



Technology Transition Workshop | *Gregory Hill, Attorney at Law*

FIDO Program: Legal Considerations

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Overview

- Statutes
- Case law
- Jury instructions
- Courtroom testimony
 - Qualifications
 - Direct examination
 - Cross-examination

Federal Law

- **Uniform Controlled Substances Act**
 - The **Controlled Substances Act (CSA)** was enacted into law by the [Congress of the United States](#) as Title II of the [Comprehensive Drug Abuse Prevention and Control Act of 1970](#).^[1] The CSA is the [federal U.S. drug policy](#) under which the manufacture, importation, possession, use and distribution of certain substances is regulated
 - The legislation created five Schedules (classifications) with varying qualifications for a substance to be included in each
 - The [DEA](#) and the [FDA](#) determine which substances are added or removed from the various schedules

State Drug Statutes

FL	F.S. §893
KY	KRS 218A.00
LA	RS 40
MA	M.C.L.A. Ch 94C
MI	M.C.L. 333.7401
NY	Penal Code Title M, Article 220
PA	35 P.A. C.S. 780

State Evidence Codes

FL	F.S. § 90
KY	KRE.702
LA	C.E. 702
MA	--
MI	M.C.L. 600
NY	CPL Pt 1, Title D, Article 60
PA	225 Pa. Code Rule 702

Jury Instructions

Required element to be proven:

“the substance was (the substance alleged.)”

Evidence Admissibility

- Standard of Admissibility
 - Daubert – commonly referred to as the “gatekeeper” standard (22 states)
 - Frye – known as the “general acceptance” standard (13 states)
 - Hybrid/Other – derivative from Daubert or Frye (16 states)

Courtroom Testimony

- Qualifications
- Direct examination
- Cross-examination

Qualification

- If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion; however the opinion is admissible only if it can be applied to the evidence at trial

Subject Matter Admissibility

- What subject matter is admissible?
 - Scientific
 - Technical
 - Other specialized knowledge

Expert Opinion Testimony

- Who can present scientific, technical or other specialized knowledge – in the form of an opinion?
 - a qualified witness

Qualifying as an Expert

- How does a witness become “qualified”?
 - Knowledge
 - Skill
 - Experience
 - Training
 - Education

Qualifying – CV

- Prepare/update curriculum vitae
 - Education
 - Training
 - Conferences/seminars
 - Presentations
 - Publications (peer reviewed by field)

Qualifying – Specific Experience

- Case/test tracking record
 - Date
 - Case type
 - Case name
 - Case synopsis
 - Test used
 - Test result
 - Court testimony (expert)

Direct Examination

- Communicate with prosecutor in advance
- Don't assume prosecutor is familiar with FIDO
- Ensure that capabilities and limitations are understood

Cross-Examination - SETO Approach[©]

- Science
- Examination
and
- Testing
- Opinions/Findings

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Prepare for Challenges

- “You’re not a chemist or toxicologist?”
- “Contamination possible?”
- “3rd party contamination possible?”
- “Chemical kit components”
- “Quality control”
- “False positives”

Challenges (continued)

- “Kit validation”
- “What other substance could result in a positive result?”
- Color test result-subjective
- New testing process that has not established an adequate history of reliability or acceptance in scientific community
- This testing is relatively new or “novel” (test methodology is well established)

Challenges (continued)

- Subjective, not quantifiable, and will mislead or confuse jury
- Testing and methodology is not adequately established to determine its reliability
- Officer is not adequately qualified to testify, opinion requires chemist
- Absence of QA to ensure validity and accuracy of kit

Challenges (continued)

- Absence of mechanism to determine whether reagents in kit are contaminated or defective
- Absence of mechanism to explain “false positive” or other legal sources of a positive test (over-the-counter medicines, etc.)
- Prejudicial effect of elevating presumptive test to a “scientific testing” outweighs probative value
- Inability to quantify the result or provide error rates
- “Dirty money” contamination

Contact Information



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