

## MEDICAL DEFENSE AND HEALTH LAW

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### IN THIS ISSUE

*The Florida Supreme Court recently surprised onlookers in its decision to decline to adopt proposed amendments governing the admissibility of expert witness testimony. In so doing, Florida appears to now be in the small minority of states that will continue to apply the Frye standard of admissibility, rather than Daubert, which is currently used by the federal courts and 36 states. The Court's decision was based on "grave constitutional concerns" that the proposed amendments diminished the right to a jury trial and denied access to the courts.*

### Declining to Raise Its Standards? The Florida Supreme Court Rejects the *Daubert* and Same Specialty Amendments

#### ABOUT THE AUTHORS



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#### ABOUT THE COMMITTEE

The Medical Defense and Health Law Committee serves all members who represent physicians, hospitals and other healthcare providers and entities in medical malpractice actions. The Committee recently added a subcommittee for nursing home defense. Committee members publish monthly newsletters and *Journal* articles and present educational seminars for the IADC membership at large. Members also regularly present committee meeting seminars on matters of current interest, which includes open discussion and input from members at the meeting. Committee members share and exchange information regarding experts, new plaintiff theories, discovery issues and strategy at meetings and via newsletters and e-mail. Learn more about the Committee at [www.iadclaw.org](http://www.iadclaw.org). To contribute a newsletter article contact:



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*The International Association of Defense Counsel serves a distinguished, invitation-only membership of corporate and insurance defense lawyers. The IADC dedicates itself to enhancing the development of skills, professionalism and camaraderie in the practice of law in order to serve and benefit the civil justice system, the legal profession, society and our members.*

Legislative Changes at Issue

1) The *Daubert* Amendment:

Until 2013, Florida was in the minority of states that continued to use the *Frye* standard of admissibility for scientific expert evidence. In 2013, the Legislature passed, and Governor Rick Scott signed in to law, HB 7015, codifying *Daubert* and amending sections 90.702 and 90.704, Florida Statutes (2012), to mirror the standard found in Federal Rule of Evidence 702.

Under Article V, Section 2 of the Florida Constitution, the Florida Supreme Court is vested with the sole authority to adopt “rules for the practice and procedure in all courts.” The Florida Bar’s Code and Rules of Evidence Committee (“the Committee”) advises the Court on whether to adopt procedural changes to Chapter 90, Florida Statutes. The Committee voted 16-14 to recommend that the Court not adopt the proposed amendments to sections 90.702 and 90.704 of the Florida Evidence Code (“the *Daubert* Amendment”).

*Daubert* proponents argued that legislation governing the qualifications of expert witnesses is a substantive policy issue that is under the jurisdiction of lawmakers. *Daubert* opponents argued that this was a procedural issue that fell exclusively within the ambit of the Florida Supreme Court’s rulemaking authority.

2) The Same Specialty Amendment:

In 2012, the Florida Legislature amended section 766.102 to require “standard of care” expert witnesses in medical malpractice cases to practice in the same specialty as the defendant. Before then, standard of care experts were required to practice in the “same or similar” specialty as the defendant, which proved to be a challenging line for the courts to grapple with drawing.

The Committee also voted 24-0-1 to recommend that the Court not adopt chapter 2013-108, section 2, Laws of Florida (“the Same Specialty Amendment”), which amended section 766.102, (Medical negligence; standards of recovery; expert witness), Florida Statutes (2012), to require standard of care expert witnesses in medical negligence actions to specialize in the same specialty as the health care providers against whom or on whose behalf the testimony is offered.

“The Committee and commenters in this case contend that requiring a standard-of-care expert witness to specialize in the same specialty, rather than the same or similar specialty, as the health-care provider against whom or on whose behalf the testimony is offered has ‘a chilling effect on the ability to obtain expert witnesses,’ making it more difficult for a victim of medical negligence to bring a medical malpractice action.” *In Re: Amendments to the Florida Evidence Code*, No. SC16-181, 10 (Feb. 16, 2017). Based on this concern, the Court felt that the Same Specialty Amendment limited access to courts

and was prejudicial to the administration of justice.

#### The Court's Reasoning

The Florida Constitution vests the judicial branch with the sole authority to promulgate procedural rules to be followed in Court. The Legislature has the sole authority to promulgate substantive law. The major issue before the Court in deciding whether to adopt the *Daubert* Amendment and the Same Specialty Amendment was whether the admission of testimony is procedural in nature.

The Court explained that it is its "policy to adopt, to the extent they are procedural, the provisions of the Florida Evidence Code as they are enacted and amended by the Legislature." *In Re: Amendments to the Florida Evidence Code, No. SC16-181*, 2 (Feb. 16, 2017). However, the Court "declined to adopt legislative changes to the Evidence Code because of significant concerns about the amendments, including concerns about the constitutionality of an amendment." *Id.* The Court explained that it had "grave constitutional concerns" about the *Daubert* and same specialty amendments, including the possibility that they could restrict citizens' access to courts and right to a jury trial. *Id.* The Court felt that the proposed amendments had the potential of imposing too high of a hurdle for plaintiffs to overcome, which would drag out pretrial litigation to the detriment of low income plaintiffs, making litigation less practical and denying access to the courts. *Id.* Similarly, the Court expressed concerns that

the right to a jury trial was diminished by the amendments because they enabled the trial judge to weigh the evidence, rather than the jury. *Id.*

#### The Impact of the Court's Ruling

The Court overruled these proposed legislative amendments "to the extent that [they are] procedural," but the true impact of its decision will not be known until the Court as a proper case or controversy before it. While the ramifications of this decision remain uncertain, Justice Ricky Polston's dissent echoed the sentiments of many puzzled practitioners who are unpersuaded by these "grave constitutional concerns" given that the *Daubert* standard has been routinely applied by the federal courts since the U.S. Supreme Court decision in *Daubert v. Merrell Dow Pharmaceuticals Inc.* in 1993. Justice Polston wrote "Has the entire federal court system for the last 23 years as well as 36 states denied parties' rights to a jury trial and access to courts?" Justice Polston asked. "Do only Florida and a few other states have a constitutionally sound standard for the admissibility of expert testimony? Of course not."

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