

AZ Supreme Court Adopts Daubert Standard for Expert Witness Testimony after Constitutional Dustup

Emily Ward, Arizona Law Review, 9/14/11

For nearly 40 years the Arizona Supreme Court followed the Frye standard governing expert witness testimony. On September 7, 2011, the Court changed this trajectory by amending Arizona Rule of Evidence 702. The Court's decision effectively resolved the lengthy tension between Frye and Daubert in Arizona. Effective January 1, 2012, Arizona will join a majority of other states in following the Daubert standard.

But the Supreme Court's recent amendment was prompted over a year earlier. In April 2010, the Arizona Legislature ignited this debate by enacting the Daubert standard through Senate Bill 1189 (later codified Arizona Revised Statutes section 12-2203). The bill's sponsor defended SB 1189 as a mechanism to make Arizona a "competitive business location." Other members of the legal community noted that Arizona should make the change to Daubert to align with federal courts and improve judicial efficiency.

Although the legislature was well-meaning in enacting section 12-2203, it could not pass constitutional muster. The Arizona Constitution gives the Arizona Supreme Court the exclusive power to promulgate procedural rules. Given this select authority, any procedural statute enacted by the legislature conflicts with the Court's constitutionally vested rulemaking power. Applying the constitutional framework set forth in *Seisenger v. Seibel*, the Arizona Court of Appeals in *Lear v. Fields* held that § 12-2203 violated the separation of powers doctrine.

This Daubert debate prompted the Court to initiate its own independent review of the Rules of Evidence—thereby mooting any separation of powers issue. On March 24, 2010, Chief Justice Rebecca Berch established the Ad Hoc Committee on Rules of Evidence. The Committee's goal was to compare the Arizona and Federal Rules—especially Rule 702. On October 15, the Committee met at the University of Arizona to discuss the merits of retaining Frye or adopting Daubert. After conferring with Professor Thomas Mauet, Deputy County Attorney Kathleen Mayer and Attorney John Canby, the Committee became deadlocked and did not give a definitive recommendation to the Court. From January to May 2011, the Court accepted public comment.

Unlike a formal adjudication, the Court's recent amendment to Rule 702 did not include an analysis for their selection. Rather, the Court's Daubert decision was framed as a 2012 amendment to Rule 702 and only included a Comment about its application.¹

Professor Mauet commented on the long-term impact of the change:

What will Arizona's change from a Frye jurisdiction to a Daubert jurisdiction mean for trial lawyers? First, the result in most cases, as far as the admissibility of expert witness testimony is concerned, will not change. For example, in personal injury cases, plaintiffs' and defendants' expert medical witnesses, previously admitted under Frye, will also be admissible under Daubert. Second, only in complex cases, such as toxic tort and pharmaceutical cases involving causation issues, will the Daubert requirement of showing that the expert's proposed testimony is sufficiently reliable be an additional hurdle. Third, Arizona will probably go through the same phases as other states that have adopted Daubert. In the first months lawyers may file a number of Daubert motions challenging the admissibility of the other side's expert witness testimony. As courts rule, and lawyers learn that the rulings are much the same as before, the flurry of motions will abate, and life will return largely to how things were before the change.

Notwithstanding the lack of guidance on the Rule's application, the Court's amendment to Rule 702 will still substantially affect how expert testimony is conducted in Arizona. The judge's role as "gatekeeper" of reliability will likely afford many new challenges to existing expert witness testimony.

1. Comment to 2012 Amendment: "The amendment recognizes that trial courts should serve as gatekeepers in assuring that proposed expert testimony is reliable and thus helpful to the jury's determination of facts at issue... The trial court's gatekeeping function is not intended to replace the adversary system. Cross-examination, presentation of contrary evidence, and careful instruction on

the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.”