PROCEDURES FOR SCHEDULING F.S. 90.702
("*DAUBERT*[1]") TYPE HEARINGS IN DIVISION CV-E

Hearing time requested by Counsel for motions entitled "*Daubert* Motions", matters related to *Daubert* or any other expert witness issues, or Motion(s) to Exclude Novel Opinion(s) of Expert(s) shall be treated as requests for a "*Daubert* Hearing" pursuant to Florida Statute 90.702.

Hearings to determine the admissibility of opinion testimony by experts must be heard prior to the Pre-Trial Conference and can be time consuming. By statutory definition these hearings will be evidentiary in nature. Therefore, testimony will probably be required.[2] However, the Court has discretion in whether a hearing is required and how to conduct any proceedings.[3] The Court has the discretion to conduct a paper review only, a hearing with argument, an evidentiary hearing, or defer ruling until the time of trial. In any event, sufficient hearing time will have to be set aside within the Court's extremely busy docket, and, therefore, once scheduled, such hearings will not be continued without a court order. **ALL HEARINGS OF THIS NATURE MUST BE SCHEDULED AND HEARD AT LEAST THIRTY (30) DAYS PRIOR TO THE PRE-TRIAL CONFERENCE.**

Accordingly, the following procedures and considerations are hereby set forth to inform and govern counsel raising any expert witness issues:

1. Counsel for the parties shall familiarize themselves with all of the provisions of the *Order Setting Case for Trial and Pre-Trial Conference and Requiring Matters to be Completed Prior to Pre-Trial Conference* entered by this Court, including the specific provisions governing "*Daubert* or other expert witness issues."

2. Although the Court has broad discretion in deciding how to manage its *Daubert* gatekeeper function,[4] counsel have an obligation to raise a *Daubert* challenge as soon as the party is reasonably aware of the basis for it.[5] Absent "exceptional circumstances," an untimely *Daubert* motion will not be considered by the Court.[6] After filing the *Daubert* motion, the moving party has an obligation to advance the motion by bringing it to the Court's attention and timely seeking a hearing. The Court shall consider the failure to do so a waiver.[7]

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[1] *Daubert v. Merrill Dow Pharmaceuticals, Inc.* 509 U.S. 579; 113 S. Ct. 2786; 125 L. Ed. 469 (1993).
[2] Video-conferenced testimony can be utilized if coordinated with other counsel and approved by the Court.
[3] *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 152 (1999).
[4] *See Booker v. Sumter County Sheriff's Office/North America Risk Services*, 166 So. 3d 189, at 192 (Fla. 1st DCA 2015).
[5] *Id.*; *Rojas v. Rodriquez*, 185 So. 3d 710, at 711-12 (Fla. 3d DCA 2016) (noting that the trial judge reversed for excluding expert testimony when the objecting party did not raise the *Daubert* challenge timely).
[6] *Rojas*, 185 So. 3d at 712. *See also Feliciano Hill v. Principi*, 439 F. 3d 18, 24 (1st Cir. 2006) (noting that parties are obligated to object to expert testimony in a timely fashion, so that the expert's proposed testimony can be evaluated with care); *Alfred v. Caterpillar Inc.*, 262 F. 3d 1083, 1087 (10th Cir. 2001) (holding that because *Daubert* "contemplates a gatekeeping function, not a gotcha junction," untimely *Daubert* motions should be considered only in rare circumstances); *Club Car Inc. v. Club Care (Quebec) Import, Inc*., 362 F. 3d 775, 780 (11th Cir. 2004) (explaining that a *Daubert* objection not raised before trial may be rejected as untimely).
[7] *See Booker*, 166 So. 3d at 193.

3. A *Daubert* challenge shall not begin until a timely, proper, and facially sufficient motion is served. Once timely raised, the Court as the gatekeeper "must determine whether the objection was sufficient to put opposing counsel on notice so as to have the opportunity to address any perceived defect in the expert's testimony."[8] A proper *Daubert* motion must identify the source, substance, and methodology of the challenged testimony.[9] If the motion is not supported by conflicting expert testimony and literature, the Court shall be justified in declining to hear the motion.[10] "*Daubert* objections must be directed to specific opinion testimony and 'state a basis for the objection beyond just stating [the party] was raising a *Daubert* objection, in order to allow opposing counsel an opportunity to have the [expert] address the perceived defect in his testimony.'"[11]

4. Generally, in most cases, the *Daubert* challenge will focus on one or more of the following major areas:

a. ***Qualifications*:** The expert must demonstrate knowledge "beyond the understanding of the average person."[12] A witness can be qualified as an expert by "knowledge, skill, experience, training, or education." [13]

b. ***Relevance and Helpfulness*:** The expert testimony is relevant if it will "help"[14] or "assist the trier of fact in understanding the evidence or in determining a fact in issue."[15] "Rule 702's 'helpfulness' standard requires a valid scientific connection to the pertinent inquiry as a precondition to admissibility."[16] This "connection" has been appropriately denominated as "fit."[17]

c. ***Fit:*** The Court, in performing its "gatekeeper" role of screening of such expert testimony, is required to analyze whether there is "too great an analytical gap between the data and the opinion proffered,"[18] and may not accept opinion evidence that is connected to existing data only by the *ipse dixit* of the expert (i.e. "because I said so").[19] "'Fit' is not always obvious, and scientific validity for one purpose is not necessarily scientific validity for other, unrelated purposes."[20]

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[8] *See id.*; *Tanner v. Westbrook*, 174 F. 3d 542, 546 (5th Cir. 1999), *superseded in part by rule on other grounds in Mathias v. Exxon Corp.*, 302 F. 3d 448, 459 n. 16 (5th Cir. 2002).
[9] *Booker*, 166 So. 3d at 193.
[10] *Id.*; *See also Rushing v. Kansas City Ry.,* 185 F. 3d 496, 506 (5th Cir. 1999), *superseded by statute on another ground as noted in Mathias*, 302 F. 3d at 459 n. 16.
[11] *Booker*, 166 So. 3d at 193.
[12] 4 Weinstein's Federal Evidence §702.03(1).
[13] Fla. Stat. §90.702.
[14] Fed. R. Evid. 702.
[15] Fla. Stat. §90.702(a).
[16] *See Daubert*, 509 U.S. at 591-592.
[17] *Allison*, 184 F. 3d at 1312 (citing *Daubert*, 509 U.S. at 591).
[18] *See Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997).
[19] *Id.*
[20] *Daubert*, 509 U.S. at 591.

d. ***Reliable Methodology:*** *Daubert* set forth the following **non-exclusive** factors, checklist or considerations for trial courts to use in assessing the reliability of scientific expert testimony: (1) whether the expert's technique or theory can be or has been tested --- that is, whether the expert's theory can be challenged in some objective sense, or whether it is instead simply a subjective conclusory approach that cannot reasonably be assessed for reliability; (2) whether the technique or theory has been subject to peer review and publication; (3) the known or potential rate of error of the technique or theory when applied; (4) the existence and maintenance of standards and controls; and (5) whether the technique or theory has been generally accepted in the scientific community.[21] *Daubert* makes clear that the factors it mentions do **not** constitute a "definitive checklist or test."[22] The *Daubert* court emphasized that the "inquiry envisioned by Rule 702 is…a flexible one."[23] "It's overarching subject is the scientific relevance and reliability-of the principles that underlie a proposed submission. The focus, of course, must be on principles and methodology, not on the conclusions that they generate."[24] The U.S. Supreme Court has concluded that "we can neither rule out, nor rule in, for all cases and for all time the applicability of the factors mentioned in *Daubert*, nor can we now do so for subsets of cases categorized by category of expert or by kind of evidence."[25] "[T]oo much depends upon the particular circumstances of the particular case at issue."[26] In addition to the non-exclusive reliability factors set forth in *Daubert*,[27] the Federal Rules of Evidence Advisory Committee outlined and summarized Federal caselaw before and after *Daubert,* finding other non-exclusive factors relevant in determining whether expert testimony is sufficiently reliable to be considered by the trier of fact in the Notes to Fed. R. Evid. 702. In addition, *The Reference Manual on Scientific Evidence Third Edition*[28] *published in 2011* by The Federal Judicial Center can assist the parties in identifying disputed scientific areas or issues and facilitate the process of narrowing the issues concerning the basis of expert evidence, including additional possible reliability factors the Court may consider.

5. Once a timely, proper, facially sufficient, case-specific and expert-specific *Daubert* motion or motion related to other expert witness issues such as qualification(s) or opinion(s) has been filed and served on opposing counsel pursuant to the *Order Setting Case for Trial and Pre-Trial Conference and Requiring Matters to be Completed Prior to Pre-Trial Conference*, counsel shall comply with the specific provisions of the "Division CV-E Policies

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[21] *Id.* at 593-594.
[22] *Id*. at 593.
[23] *Id.* at 594.
[24] *Id*. at 594-595.
[25] *Kumho Tire,* 526 U.S. at 150 (1999).
[26] *Id*.
[27] *Daubert*, 509 U.S. at 593-594.
[28] See Division CV-E website: https://www.jud4.org/ex-parte-dates-judge-s-procedures/duval-judges; "SciMan3D01.pdf". Federal Judicial Center Reference Manual on Scientific Evidence (3d Ed. 2011), *available at https://www.fjc.gov/sites/default/files/2015/SciMan3D01.pdf.*

and Procedures"[29] related to this motion, including but not limited to, the "Meet and Confer" Requirements (Section III. L. and M.). Counsel shall meet and confer pursuant to said "Meet and Confer" Requirements (Section III. L. and M.) of the "Division CV-E Policies and Procedures" to resolve any issues or objections to the admissibility of expert opinion testimony. Pursuant to said "Meet and Confer" Requirements provisions a "Certificate of Compliance" (See Exhibits "A" and "B" to "Division CV-E Policies and Procedures") that the conference has occurred shall be included in the Notice of Hearing filed with the Court.

6. If the expert witness matter is not resolved at the meet and confer, the attorneys for the parties shall discuss and provide the Court the following basic information[30] within a joint pre-evidentiary hearing stipulation[31] for the *Daubert* hearing.

a. a list of the experts that will be the subject of the hearing;
b. a copy of the detailed resume or CV of each expert witness;
c. the specific subject matter about which the witness is expected to testify;
d. each opinion the expert is expected to provide at trial about which there is a challenge and for which a ruling is requested from this Court;
e. the basis of each challenged opinion including the facts and data relied upon or that is absent;
f. the principles and methodology used, or not utilized, to arrive at those challenged opinions;
g. the peer review to which these methods have been subjected; and
h. a <u>good faith estimate</u> be each party of the time each will need for their presentation as well as an estimate of the total amount of time needed for the entire hearing. (Counsel are reminded that hearing time is limited, and estimates should be as accurate as possible.)

7. During the above referenced meet and confer or a subsequent meet and confer, Counsel must prepare an appropriate proposed Order scheduling the evidentiary hearing on the *Daubert* Motion and establishing appropriate deadlines for matters to be disclosed, discovered and completed prior to the hearing. To facilitate this meet and confer process the parties must comply with *Division CV-E Procedures for Scheduling and Hearing Motions Requiring Evidentiary Hearing* published on the Court's website[32] and should utilize the Court's template for *Order Scheduling Motion for Evidentiary Hearing and Pre-Evidentiary Hearing Case Management Conference, and Requiring Matters to be Completed Prior to Pre-Evidentiary Hearing Case Management Conference* published in Word format on the Court's website[33] to

[29] See Division CV-E website: https://www.jud4.org/ex-parte-dates-judge-s-procedures/duval-judges
[30] If the attorneys cannot agree, the attorney challenging the expert will provide a list of the opinions that they expect the expert to provide and about which they object. The proponent of the expert will provide the information set forth herein as to each of those expert opinions.
[31] The Court does not have a template form for a pre-evidentiary hearing stipulation; Exhibit "A" attached to these procedures is a comprehensive example of how local counsel Michael Pajcic and Michael Lockamy interpreted this requirement.
[32] See Division CV-E website: https://www.jud4.org/ex-parte-dates-judge-s-procedures/duval-judges
[33] See Division CV-E website: https://www.jud4.org/ex-parte-dates-judge-s-procedures/duval-judges

draft either an "Agreed Order" or a red-lined version of the Order in draft form for the Court to consider competing provisions during a Case Management Conference if necessary.

8. Each party shall provide the opposing counsel and file with the Court a list of any witnesses expected to be called at the *Daubert* hearing, including the challenged expert, and a short summary of their expected testimony and relevance to the expert witness issue(s) before the Court.

9. Counsel shall comply with the governing provisions of the "Division CV-E Policies and Procedures" related to scheduling hearing time(s) for the *Daubert* motion(s) or motion(s) related to other expert witness issues, including but not limited to, Sections III, IV, V, VI and VII.

10. If a court reporter is to be obtained by either party, the party obtaining the court reporter should notify opposing counsel and the Court that she/he is obtaining a court reporter.

11. Counsel shall comply with the provisions of Sections III I. and J. of the "Division CV-E Policies and Procedures"[34] related to providing the Court courtesy copies (hard copies) of all Court filings pertaining to the motion, hearing notebooks, legal memorandums or briefs, along with hard copies of any exhibits to be marked for identification or to be admitted in evidence during the evidentiary hearing and any significant cited legal, medical and/or scientific authorities.

12. In Florida experts may consider inadmissible material in forming opinions.[35] In Federal Court, a *Daubert* hearing is not bound by the Rules of Evidence.[36] Therefore, counsel may provide the Court with materials and documents inadmissible to a jury, including, but not limited to, peer-reviewed articles, industry standards, affidavits from consulting experts, or any other relevant materials that will assist the Court in reaching a conclusion as to whether a proper predicate can be laid for the expert's testimony.[37]

13. The Court will **NOT** read deposition transcript(s) that are offered in lieu of live testimony before the hearing, during the hearing, or after the hearing. If page(s)/line(s) of the deposition transcript(s) are considered important to the issue(s), such page(s)/line(s) should be: designated and highlighted for the Court to review, if possible, before the hearing, as part of the "courtesy copies (hard copies)" provided to the Court pursuant to paragraph 10 above; and published at the motion hearing, on the record.

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[34] See Division CV-E website: https://www.jud4.org/ex-parte-dates-judge-s-procedures/duval-judges

[35] Fla. Stat. §90.704 ("If the facts for 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.").

[36] Fed. R. Evid. 104.

[37] Fla. Stat. §90.704.

14. The Court will strive to announce a ruling in a timely manner, at the conclusion of the hearing if at all possible. The attorney preparing the proposed order, and all other counsel, shall comply with the provisions of Section XXII of the "Division CV-E Policies and Procedures"[38] related to the preparation of proposed orders after a hearing. In the event it is necessary for the Court to take the *Daubert* Motion under advisement at the end of the evidentiary hearing, the Court will endeavor to self-impose a reasonable and prompt deadline by which it will issue its ruling. The Court will give the movant(s) and nonmovant(s) specific instructions and deadlines for submitting proposed orders to the Court at the close of the hearing. However, in general, counsel should expect and be prepared to comply with the requirements of Section XXIV of the "Division CV-E Policies and Procedures"[39] related to the preparation of proposed orders after the Court takes a matter under advisement.

15. Please advise the Judicial Assistant when scheduling the expert witness hearing(s) how many attorneys, paralegals, parties, witnesses, and/or other interested persons will be present or participating in the hearing(s) to allow the Judicial Assistant to determine if a courtroom or hearing room is the appropriate location for such hearing(s).

[38] See Division CV-E website: https://www.jud4.org/ex-parte-dates-judge-s-procedures/duval-judges
[39] See Division CV-E website: https://www.jud4.org/ex-parte-dates-judge-s-procedures/duval-judges