Civil Justice Playbook

IDEAS, INITIATIVES, INFLUENCE

The Exception Highlights the Trend

By David Hechler

There was an early television show called "The Naked City," and it always ended with this voice-over: "There are eight million stories in the naked city. This has been one of them." There must be more than eight million in the civil justice litigation docket. Here's one that highlights an important trend by veering the other way.

It's about the admissibility of scientific evidence in court. Every law student after 1923 learned about *Frye v. United States,* the U.S. Supreme Court decision that set the legal standard that guided judges for more than 70 years. But that changed for many judges in 1993.

Following years of complaints about unreliable experts whose testimony amounted to "junk science" that confused and misled juries, the Supreme Court tightened its standards with its ruling in *Daubert v. Merrell Dow Pharmaceuticals.* In *Daubert* and subsequent decisions, the court ruled that experts who introduce scientific evidence have to be able to show that their testimony is truly grounded in science and the scientific method.

Slowly but surely over the past 24 years, state legislatures have amended their laws to align them with the federal standard, and state courts have ruled accordingly. About 40 states have adopted the Daubert standard to date, according to an article by Alston & Bird lawyers Josh Becker and Aaron Block that was published by the Washington Legal Foundation.

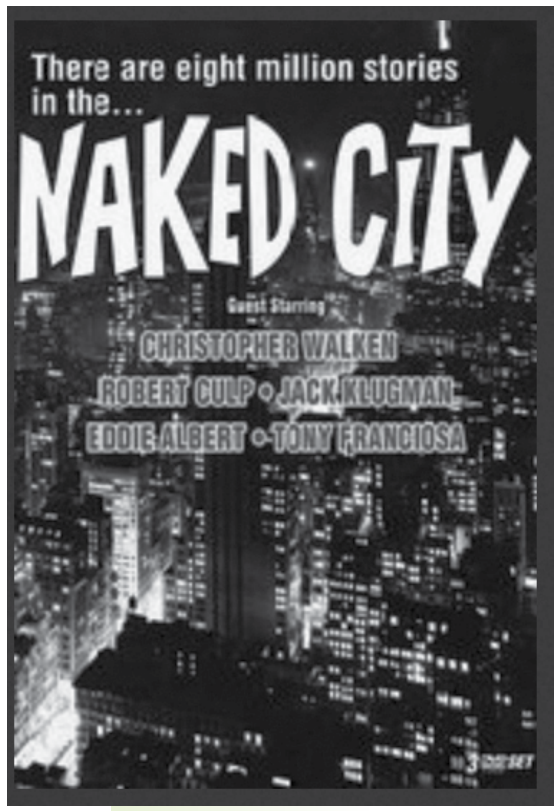
One of them is Florida, which passed a law in 2013. This year, however, the Florida Bar's Code and Rules of Evidence Committee recommended that the Florida Supreme Court reject the legislature's action and leave *Frye* in place as the state's standard. The committee argued that there was a question about *Daubert's* constitutionality.

There was no case before the justices that required a ruling, but as a matter of procedure, a majority of the justices on the panel that reviewed the recommendations agreed. So *Daubert* is no longer the standard for expert testimony in Florida state courts. (Technically, since the state's high court never officially adopted it, it never was the standard.)

But the situation remains fluid. A change is still possible. There is now a case on appeal before the Florida Supreme Court that argues that a trial court, in admitting expert testimony, applied the Daubert standard that the legislature has adopted but the state's top court has not. Now that it has an actual case teed up, will the court rethink what it did when it ruled on the matter in February? Or will it use this case to firmly establish that Florida has gone another way and that *Frye* is the law in Florida state courts? A decision is expected later this year.

Whatever the court does, there are two lessons worth noting. First, this counter-example underscores the trend. Following the lead of *Daubert*, most states have matched the federal law for the admissibility of scientific evidence.

The other takeaway from this story ripped from the naked civil docket is this: You can never be sure what a panel of judges will do.



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