



April 1, 2016

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VIA THE FLORIDA COURTS E-FILING PORTAL

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**Re: *In re: Amendments to the Florida Evidence Code*  
*Case No. SC16-181***

Dear Justices of the Florida Supreme Court:

As a member of the Florida Bar, and as a former chair of the Code and Rules of Evidence Committee (“CREC”), I urge this Court to adopt chapter 2013-107, Laws of Florida, to the extent it is procedural.

*Daubert* is superior to its predecessors, *Marsh v. Valyou*, 977 So. 2d 543 (Fla. 2007) and *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). *Marsh* prevented judges from easing their overburdened docket by culling meritless cases propped up by evidence untethered to reproducible, verifiable, genuinely scientific theories. Instead, cases supported by no more than pure opinion testimony remained an albatross on judges’ dockets. Chapter 2013-107 solves this problem by empowering our already overworked judges to expel cases to which the scientific method is a stranger. Thus, chapter 2013-107 enhances the quality of admissible evidence. *Frye* closed the courthouse doors to meritorious cases whose scientific theories simply had not been around long enough or been interesting enough to become generally accepted. The *Daubert* approach, on the other hand, breathes life into those cases by replacing general acceptance with reliance on the scientific method. Thus, chapter 2013-107 enhances the quantity of admissible evidence.

*Daubert* also advances orderly and inexpensive procedures in the administration of justice, the meter by which this Court has always judged rule amendments. The forgiving standards in *Frye* and *Marsh* rewarded forum shopping cases into Florida. By aligning Florida with federal courts and a majority of states, chapter 2013-107 ends this affront to justice. Chapter 2013-107 also reduces litigation costs and promotes certainty in Florida courts by enabling Florida judges to use

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federal courts' and the majority of state courts' collective, decades-long experience with *Daubert*. While *Daubert* requires judges to undertake a thorough "gatekeeping" review of the reliability of expert testimony, this approach eliminates the far greater burden imposed by lengthy litigation of claims and defenses that are unsupported by scientific evidence.

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These are among the reasons why *Frye* and *Marsh* enjoy limited support among Florida lawyers. A close look at the CREC's voting record on the *Daubert* legislation confirms this.

As a member and later the chair of CREC when it addressed the *Daubert* legislation, I had a front-row seat to each of its votes. On September 27, 2013, CREC took a straw poll of its membership: 28 members voted in favor of chapter 2013-107, 21 voted against. A majority of CREC's membership supported the *Daubert* legislation. In a later straw poll, 21 voted in favor of chapter 2013-107, and only six members voted against. Again, a majority of CREC's membership supported the *Daubert* legislation. Several months later, in July 2014, a new Bar year changed CREC's membership. On October 17, 2014, CREC held a final vote on chapter 2013-107. By a two-vote margin (16-14), those attending the vote (but not a majority of CREC's 42 voting members at that time) voted against adoption of the *Daubert* legislation.

CREC's official position has never enjoyed support from a majority of CREC's membership. In fact, the only times that a majority of CREC's members expressed their view, that majority favored the *Daubert* legislation. Furthermore, the slim margin in the final vote, compared to the *Daubert* legislation's longstanding and broad support, shows that many (if not most) CREC members have significant reservations about *Frye* and *Marsh*. CREC's recommendation is neither wholesale support for *Frye* and *Marsh* nor a resounding rejection of *Daubert*. Instead, CREC's voting history shows that Florida lawyers have grave misgivings about *Frye* and *Marsh*.

Finally, the *Daubert* legislation does not conflict with an existing constitutional right, the only reason why this Court has ever refused to adopt a legislative amendment to the Evidence Code. True, CREC's majority report argues that the *Daubert* legislation conflicts with the right to jury trial. But none of the cases CREC's majority cites are anchored on constitutional analysis. Hence, this Court's refusal to

adopt the *Daubert* legislation to the extent it is procedural would have to be based on something other than constitutional grounds. This would be a departure from the Court's longstanding precedent.

While there are many more reasons why this Court should adopt chapter 2013-107 to the extent it is procedural, those reasons, as well as those above, may be distilled to one. In a time of shrinking budgets and increasing demands, the *Daubert* approach provides this Court with the opportunity to address both while preserving access to justice. That is reason enough to adopt chapter 2013-107.

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Respectfully submitted,

/s/ Timothy M. Moore  
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### **Certificate of Service**

I certify that a copy of the foregoing was served via an authorized service method on April 1, 2016, to following:

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