pertaining to obligations of the parties to disclose the identity of their experts, their opinions and bases therefore. Are written reports required? Are rebuttal experts required to be disclosed (is your expert truly a rebuttal expert)? What is the order of expert disclosure? Are they to be disclosed simultaneously or serially, with those parties seeking affirmative relief disclosing first and those parties defending only in response?

What rights of inspection and destructive testing do defense experts have? How are these rights balanced against the needs of a project owner where there is an emergency? What communications with experts are protected from disclosure and are draft reports required to be kept and produced?

These questions and a host of others must be considered early in the case so that both the client and the expert witness can implement protocols that will insure compliance with court orders.

A final critical issue is whether to depose experts. Many practitioners depose every expert (and every fact witness) as a matter of practice. Is this truly necessary or advisable in the case of an expert? Consider that most of the evidence in a construction case derives from the contemporaneous project record – not witnesses impressions, recollections and observations recalled in a deposition months or years after the fact. If the expert provided a report and her testimony will be limited at trial to what was addressed in the report, is there a purpose to the deposition? Is the expert simply being provided insight into the adversary's method of cross-examination? Also, note that expert's depositions are always admissible in evidence, even if the witness is otherwise available. If one does decide to depose an expert, he would be well-advised to keep in mind that the deposition may be read (or the video of the deposition played) to the

fact-finder in lieu of a live appearance – so that the deposition should include a full cross-examination – just in case.

XI – Conclusion

The decision as to whether experts are needed in a particular case is an important one that should be considered at the very early stages of a construction dispute. The scope of likely required expert testimony should be analyzed and the project personnel evaluated with an eye to identifying potential lay witnesses who can provide valuable opinion testimony. Thereafter, as needed, retained, forensic experts should be located, vetted, prepared, and briefed on the importance of limiting communications which, in the case of testifying experts, are discoverable in most cases.⁵

Experts should be provide access to the project itself, pertinent project information (as determined by the expert, not the lawyer) and the project personnel (people, places and things) so that the expert’s qualifications and methodology will pass muster with the gatekeeper.

Construction cases are different animals. They call for special handling at every stage, including the use of experts. Be careful out there.

⁵ In an appropriate case, consider retaining an expert who, from the very beginning, is never intended to testify. That expert’s records, advise and mental impressions will be protected from disclosure as work product. That expert may prove extremely valuable in uncovering weaknesses in one’s own case and developing and exploiting weaknesses in the adversary’s case.