Evidence

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Evidence

by Marc T. Treadwell

I. INTRODUCTION

This survey marks the fourteenth year the author has surveyed Eleventh Circuit evidence decisions. During these years there has been, in the author's opinion, an unmistakable trend—a trend that continued during the current survey period. In stark contrast to the days when the Eleventh Circuit rigorously examined district court evidentiary decisions and freely reversed those decisions, the Eleventh Circuit now carefully defers to district judges. The abuse-of-discretion standard that has always governed evidentiary issues on appeal now seems to be the standard of review in practice as well as in name.

Absent some action by Congress, the most extensive changes to the Federal Rules of Evidence in recent years will become effective December 1, 2000. A summary and brief discussion of the amendments follow. The full text of the new Rules and the Advisory Committee notes can be found at the website of the Administrative Office of the United States Courts.¹

An amendment to Rule 103² may provide needed clarity to the circumstances that require a party to renew an objection or to make an additional offer of proof after a court has previously ruled on an evidentiary matter. The new rule will provide that "[o]nce the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer a proof to preserve a claim of error for appeal."³ Thus, if a court grants

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2. FED. R. EVID. 103.
3. PROPOSED FED. R. EVID. 103.
a motion in limine to exclude evidence, and assuming that the party wishing to propound the evidence made an adequate offer of proof, that party need not make a further offer of proof at trial. Similarly, if the trial court denies the motion in limine and rules that the evidence will be admissible at trial, the party seeking to exclude that evidence need not object at trial when the evidence is tendered. The same is true of “continuing objections” during trial; they are no longer necessary. However, the new rule has both an express and, it would seem, an implicit limitation. The express limitation is that the ruling must be “definitive.” Thus, if the trial court’s ruling is conditional or equivocal, further action would be required when the evidence is tendered. The implicit limitation is that the circumstances existing at the time of the initial ruling must also exist when the issue arises again. For example, the district court may, based upon the facts established at the time of its ruling on a motion in limine, deny the motion. When the issue arises again at trial, the record may contain additional facts relevant to the issue. Similarly, a ruling excluding evidence may be entirely correct based on the facts then known to the district court, but incorrect based on further facts developed at trial. In either event, it would seem that the party should renew his objection or make another offer of proof based on the changed circumstances or additional facts.

Current Rule 404(a)(2) permits a defendant to offer evidence of a pertinent trait of character of his alleged victim. The proposed amendment to Rule 404(a)(2) would allow the prosecution to tender evidence of a homicide victim’s character trait of peacefulness to rebut a defendant’s contention that the alleged victim was the aggressor. This change to Rule 404(a)(2) is substantially narrower than the amendment initially proposed, which would have allowed the prosecution to tender rebuttal evidence to any evidence of a victim’s character tendered by the defense.

As discussed in this survey and several prior surveys, the Supreme Court’s landmark decision in Daubert v. United States has had a profound impact on the scope of admissible expert testimony. Since Daubert district courts and courts of appeals have struggled to come to terms with the district courts’ new gatekeeper role in determining the admissibility of expert testimony. Daubert has now inspired proposed amendments to the Federal Rules of Evidence.

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4. Id.
5. FED. R. EVID. 404(a)(2).
6. PROPOSED FED. R. EVID. 404(a)(2).
7. Id.
Rule 701 currently addresses the scope of opinion testimony by lay witnesses. Amended Rule 701 will make clear that lay witnesses cannot give opinion testimony based on "scientific, technical, or other specialized knowledge within the scope of Rule 702." In other words, the reliability requirements imposed by Daubert on expert testimony cannot be avoided by labeling the witness a lay witness.

The proposed amendment to Rule 702 basically codifies Daubert and requires that expert testimony must be based upon sufficient facts or data, must be the product of reliable principles and methods, and those principles and methods must be applied reliably to the facts of the case.

Rule 703 allows an expert to base opinions on facts or data not admitted in evidence if the facts or data are "of a type reasonably relied upon by experts in the particular field." The proposed amendment to Rule 703 provides that such facts or data, although relied upon by the expert, cannot be disclosed to the jury by the proponent of the testimony unless the court determines that the probative value of the facts or data in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

The business records exception to the hearsay rule, Rule 803(6), will be amended to allow the foundational requirements of the exception to be established "by certification that complies with Rule 902(11), Rule 902(12), or a statute permitting certification," rather than by a "live" witness. Thus, it would not be necessary to bring the records custodian into the courtroom to establish that the documents satisfy the requirements of the business records exception. To complement this amendment, subdivisions 11 and 12 will be added to Rule 902, the Rule providing the means of self-authentication. Rule 902(11) will permit a records custodian to certify that domestic documents meet the requirements of Rule 803(6). Rule 902(12) does the same for foreign records.
II. ARTICLE I: GENERAL PROVISIONS

Rule 101 provides that the Federal Rules of Evidence “govern proceedings in the courts of the United States.”\(^\text{19}\) Notwithstanding this seemingly clear statement, however, the precise application of the Rules can be problematic.\(^\text{20}\) In diversity cases, state law provides the substantive rule of decision, but procedural issues, such as the admission of evidence, are determined by federal law. However, there are some exceptions to this general rule. For example, Rules 302, 501, and 601 provide express exceptions for presumptions of fact in civil actions, privileges, and competency of witnesses.\(^\text{21}\) These Rules provide that if state law governs the substantive issues, then state evidentiary rules will govern those evidentiary issues. In addition to these express exceptions, there are judicially created exceptions to the general applicability of the Federal Rules of Evidence. For example, some state evidentiary rules may embody a matter of state substantive policy. In that event, the state evidentiary rule is often applied. For example, in *Gardener v. Chrysler Corp.*,\(^\text{22}\) the Tenth Circuit held that a state law prohibiting the admission of evidence of failure to use a seatbelt is not simply a rule of evidence that “we could then ignore,” but rather is a statement of substantive law “concerned with the channeling of behavior outside the courtroom, and where as in this case the behavior in question is regulated by state law rather than by federal law, state law should govern even if the case happens to be in federal court.”\(^\text{23}\)

This apparently is the case in the Eleventh Circuit because, during the current survey, the Eleventh Circuit in *Whitley v. United States*\(^\text{24}\) affirmed a district court’s application of a Georgia statute\(^\text{25}\) deeming the failure to wear a seatbelt irrelevant.\(^\text{26}\)

Also during the survey period, the effect of state rules on the admission of evidence in federal courts arose in a federal criminal trial. In *United States v. Lowery*,\(^\text{27}\) defendant contended that the trial court should have suppressed the testimony of his alleged coconspirator because that testimony was based on plea bargain agreements between

\(^{19}\) FED. R. EVID. 101.


\(^{21}\) FED. R. EVID. 302, 501, 601.

\(^{22}\) 89 F.3d 729 (10th Cir. 1996).

\(^{23}\) Id. at 736 (quoting Barron v. Ford Motor Co., 965 F.2d 195, 199 (7th Cir. 1992)).

\(^{24}\) 170 F.3d 1061 (11th Cir. 1999).

\(^{25}\) O.C.G.A. § 40-8-76.1 (Supp. 2000).

\(^{26}\) 170 F.3d at 1078-79.

\(^{27}\) 166 F.3d 1119 (11th Cir.), cert. denied, 120 S. Ct. 212 (1999).
the coconspirator and the prosecution. Defendant argued that Rule 4-3.4(b) of the Florida Bar Rules of Professional Conduct, which forbids lawyers from "offering an inducement to a witness," rendered the plea agreements inadmissible. The district court agreed and suppressed the statements. Although the district court's local rules incorporated the Florida Bar Rules, and Congress, since the district court's opinion, had by statute provided that government prosecutors are subject to state bar organization rules, the Eleventh Circuit nevertheless held that the Florida Bar Rule did not bar the admission of the codefendant's testimony. The admissibility of evidence in federal courts, the Eleventh Circuit held, is a matter entirely of federal law: "State rules of professional conduct, or state rules on any subject, cannot trump the Federal Rules of Evidence."

To reach this conclusion, the court took an interesting route. The court noted that Rule 402 provides that all relevant evidence is admissible, "except as otherwise provided by the Constitution of the United States, by act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority." This, the court held, was "an exclusive list of the sources of authority for exclusion of evidence in federal court." Because state rules of professional conduct are not listed in Rule 402, the court determined they cannot bar the admission of evidence in federal court. Similarly, because local rules of federal courts are not listed in Rule 402, they also cannot bar the admission of otherwise admissible evidence. Finally, the court reasoned, Congress's decision to subject United States Attorneys to local bar rules was not aimed at the admission of evidence. Clearly, the court concluded, Congress did not intend to give states and state bar organizations the authority to determine the

28. 166 F.3d at 1121-22. This issue had its genesis in the once famous, now infamous, decision of a Tenth Circuit panel holding that plea agreements violated federal law prohibiting the bribing of witnesses. See United States v. Singleton, 144 F.3d 1343, 1344-52 (10th Cir. 1998), rev'd en banc, 165 F.3d 1297 (10th Cir.), cert. denied, 119 S. Ct. 2371 (1999). In Lowery the Eleventh Circuit joined the rush of circuits rejecting the panel's holding that plea agreements constituted bribery. 166 F.3d at 1124.
29. 166 F.3d at 1124 (quoting FLA. BAR RULE OF PROFESSIONAL CONDUCT 4-3.4(b)).
30. Id. at 1121-22.
31. Id. at 1124 (citing 28 U.S.C. § 530B (Supp. IV 1998)).
32. Id. at 1125.
33. Id. (quoting FED. R. EVID. 402).
34. Id.
35. Id.
36. Id.
37. Id.
admissibility of evidence in federal court.\footnote{38} Accordingly, the court reversed the district court's decision suppressing the codefendant's testimony.\footnote{39}

Rule 106, known as the rule of completeness, provides that if a party introduces a portion of a document or recorded statement, the opposing party may require the introduction of any other part of the document or the recorded statement "which ought in fairness to be considered contemporaneously with it."\footnote{40} In Rainey \textit{v. Beech Aircraft Corp.},\footnote{41} the Eleventh Circuit held that Rule 106 is not limited to situations in which a party has actually introduced a portion of a document or recorded statement.\footnote{42} Acknowledging that Rule 106 is "technically" limited to such situations, the court concluded that if a party has examined a witness about a document to the extent that the examination is "tantamount" to the introduction of the document into evidence, then Rule 106 is applicable.\footnote{43}

During the current survey period, the court returned to the issue of when examination of a witness about a document or a recorded statement is "tantamount" to the introduction of the document or recorded statement and thus implicates Rule 106. In United States \textit{v. Ramirez-Perez},\footnote{44} the prosecutor attempted to admit defendant's signed statement into evidence. However, because the statement implicated a codefendant, that codefendant moved to redact a portion of the statement. Defendant argued that if a redacted statement were tendered by the government, he should be allowed, pursuant to Rule 106, to introduce any other part of the statement that tended to exculpate him. The trial court agreed. To avoid this dilemma, the prosecutor, rather than tendering the written statement, proceeded to examine the agent who interrogated defendant about what defendant said. Thus, although the prosecutor did not tender the statement, he elicited from the agent statements made by defendant that were later memorialized in the written statement. Relying on Rainey, defendant argued that this examination was "tantamount" to offering the statement into evidence and that he could thus require the prosecution to introduce any other

\begin{footnotes}
38. Id.  
39. Id.  
41. 784 F.2d 1523 (11th Cir. 1986), aff'd en banc, 827 F.2d 1498 (11th Cir. 1987), rev'd in part on other grounds, 488 U.S. 153 (1988).  
42. 784 F.2d at 1529-30.  
43. Id. at 1529 n.11. For a fuller discussion of Rainey, see Marc T. Treadwell, \textit{Evidence}, 39 Mercer L. Rev. 1259, 1262-63 (1988).  
44. 166 F.3d 1106 (11th Cir. 1999).
\end{footnotes}
portions of the statement that were favorable to him.\textsuperscript{45} The Eleventh Circuit disagreed.\textsuperscript{46} In his examination the prosecutor never referred to the written statement.\textsuperscript{47} “Because the prosecutor questioned the agent only about what [defendant] said rather than about what was written in the document, Rule 106 did not apply.”\textsuperscript{48} Under Ramirez-Perez, if the jury is never informed that a document or recorded statement exists, then Rule 106 can never apply.

III. ARTICLE IV: RELEVANCY AND ITS LIMITS

The broad discretion afforded district judges in evidentiary determinations is perhaps most apparent in matters of relevancy. The decisions of district courts determining relevancy, as the Eleventh Circuit has noted, should be affirmed “even though we would have gone the other way had it been our call.”\textsuperscript{49} However, the Eleventh Circuit determined in United States v. Hands\textsuperscript{50} that the district court and the prosecutor went too far.\textsuperscript{51} Defendant’s wife testified that her husband had been at home full-time caring for her and their children during much of the time when he had allegedly engaged in drug dealing. She also testified that she had never seen her husband deal drugs. Defendant then took the stand and testified in his own defense. On cross-examination the prosecutor asked defendant about his use of firearms after the revocation of his handgun permit. Defendant blamed the revocation on a personal disagreement between him and the local sheriff. The prosecutor then embarked on a line of questions suggesting that defendant’s handgun permit was revoked because he had beaten his wife. The district court overruled defendant’s repeated objections to this line of questioning because, the court concluded, the testimony was inconsistent with the wife’s testimony. The district court even admitted photographs allegedly showing the wife’s injuries from the beatings. Defendant denied any connection between the allegations of spousal abuse and the revocation of his handgun permit. Eventually, the prosecutor left the subject and never offered any evidence demonstrating that defendant’s handgun

\textsuperscript{45} Id. at 1111, 1113.

\textsuperscript{46} Id. at 1113.

\textsuperscript{47} Id. at 1112.

\textsuperscript{48} Id. at 1113.

\textsuperscript{49} United States v. Williams, 51 F.3d 1004, 1010 (11th Cir. 1995) (quoting In re Rasburg, 24 F.3d 159, 168 (11th Cir. 1994)).

\textsuperscript{50} 184 F.3d 1322 (11th Cir. 1999).

\textsuperscript{51} Id. at 1327.
permit had been revoked because of charges stemming from spousal abuse.\textsuperscript{62}

In an opinion highly critical of the prosecutor, the Eleventh Circuit reversed defendant’s conviction because of the admission of irrelevant evidence.\textsuperscript{53} The reason for the revocation of defendant’s handgun permit, whatever it might have been, was not relevant to the charges against him.\textsuperscript{54} Nor was the evidence relevant to impeach the wife’s testimony because nothing she said conflicted with evidence that her husband had beaten her.\textsuperscript{55} Contrary to the district court’s conclusion, the wife did not present herself as a dutiful spouse.\textsuperscript{56} Finally, the Eleventh Circuit rejected the government’s argument that the evidence was relevant because it suggested that defendant had lied concerning the reasons for the revocation of his handgun permit.\textsuperscript{57} Acknowledging that otherwise irrelevant evidence may be admissible to impeach a witness’s relevant testimony, the court noted that the entire line of questioning was irrelevant and that “the government could not bootstrap irrelevant evidence into the trial by using it to impeach the answers to irrelevant questions.”\textsuperscript{58}

Moreover, even if evidence of defendant’s spousal abuse was relevant, the Eleventh Circuit concluded that the district court should have excluded the evidence under Rule 403.\textsuperscript{59} Rule 403 requires the exclusion of relevant evidence “if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.”\textsuperscript{60} As noted in previous surveys, Rule 403 was once frequently used by the Eleventh Circuit to reverse criminal convictions. However, consistent with its dramatic lowering of the level of scrutiny on evidentiary issues, Rule 403 is now rarely a factor in appellate decisions. Thus, the Eleventh Circuit in Hands made clear that Rule 403 is an “‘extraordinary remedy’”\textsuperscript{61} and “carries a ‘strong presumption in favor of admissibility.’”\textsuperscript{62} However, the court reasoned

\begin{itemize}
\item 52. \textit{Id.} at 1326.
\item 53. \textit{Id.} at 1334-35.
\item 54. \textit{Id.} at 1327.
\item 55. \textit{Id.}
\item 56. \textit{Id.}
\item 57. \textit{Id.} at 1327-28.
\item 58. \textit{Id.} at 1328.
\item 59. \textit{Id.}
\item 60. \textit{FED. R. EVID.} 403.
\item 61. 184 F.3d at 1328 (quoting United States v. Utter, 97 F.3d 509, 514 (11th Cir. 1996)).
\item 62. \textit{Id.} (quoting United States v. Church, 955 F.2d 688, 703 (11th Cir. 1992)).
\end{itemize}
that evidence of spousal abuse in a drug trial was so prejudicial that Rule 403 should be invoked.63

Rule 404 is the principal rule of evidence governing the admissibility of "extrinsic act evidence," or evidence of acts and transactions other than the one at issue. Rule 404 is primarily intended to bar the introduction of propensity evidence, or evidence of prior misconduct offered to prove that a party is more likely to have engaged in the conduct at issue because he engaged in the prior misconduct. Although extrinsic act evidence is not admissible to prove a party's propensity to engage in misconduct, it is admissible "for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."64 Extrinsic act evidence is a favorite weapon of prosecutors. For example, prosecutors frequently introduce evidence of a defendant's prior drug conviction to prove his intent to commit a subsequent drug offense. Like Rule 403, Rule 404 was once a frequent subject of Eleventh Circuit decisions, but now is seldom mentioned by the Eleventh Circuit, much less used to reverse convictions.

During the current survey period, Rule 404(b) played a significant role in only one decision, United States v. Marshall.65 In Marshall the Government successfully tendered evidence that defendants previously had been arrested on drug charges when they were found by police in a house containing crack cocaine production paraphernalia. However, these charges were later dismissed because there was no evidence connecting defendants to drug production. The Government contended that these prior arrests were relevant to prove defendants' intent to engage in the drug activity that led to the current charges against them.66 The Eleventh Circuit acknowledged that intent to commit a charged offense can be proved by evidence of prior criminal activity when the same intent was required.67 As a threshold matter, however, the court noted that the prosecutor must prove that a defendant committed the extrinsic offense.68 In this case the prosecutor merely proved that defendants were only arrested for prior similar offenses.69

63. Id.
64. FED. R. EVID. 404(b).
65. 173 F.3d 1312 (11th Cir. 1999).
66. Id. at 1317.
67. Id. at 1317-18.
68. Id.
69. Id.
The court held this evidence was insufficient to prove that they committed those offenses.\footnote{70}

The Eleventh Circuit's decision in United States v. Matthews\footnote{71} is notable not because it broke new ground, but rather because of its clear statement on the relationship between Rules 404 and 608. In Matthews defendants claimed the district court wrongly prohibited them from cross-examining a government witness about a prior arrest. After the witness testified that she cooperated with the prosecutors because they promised to enroll her in a drug rehabilitation program, defendants attempted to use evidence of her prior arrest to demonstrate that criminal charges against the witness had been dropped in exchange for her cooperation. However, there was no evidence of any connection between the dropping of the charges and the witness's cooperation with the Government.\footnote{72} The Eleventh Circuit's succinct analysis of defendants' claim merits quotation in full:

Federal Rule of Evidence 405 [sic] generally prohibits the use of specific prior acts as proof of character to show action in conformity with a character trait evidenced by the behavior. Evidence of prior conduct may, however, be used as circumstantial evidence of a non-character issue, such as motive, intent, opportunity, knowledge, or other issues material to the charge. Where impeachment is concerned, Rule 608(b) provides that the trial court may in its discretion permit questioning about a witness' prior bad acts on cross-examination, if the acts bear on the witness' character for truthfulness. If the witness denies the conduct, such acts may not be proved by extrinsic evidence and the questioning party must take the witness' answer, unless the evidence would be otherwise admissible as bearing on a material issue of the case.\footnote{73}

The Eleventh Circuit held that the witness's prior arrest was not relevant to a material issue and that Rule 404 was thus inapplicable.\footnote{74} Regarding impeachment pursuant to Rule 608, the court found that docket sheets allegedly documenting the witness's arrest were inadmissible because Rule 608 prohibited the use of extrinsic evidence to prove

\footnote{70. Id. Although not mentioned by the Eleventh Circuit, it is not necessary that the prosecutor prove beyond a reasonable doubt or even by clear and convincing evidence that a defendant committed an extrinsic act. The prosecution need only produce evidence sufficient to allow a juror reasonably to conclude that the act occurred and that the defendant was the actor. Huddleston v. United States, 485 U.S. 681, 687 (1988).}
\footnote{71. 168 F.3d 1234 (11th Cir. 1999).}
\footnote{72. Id. at 1243-44.}
\footnote{73. Id. at 1244 (citations omitted).}
\footnote{74. Id.}
prior incidents of conduct. Additionally, with regard to questions about the prior arrest, the Government produced sufficient evidence to permit the district court, in its discretion, to bar cross-examination about the arrest because prosecutors established that the arrest had never taken place and that the docket sheets were in error.

If character evidence is admissible for substantive, as opposed to impeachment, purposes, Rule 405 provides the methods of proving character. In criminal cases the prosecutor may cross-examine a defendant's character witness regarding the witness's knowledge of specific prior acts committed by the defendant. Such questions are sometimes called "have you heard" questions because the prosecution can ask the witness whether he was aware that the defendant had committed an act of misconduct to show that the witness's opinion of the defendant's character is suspect, either because he was unaware of the prior misconduct or because he has a favorable impression of the defendant's character notwithstanding his knowledge of the misconduct. However, the prosecutor cannot ask questions that effectively assume the defendant's guilt of the charges against him. For example, in United States v. Guzman, the Eleventh Circuit held the district court improperly allowed the prosecutor to cross-examine defendant's character witness with guilt-assuming questions. The court considered whether this error was subject to harmful error analysis. The court concluded that "using guilt-assuming hypotheticals [is not] error so grave as to be beyond harmless error analysis." The court then concluded that the error was, in fact, harmless.

IV. ARTICLE V: PRIVILEGES

The Federal Rules of Evidence do not define various evidentiary privileges, but rather provide that the federal judiciary may formulate rules governing privileges in nondiversity cases. In diversity cases state law determines the existence of privileges.

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75. *Id.* at 1243-44.
76. *Id.*
77. See United States v. Collins, 779 F.2d 1520, 1532 (11th Cir. 1986); *see also* Michelson v. United States, 335 U.S. 469, 477-82 (1948).
78. 167 F.3d 1350 (11th Cir. 1999).
79. *Id.* at 1354.
80. *Id.* at 1352-53.
81. *Id.* at 1352.
82. *Id.* at 1354.
In *Hicks v. Talbott Recovery System, Inc.*, the Eleventh Circuit interpreted Georgia's "absolute privilege" for communications between a psychiatrist or psychologist and a patient. Defendants, without plaintiff's authorization or in excess of plaintiff's authorization, released records of plaintiff's treatment for alcohol, drug, and sex addiction to the Texas State Board of Medical Examiners. Plaintiff, a physician, had undergone treatment for his addictions at the insistence of his employer after a patient smelled alcohol on his breath. Although plaintiff provided defendants with limited authority to release some of his records, defendants released virtually all records of his treatment. As a result the Texas Board of Medical Examiners imposed restrictions on plaintiff's return to practice that prevented him from returning to work with his employer. The only medical employment plaintiff was able to find was at a prison 150 miles from his home.

Contending that defendants' release of his records was unauthorized, plaintiff sued defendants, and the jury returned a verdict in plaintiff's favor. On appeal defendants argued that because plaintiff signed a release relating to his therapy, the trial court should have granted their motion for judgment as a matter of law. Apparently, defendants contended that the authorization to release some of the records resulted in a waiver of the privileged nature of all the records.

To resolve this issue, the court undertook a detailed review of Georgia law governing communications between a psychiatrist or psychologist and a patient. First, the records are not privileged unless the patient voluntarily sought therapy. According to the court, this requirement was satisfied because although plaintiff was required to undergo therapy, he was allowed to choose the institutions for his therapy. The court then noted that the psychiatrist/psychologist-patient privilege is held in high regard by Georgia law, and communications arising from the relationship are absolutely privileged unless waived. Waiver of the privilege requires "some express intentional act to do so."

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83. 196 F.3d 1226 (11th Cir. 1999).
84. *Id.* at 1229-36.
85. *Id.* at 1236.
86. *Id.* at 1236-39.
87. *Id.* at 1238.
88. *Id.* at 1239-40.
89. *Id.* at 1238; see also O.C.G.A. § 23-2-58 (1982). The court also noted that the relationship between a patient and his psychologist or psychiatrist constitutes a confidential relationship under Georgia law. 196 F.3d at 1238.
The court then addressed the protection afforded psychiatric and psychological records and concluded that Georgia law likewise protects such records.91 Again, the Eleventh Circuit's opinion is interesting for what it does not say. Psychiatric records, as opposed to communications, are not absolutely privileged under Georgia law.92 The Eleventh Circuit concluded that plaintiff did not waive the psychiatrist/psychologist-patient privilege and did not authorize the release of his therapy records to the extent defendants released them.93

V. ARTICLE VII: OPINIONS AND EXPERT TESTIMONY

_Daubert v. Merrell Dow Pharmaceuticals, Inc._94 loomed again like a specter over the Eleventh Circuit. The Supreme Court's two most recent _Daubert_ decisions, _General Electric Co. v. Joiner_,95 and _Kumho Tire Co. v. Carmichael_,96 have come at the expense of the Eleventh Circuit, a fact that appeared to be painfully apparent to the Eleventh Circuit during the survey period.97 The long-standing test for the admissibility of expert testimony established in _Frye v. United States_98 was held to be supplanted by the Federal Rules of Evidence in _Daubert_.99 The Court in _Daubert_ assigned to district courts a "gatekeeping" function for assessing the admissibility of expert testimony. Since _Daubert_, circuit and district judges have struggled mightily to fashion a framework for the analysis of expert testimony. During the current survey period, the Eleventh Circuit rendered its most detailed _Daubert_ analysis yet.

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91. 196 F.3d at 1238-39.
93. 196 F.3d at 1244.
97. The Supreme Court reversed the Eleventh Circuit in both _Joiner_, 522 U.S. at 147, and, during the current survey period, in _Kumho Tire_, 526 U.S. at 158. In _Kumho Tire_ the Supreme Court held that _Daubert_ applies to all expert testimony and is not limited to "scientific" testimony. _Id._ at 147-49. The Court also held that all four _Daubert_ factors (testing, peer review, error rates, and scientific acceptability) need not be satisfied for expert testimony to be admissible. _Id._ at 149-50. Rather, district courts, in performing their gatekeeping analysis of the reliability of expert testimony, are entitled to great flexibility, and the scope and nature of their inquiry will be determined by the particular facts of each case. _Id._ at 151-53.
98. 293 F. 1013, 1014 (D.C. Cir. 1923).
99. 509 U.S. at 587.
100. _Id._ at 589 n.7.
In *Allison v. McGhan Medical Corp.*, plaintiff sought to recover for injuries allegedly caused by her silicone breast implants. After a three-day “Daubert hearing,” the district court concluded that plaintiff's expert testimony on causation was inadmissible. Because plaintiff could not prove causation without this evidence, the district court granted defendants' motion for summary judgment.

On appeal the Eleventh Circuit first noted the standard for the admission of scientific expert testimony. Such evidence is admissible if (1) the expert is qualified to testify competently regarding the subject matter of his testimony, (2) the expert's methodology is sufficiently reliable, and (3) the testimony assists the trier of fact to understand the evidence or to determine a fact in issue. However, the court noted that the Daubert analysis “does not operate in a vacuum,” and thus defendants in *Allison* also challenged plaintiff's expert testimony on the basis of Rules 401, 402, 403, 702, and 703. The court's reference to Rules 401, 402, and 403, all of which deal with the admission of relevant evidence, is interesting. The court acknowledged that Rules 401 and 402 favor the liberal admission of evidence. Rule 403, on the other hand, permits a court to exclude relevant evidence “if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” As discussed above the Eleventh Circuit no longer aggressively uses Rule 403 to exclude evidence. Indeed, Rule 403, as noted, is an extraordinary remedy that “carries a ‘strong presumption in favor of admissibility.’” In the case of expert evidence, however, the Eleventh Circuit appears to be taking a different approach. Rule 403, the court said in *Allison*, plays an “intricate role . . . in an expert testimony admissibility analysis” because of the potential influential impact of expert testimony. Thus, the court noted, Rule 403 is of particular relevance in the analysis of expert testimony. The Eleventh Circuit's detour into Rule 403 analysis is

101. 184 F.3d 1300 (11th Cir. 1999).
102. Id. at 1306.
103. Id. at 1309.
104. Id.
105. Id.
106. Id.
107. Id. at 1310 (quoting FED. R. EVID. 403).
108. United States v. Hands, 184 F.3d 1322, 1328 (11th Cir. 1999) (quoting United States v. Church, 955 F.2d 688, 703 (11th Cir. 1992)).
109. 184 F.3d at 1310.
110. Id.
even more interesting because of the fact that the district court did not rely on Rule 403. Nevertheless, the court felt it necessary to note that Rule 403 buttressed the district court's exclusion of plaintiff's expert evidence.\(^{111}\) It seems that the Eleventh Circuit wanted to make a point, and the point is that general principles of relevancy do not apply to expert evidence. Rather, such evidence must satisfy a stricter standard, and Rule 403 alone can be used to exclude expert evidence.

With that the court turned to the district court's \textit{Daubert} analysis. First, the court discussed the gatekeeper status imposed on district judges by \textit{Daubert}, a role that often leads to intensive and extensive evaluation of expert evidence.\(^{112}\) The court acknowledged that such meticulous \textit{Daubert} inquiries may bring judges under criticism for donning white coats and making determinations that are outside their field of expertise, [but] the Supreme Court has obviously deemed this less objectionable than dumping a barrage of questionable scientific evidence on a jury, who would likely be even less equipped than the judge to make reliability and relevance determinations and more likely than the judge to be awestruck by the expert's mystique.\(^{113}\)

As it began its analysis, the court noted "in passing" that other district courts evaluating scientific evidence in breast implant litigation had commissioned panels of experts and used court-appointed technical advisors who concluded that there was no reliable evidence that silicone breast implants caused injuries, but the court claimed not to have relied on those conclusions.\(^{114}\)

\textit{Daubert} suggests four factors that should be considered by district judges in their gatekeeper roles when determining whether expert evidence is reliable. First, the court should consider whether the theory or technique used by the expert can be tested.\(^{115}\) Second, the court should consider whether the theory or technique has been subjected to peer review.\(^{116}\) Third, the court should consider whether the technique has a high potential rate of error.\(^{117}\) Finally, the court should consider whether the theory has attained general acceptance within the relevant scientific community.\(^{118}\) However, these factors are not exhaustive, and the court in \textit{Allison} noted that the general thrust of \textit{Daubert}}
analysis is to prove that the evidence at issue is reliable.¹¹⁹ In this regard plaintiff argued that the Eleventh Circuit had long favored the liberal admission of expert evidence.¹²⁰ In response, the court noted plaintiff had failed to appreciate "the fact that this Circuit has been twice overruled on Daubert decisions in precedent setting Supreme Court decisions in Joiner and Kumho Tire, both of which imposed stricter admissibility standards than the Eleventh Circuit had deemed appropriate."¹²¹

If the proper scientific evidence is "reliable," Daubert next requires that the evidence be relevant within the context of Rule 702; thus, the evidence must have a valid scientific connection to the disputed facts at issue.¹²² This connection, the Eleventh Circuit noted, has been referred to as "fit."¹²³

The Eleventh Circuit then began a detailed examination of the district court's intensive evaluation of the three experts' opinions. For example, noting that one expert relied on studies performed with animals, the court concluded that plaintiff "does not explain why the results of these animal studies should trump more than twenty controlled epidemiological studies of breast implants in humans which have found no valid increase risk of autoimmune disease."¹²⁴ Another expert's opinion was based on "unreliable methodology."¹²⁵ For present purposes, it is sufficient to note that the district court's and the Eleventh Circuit's analyses were, to put it mildly, rigorous. The Eleventh Circuit was not sanguine about the effects of such thorough analysis on a wide scale basis:

"We recognize that, in practice, a gatekeeping role for the judge, no matter how flexible, inevitably on occasion will prevent the jury from learning of authentic insights and innovations. That, nevertheless, is the balance that is struck by Rules of Evidence designed not for the exhaustive search for cosmic understanding but for the particularized resolution of legal disputes."¹²⁶

Perhaps in an effort to make another point, the Eleventh Circuit repeatedly noted its disagreement with various aspects of the district

¹¹⁹. 184 F.3d at 1312.
¹²⁰. Id.
¹²¹. Id.
¹²². 509 U.S. at 591-92.
¹²³. 184 F.3d at 1312.
¹²⁴. Id. at 1314.
¹²⁵. Id. at 1316.
¹²⁶. Id. at 1322 (quoting Daubert, 509 U.S. at 597).
court's analysis and conclusions.\textsuperscript{127} The fact that the Eleventh Circuit thought the district court wrong, however, did not mean the district court had abused its discretion.\textsuperscript{128}

One's opinion on such rigorous \textit{Daubert} analysis no doubt will be shaped by whether one is likely to reap the rewards or suffer the injury of such analysis. What seems clear, however, is that the Eleventh Circuit, having been rebuffed by the Supreme Court in its prior significant \textit{Daubert} decisions, has now embraced such rigorous examination. Perhaps more significantly, the Eleventh Circuit appears ready to defer to district court \textit{Daubert} determinations to the point that it can reasonably be asked whether there is any meaningful appellate review. Indeed, according to counsel for plaintiff in \textit{Allison}, one judge asked at oral argument whether, in view of the Supreme Court's decision in \textit{Joiner}, there were any district court \textit{Daubert} determinations that could be reversed on appeal. A good question.

The Eleventh Circuit's \textit{Daubert} analysis was much more cursory in \textit{United States v. Paul}.\textsuperscript{129} In \textit{Paul} defendant contended that \textit{Daubert} should have barred the admissibility of testimony by a handwriting expert, arguing that handwriting analysis does not qualify as reliable scientific research.\textsuperscript{130} After noting the \textit{Daubert} framework, the Eleventh Circuit discussed what had been a split among the circuits over whether \textit{Daubert} applied to nonscientific expert testimony.\textsuperscript{131} This split was resolved by the Supreme Court in \textit{Kumho Tire Co.}, which made clear that \textit{Daubert} applies to all expert testimony.\textsuperscript{132} However, the Eleventh Circuit said that the Supreme Court in \textit{Kumho Tire Co.} acknowledged that an expert witness, pursuant to Rule 702 and 703, is given leeway unavailable to other witnesses because the expert's opinion testimony "will have a reliable basis in the knowledge and experience of his discipline."\textsuperscript{133} The \textit{Daubert} analysis, the court continued, is a flexible analysis, and the district court need not necessarily apply each and every \textit{Daubert} factor in its analysis.\textsuperscript{134} Furthermore, the district court's determination is subject to the abuse-of-discretion standard of review.\textsuperscript{135} Although the Eleventh Circuit concluded that defendant's
Daubert-based argument was without merit, it never said why.\textsuperscript{136} It merely outlined in truncated form the Daubert analysis.\textsuperscript{137}

Similarly, in United States v. Majors,\textsuperscript{138} the Eleventh Circuit held that the district court properly allowed an FBI financial analyst to testify, based on his analysis of defendants' documents and his opinion that defendants defrauded investors of $3.3 million, even though the district court did not hold a Daubert hearing and the analyst was not a certified public accountant.\textsuperscript{139}

In United States v. Marshall,\textsuperscript{140} the Eleventh Circuit addressed the permissible use of opinion testimony by lay witnesses.\textsuperscript{141} In Marshall defendants' counsel established on cross-examination of a Drug Enforcement Agency agent that the Agency's informant had three separate sources of cocaine. The point was to establish doubt whether the cocaine at issue was obtained from defendants. On redirect examination, the district court allowed the prosecutor to ask the agent whether he believed the cocaine came from a source other than defendants.\textsuperscript{142} The Eleventh Circuit held this was error.\textsuperscript{143} While a lay witness may opine with regard to matters of which he has firsthand knowledge, such as knowledge about whether a car was speeding or whether a person was drunk, the agent was not present at the cocaine transaction and thus did not have any firsthand knowledge as to where the cocaine came from.\textsuperscript{144} The court held that this was not proper lay opinion testimony.\textsuperscript{145}

The prosecutor next contended that this testimony was admissible because defendants had impeached the informant's credibility and thus the Government, pursuant to Rule 608(a)(2), should have been allowed to rehabilitate the informant's credibility.\textsuperscript{146} The Eleventh Circuit acknowledged that defendants had attacked the informant's credibility, but posing the question to the agent was not the proper way to rehabilitate that credibility.\textsuperscript{147} Asking the agent whether he believed that the informant received the cocaine from defendants was a question

\begin{itemize}
\item[136.] Id. at 910-11.
\item[137.] Id.
\item[138.] 196 F.3d 1206 (11th Cir. 1999).
\item[139.] Id. at 1215-16.
\item[140.] 173 F.3d 1312 (11th Cir. 1999).
\item[141.] Id. at 1315.
\item[142.] Id.
\item[143.] Id. at 1316-17.
\item[144.] Id. at 1315.
\item[145.] Id.
\item[146.] Id.
\item[147.] Id.
\end{itemize}
intended to establish a fact and not to bolster the informant's credibility.\textsuperscript{148} Accordingly, the court reversed defendants' convictions.\textsuperscript{149}

VI. ARTICLE VIII: HEARSAY

In criminal cases the use of hearsay evidence against an accused potentially raises constitutional issues; if an out-of-court statement is admitted into evidence, then the defendant will not "be confronted with the witnesses against him."\textsuperscript{150} In \textit{Ohio v. Roberts},\textsuperscript{151} the Supreme Court held that the Sixth Amendment imposes two limitations on the use of hearsay evidence against an accused.\textsuperscript{152} First, hearsay evidence is not admissible unless the prosecutor proves the declarant is unavailable.\textsuperscript{153} Second, the hearsay statement must bear "adequate 'indicia of reliability.'\textsuperscript{154} However, in \textit{United States v. Inadi},\textsuperscript{155} the Supreme Court concluded that \textit{Roberts} does not stand for the blanket proposition that "no out-of-court statement can be introduced . . . without a showing that the declarant is unavailable."\textsuperscript{156} In \textit{Inadi} the Court held that the Confrontation Clause does not require a showing of unavailability as a prerequisite to the admission of a coconspirator's statement under Rule 801(d)(2)(E).\textsuperscript{157} The Supreme Court returned to this issue in \textit{Idaho v. Wright}.\textsuperscript{158} In \textit{Wright} the out-of-court declarant, a child, was unavailable to testify. Therefore, the issue was whether the out-of-court statement satisfied the reliability requirement of the second prong of the \textit{Roberts} test. \textit{Roberts} suggested, and the Supreme Court later confirmed, that the requisite indicia of reliability can be found if the evidence falls within a firmly rooted hearsay exception.\textsuperscript{159} In \textit{Wright} the lower court admitted the out-of-court statement under Idaho's residual exception to the hearsay rule, an exception that the Supreme Court concluded was not sufficiently firmly rooted to establish automatically the requisite reliability.\textsuperscript{160} Therefore, the circumstances surrounding the statement had to be examined to determine if the statement was sufficiently

\textsuperscript{148} \textit{Id.} at 1315-16.
\textsuperscript{149} \textit{Id.} at 1318.
\textsuperscript{150} U.S. CONST. amend. VI.
\textsuperscript{151} 448 U.S. 56 (1980).
\textsuperscript{152} \textit{Id.} at 65.
\textsuperscript{153} \textit{Id.}
\textsuperscript{154} \textit{Id.} at 66.
\textsuperscript{155} 475 U.S. 387 (1986).
\textsuperscript{156} \textit{Id.} at 394.
\textsuperscript{157} \textit{Id.} at 399-400.
\textsuperscript{158} 497 U.S. 805 (1990).
\textsuperscript{159} \textit{Id.} at 813-14; see also \textit{Bourjaily v. United States}, 483 U.S. 171, 183 (1987).
\textsuperscript{160} 497 U.S. at 817.
trustworthy. Significantly, the Court noted that the reliability of the statement could not be established by corroborating evidence, but rather the statement "must possess indicia of reliability by virtue of its inherent trustworthiness."\textsuperscript{161}

The Supreme Court next addressed the tension between hearsay evidence and the Confrontation Clause in \textit{White v. Illinois}.\textsuperscript{162} In \textit{White} the trial court admitted testimony from several witnesses concerning statements made by a child who allegedly had been sexually molested by defendant. These statements were admitted pursuant to Illinois' hearsay exceptions for spontaneous declarations and statements made in the course of securing medical treatment.\textsuperscript{163} The Supreme Court first addressed whether it was necessary to demonstrate the child's unavailability. The Court acknowledged that its decision in \textit{Roberts} suggested that the Confrontation Clause generally requires proof of the declarant's unavailability.\textsuperscript{164} However, the Court concluded that \textit{Roberts} should be limited to its facts; thus, a showing of unavailability must be made only when hearsay is admitted pursuant to an exception for statements made in the course of a prior judicial proceeding, the hearsay exception at issue in \textit{Roberts}.\textsuperscript{165} The hearsay exceptions at issue in \textit{White}, the Court held, do not require a showing of unavailability.\textsuperscript{166} The Court then held that the exceptions for spontaneous declarations and statements made in connection with obtaining medical treatment are sufficiently firmly established to be automatically admissible.\textsuperscript{167}

The Supreme Court's most recent examination of the conflict between hearsay evidence and the Confrontation Clause occurred during the current survey period. In \textit{Lilly v. Virginia},\textsuperscript{168} the Court addressed the issue of whether defendant's Sixth Amendment rights were violated when the trial court admitted evidence of a statement by defendant's brother. Under police questioning the brother admitted his involvement in criminal activity with defendant, but claimed that defendant was more culpable. When the brother refused to testify at defendant's trial, the trial court admitted the brother's statements as declarations against penal interest.\textsuperscript{169} The Supreme Court granted certiorari to determine

\textsuperscript{161} \textit{Id.} at 822.
\textsuperscript{163} \textit{Id.} at 350.
\textsuperscript{164} \textit{Id.} at 353-54.
\textsuperscript{165} \textit{Id.}
\textsuperscript{166} \textit{Id.} at 356-57.
\textsuperscript{167} \textit{Id.}
\textsuperscript{168} 527 U.S. 116 (1999).
\textsuperscript{169} \textit{Id.} at 120-23.
whether defendant's Sixth Amendment right to confront his witnesses "was violated by admitting into evidence at his trial a nontestifying accomplice's entire confession that contained some statements against the accomplice's penal interest and others that inculpated the accused." After a detailed examination of the origin of the hearsay exception for statements against penal interest, the Court held that an accomplice's confession that inculpates a criminal defendant is not within a firmly rooted exception to the hearsay rule. Thus, whether the prosecutor seeks to admit an accomplice's statement under the hearsay exception for statements against penal interest, or any other hearsay exception, the Sixth Amendment bars its admission unless the prosecutor can prove the reliability and trustworthiness of the statement.

In Macuba v. DeBoer, the Eleventh Circuit attempted to dispel the "apparent confusion in the federal courts on the extent to which hearsay may be considered in ruling on a motion for summary judgment." Whether it succeeded remains undetermined. In Macuba plaintiff brought suit against a Florida county and two members of its Board of Commissioners for infringement of his First Amendment rights. The county commissioners moved for summary judgment on the ground that they were immune from suit under the doctrines of absolute and qualified immunity. When the district court denied their motion, the commissioners appealed. In response to defendants' motion for summary judgment, plaintiff relied on the affidavit of a former county commissioner recounting conversations between the former commissioner and a number of county employees, at least one of whom held a supervisory position. The Eleventh Circuit dismissed this affidavit as "rank hearsay," a problem apparently undetected by the district court. The Eleventh Circuit thought this was because of the confusion over whether and to what extent hearsay is admissible in summary judgment proceedings. The general rule, the court noted, is that hearsay cannot be considered by a trial court when ruling on summary judgment motions. However, the court acknowledged that many circuits, including the Eleventh Circuit, "appear to have restated the general rule

170. Id. at 120.
171. Id. at 134.
172. 193 F.3d 1316 (11th Cir. 1999).
173. Id. at 1322.
174. Id. at 1319-20.
175. Id. at 1322.
176. Id.
177. Id.
to hold that a district court may consider a hearsay statement in passing on a motion for summary judgment if the statement could be 'reduced to admissible evidence at trial' or 'reduced to admissible form.' The court traced these cases to the Supreme Court's decision in *Celotex Corp. v. Catrett*, in which the Court held that a party responding to a motion for summary judgment need not produce affidavits, but may rely on pleadings and discovery on file with the court. Regardless of the source, the Eleventh Circuit concluded in *Macuba* that the phrases "reduced to admissible evidence in trial" and "reduced to admissible form" do not mean that hearsay evidence is admissible in summary judgment proceedings, but rather require that the out-of-court statements be admissible at trial for some purpose. Thus, the statement at issue may be hearsay, but the district court may consider if it falls within an exception to the hearsay rule. It appears that the court concluded that the statement itself must be admissible at trial even though the form of the statement considered by the district court in the summary judgment proceeding is not admissible. For example, an affidavit would not be admissible at trial. Yet in a summary judgment proceeding, the district court may consider an affidavit recounting the hearsay statement of a declarant that falls within an exception to the rule against hearsay, but may not consider an affidavit recounting a hearsay statement not covered by an exception. But this is almost always the case; rarely do district courts hear live testimony when ruling on summary judgment motions. Instead they rely on affidavits, deposition transcripts, or similar written forms of testimony. Under the majority's holding, the testimony contained in such documents must itself be admissible. In other words, the question is whether the hearsay statement in an affidavit would be admissible if the affiant were testifying "live" in court rather than by affidavit.

If this is the majority's holding, it arguably does not address squarely the issue before the court. It would appear that the phrases "reduced to admissible evidence at trial" and "reduced to admissible form," if they mean anything, must stand for something more than the simple

178. *Id.* at 1323 (quoting *Pritchard v. Southern Co. Servs.*, 92 F.3d 1130, 1135 (11th Cir. 1996)).
180. *Id.* at 323.
181. 193 F.3d at 1323-24.
182. See *id.*
183. *Id.*
184. *Id.* at 1323-25.
proposition that affidavits can be considered even though affidavits 
would be inadmissible at trial.

This seemed to be Judge Bright's point in his dissent. He noted that 
the hearsay statements in the affidavit "may well have represented 
admissible employee statements, or may otherwise be provable or 
admissible at trial by the individual making the statement. However, 
the record remains incomplete on foundation and the manner in which 
this evidence would be presented at trial." Thus, in Judge Bright's 
opinion, a hearsay statement in an affidavit may nevertheless be 
admissible even though there is not yet a sufficient foundation in the 
record to bring the statement within some exception to the rule against 
hearsay. With regard to the evidence at issue, Judge Bright concluded 
that this evidence was sufficient, at the summary judgment stage, to 
create a genuine issue of material fact.

185. *Id.* at 1327 (Bright, J., dissenting).
186. *Id.*