

**MINUTES OF
AD HOC COMMITTEE ON RULES OF EVIDENCE**

Friday, October 15, 2010

The University of Arizona

James E. Rogers College of Law

Web Site: <http://www.azcourts.gov/rules/AdHocCommitteeonRulesofEvidence.aspx>

Members Present:

The Honorable Mark Armstrong, Acting Chair
The Honorable Michael Miller
The Honorable Samuel Thumma
Mr. Paul Ahler
Prof. Dave Cole
Mr. Timothy Eckstein
Mr. Milton Hathaway
Mr. Carl Piccarreta

Members Not Present:

The Honorable Andrew Hurwitz, Chair
Ms. Patricia Refo

Staff Present:

Mark Armstrong

Quorum:

Yes

1. Call to Order—Judge Armstrong

Judge Armstrong called the meeting to order at 10:00 a.m., and explained that Justice Hurwitz had asked him to chair the meeting in his (Justice Hurwitz's) absence. Judge Armstrong reminded the committee that, unfortunately, Justice Hurwitz was unable to attend the meeting because of injuries sustained in a bicycle accident last Saturday. Judge Armstrong reassured the committee, however, that Justice Hurwitz was doing well and would return to lead the committee in the future.

Judge Armstrong welcomed invited guests, visitors and students and asked committee members to introduce themselves. He showed a power point presentation and briefly explained the background and history of the committee, the rule-making process, the committee's work to date, and the work remaining to be done.

With respect to work completed to date, Judge Armstrong explained that the committee had generally agreed to recommend conforming to the Federal Rules of Evidence, as restyled, with certain notable exceptions, including Rule 103(d) (Fundamental Error), Rule 302, Rule 404 (Character and Other Acts Evidence), Rule 408(a)(2) (Criminal Use Exception), Rule 611(b) (Scope of Cross-Examination), and Rule 706(c) (Compensation for Expert Testimony).

2. Approval of Minutes from 9/17/2010 Meeting—Judge Armstrong

The committee voted unanimously to approve the draft minutes.

3. Revisit Rules 701 and 704—Judge Armstrong

The committee voted unanimously to defer consideration of Rule 701, which will abide the committee's decision on Rule 702, and to adopt the federal version of Rule 704. Judge Armstrong reiterated his opinion that FRE 704(b), which was added to the federal rules in 1984 but never added to the Arizona rules, is otherwise consistent with current Arizona law.

4. Discussion of Rule 702 with Professor Mauet, John Canby and Kathleen Mayer (sitting individually and not as a panel)—All

Professor Mauet spoke first and provided an academic perspective on *Frye* and *Daubert*.¹ He opined that the "gatekeeper" concept is not really novel. He believes the flaw in ARE 702 is that it includes no "screening device." He does not believe it likely that the adoption of *Daubert* would generate a proliferation of hearings; perhaps there would be an initial flurry but experience has not borne out the fear of increased litigation. He believes the position that Rule 702 has no standards for non-scientific evidence has "substance." He observed that four of the five largest states are *Frye* states, or in the case of California, a *Frye*-plus state (i.e., *Frye* + Reliability). Texas is a *Daubert* state. Thus, when considering population, there may be more of an even split between *Daubert* and *Frye* than commonly thought. He suggests as a middle ground omitting the last prong of FRE 702 (the expert has reliably applied the principles and methods to the facts of the case). He noted that critics have the greatest problem with this prong, especially in light of *Joiner*, which appears to have combined methodology and

¹ The descriptions of the speakers' comments herein are not intended to be exhaustive. The comments were videotaped so that a complete record would be available to Court and committee members.

conclusions. He believes his hybrid or compromise proposal would also be more consistent with Arizona constitutional provisions on the right to jury. When committee members questioned Professor Mauet, a concern was raised that his approach might deprive courts of the benefit of federal court interpretations of the rule.

John Canby spoke next on behalf of Arizona Attorneys for Criminal Justice. He spoke solely on the effect of the rule in criminal cases. He spoke in favor of adopting FRE 702 and *Daubert*. He noted cases and statistics concerning recent DNA and other exonerations. He also noted the NAS report finding certain forensic evidence unreliable or not demonstrably reliable. He believes that proceedings under FRE 702 may have prevented Ray Krone's wrongful conviction. Finally, he noted the frequent funding disparities between prosecution and defense, and stated that he thought Professor Mauet's proposal would be an improvement over *Frye*.

Kathleen Mayer, Deputy Pima County Attorney, spoke on behalf of Pima County Attorney Barbara LaWall, who was also present. She stated she was "happy with *Logerquist*" and favors the retention of ARE 702. She believes conclusions based on the NAS report are overstated because not all exonerations have been based on faulty expert testimony. She also expressed a concern that adoption of FRE 702 might be used to challenge defense behavioral testimony as well. She believes the adoption of FRE may result in increased litigation and cost as borne out by recent challenges to SB 1189, and other challenges. She believes the problem with Professor Mauet's proposal is that over time the last prong of FRE 702 would merely move to the preceding prong.

5. Call to the Public—Judge Armstrong

John Tully, of the Law Offices of John Tully, P.C., spoke in favor of the retention of the *Frye* standard. He has great confidence in the ability of juries and their collective wisdom. He thinks judges currently have a post-trial mechanism for setting aside a verdict based on "junk science." He believes that litigation costs will increase for bad-faith plaintiffs if the Court adopts *Daubert*.

Justice Stanley Feldman spoke last and posed a question for the committee to consider—how FRE 702 would affect social and behavioral expert testimony. He believes judges underutilize current Rules 702 and 403.

6. Next Meeting and Roadmap—Judge Armstrong

The next committee meeting will be held on November 19, 2010, from 9:00 a.m. – 2:00 p.m., at the Arizona Courts Building, Room 109, 1501 W. Washington, Phoenix, Arizona.

Judge Armstrong explained that the current plan is for committee members to vote on Rule 702 [and therefore Rule 701 as well] at the November meeting. He promised to circulate the restyled rules and comments, except for Rules 701 and 702, as early as Monday, October 18, 2010, so that if time permits, they may also be considered at the November meeting. If necessary, however, discussion and consideration of any or all remaining issues may be continued to the December meeting. Judge Armstrong also advised the committee that it is possible committee members may be recalled to service in 2011 to consider the rule-change petition [and/or any comments received during the public comment period].

7. Adjournment—Judge Armstrong

Judge Armstrong adjourned the meeting at 1:00 pm.