

MEMORANDUM

TO: Ad Hoc Committee on Rules of Evidence
FROM: Subcommittee on Undesignated Rules in Article VII
DATE: August 24, 2010
RE: Recommended Action

I. BACKGROUND

At the committee's fourth meeting on August 20, 2010, Justice Hurwitz created the Subcommittee on Undesignated Rules in Article VII, consisting of Judge Armstrong and Justice Hurwitz, to review all rules in Article VII, except Rule 702, and make appropriate recommendations for change. A review of the undesignated rules reveals significant differences between the Arizona and federal rules only with respect to the Introductory Note (contained only in the Arizona rules), and Rules 701, 704 and 706. In reviewing these rules, which are individually addressed below, the subcommittee was mindful of the committee's stated preference to make the rules consistent absent "good reason."

II. INTRODUCTORY NOTE

The Federal Rules of Evidence do not include the *Introductory Note: Problems of Opinion Testimony* that precedes and applies to all of the Arizona rules in Article VII. The subcommittee takes no position at this time on whether to retain the note, which provides as follows:

Introductory Note: Problems of Opinion Testimony

The rules in this article are designed to avoid unnecessary restrictions concerning the admissibility of opinion evidence; however, as this note makes clear, an adverse attorney may, by timely objection, invoke the court's power to require that before admission of an opinion there be a showing of the traditional evidentiary prerequisites. Generally, it is not intended that evidence which would have been inadmissible under pre-existing law should now become admissible.

A major objective of these rules is to eliminate or sharply reduce the use of hypothetical questions. With these rules, hypothetical questions should seldom be needed and the court will be expected to exercise its discretion to curtail the use of hypothetical questions as inappropriate and premature jury summations. Ordinarily, a qualified expert witness can be asked whether he has an opinion on a particular subject and then what that opinion is. If an objection is made and the court determines that the witness should disclose the underlying facts or data before giving the opinion, the witness should identify the facts or data necessary to the opinion.

In jury trials, if there is an objection and if facts or data upon which opinions are to be based have not been admitted in evidence at the time the opinion is offered, the court may admit the opinion subject to later admission of the underlying facts or data; however, the court will be expected to exercise its discretion so as to prevent the admission of such opinions if there is any serious question concerning the admissibility, under Rule 703 or otherwise, of the underlying facts or data.

However, the subcommittee does recommend making clear that the note was included in the original 1977 version of the rules.

III. RULE 701. Opinion Testimony by Lay Witnesses

ARE 701 provides as follows:

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

Amended Oct. 19, 1988, effective Nov. 1, 1988. [Amendment was technical only—making rule gender neutral.]

[FRE 701](#) provides as follows:

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of [Rule 702](#).

[FRE 701](#) differs from ARE 701 only in that the federal rule includes subdivision (c), added by a 2000 amendment, which requires that lay opinion testimony “not [be] based on scientific, technical, or other specialized knowledge within the scope of Rule 702.” Arizona has not amended this rule since the federal amendment. Subject to discussion by the full committee, the subcommittee tentatively recommends amending ARE 701 to conform to [FRE 701](#) by adding subdivision (c). It does not appear that such a change is dependent on the committee’s recommendation with respect to Rule 702. As restyled, ARE 701 would read as follows:

If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:

- (a)** rationally based on the witness’s perception;
- (b)** helpful to clearly understanding the witness’s testimony or to determining a fact in issue; and
- (c)** not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

IV. **RULE 704. Opinion on Ultimate Issue**

ARE 704 provides as follows:

Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

Comment

Some opinions on ultimate issues will be rejected as failing to meet the requirement that they assist the trier of fact to understand the evidence or to determine a fact in issue. Witnesses are not permitted as experts on how juries should decide cases.

[FRE 704](#) provides as follows:

(a) Except as provided in subdivision (b), testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

(b) No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.

Originally, both versions of the rule read the same. [FRE 704\(b\)](#) was added in 1984 but Arizona did not follow suit. The subcommittee recommends that ARE 706 be amended to conform to restyled [FRE 704](#), as follows:

Rule 704. Opinion on an Ultimate Issue
(a) In General — Not Automatically Objectionable. An opinion is not objectionable just because it embraces an ultimate issue.

(b) Exception. In a criminal case, an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense. Those matters are for the trier of fact alone.

Following is the federal Committee Note to the restyled version:

Committee Note

The language of [Rule 704](#) has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

The Committee deleted all reference to an “inference” on the grounds that the deletion made the Rule flow better and easier to read, and because any “inference” is covered by the broader term “opinion.” Courts have not made substantive decisions on the basis of any distinction between an opinion and an inference. No change in current practice is intended.

V. RULE 706. Court Appointed Experts

ARE 706 provides as follows:

(a) Appointment. Appointment of experts by the court is subject to the availability of funds or the agreement of the parties concerning compensation. The court may, on its own motion or on the motion of any party, enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection. An expert witness shall not be appointed by the court unless the witness consents to act. A witness so appointed shall be informed of the witness' duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of the witness' findings, if any; the witness' deposition may be taken by any party, and the witness may be called to testify by the court or any party. The witness shall be subject to cross-examination by each party, including a party calling the witness.

(b) Disclosure of appointment. In the exercise of its discretion, the court may authorize disclosure to the jury of the fact that the court appointed the expert witness.

(c) Parties' experts of own selection. Nothing in this rule limits the parties in calling expert witnesses of their own selection.

Amended Oct. 19, 1988, effective Nov. 1, 1988. [Amendment was technical only—making rule gender neutral.]

Comment

[Federal Rules of Evidence, Rule 706\(b\)](#) is appropriate in Federal Courts where the funds to compensate experts are made available by statute. Such funds are not generally available in Arizona except in capital offenses, [A.R.S. § 13-673](#); sanity hearings, [A.R.S. § 13-1674](#); medical liability review panels, [A.R.S. § 12-567\(B\)\(4\) and \(M\)](#); and mental health proceedings, [A.R.S. § 36-545.04](#). Therefore, [Arizona Rules of Evidence, Rule 706\(a\)](#) was prefaced by the availability of these funds or the compensation of the experts to be agreed upon, and [Federal Rules of Evidence, Rule 706\(b\)](#) was not adopted, and paragraphs numbered (c) and (d) were renumbered paragraphs (b) and (c) respectively.

[FRE 706](#) provides as follows:

(a) Appointment.

The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection. An expert witness shall not be appointed by the court unless the witness consents to act. A witness so appointed shall be informed of the witness' duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of the witness' findings, if any; the witness' deposition may be taken by any party; and the witness may be called to testify by the court or any party. The witness shall be subject to cross-examination by each party, including a party calling the witness.

(b) Compensation.

Expert witnesses so appointed are entitled to reasonable compensation in whatever sum the court may allow. The compensation thus fixed is payable from funds which may be provided by law in criminal cases and civil actions and proceedings involving just compensation under the fifth amendment. In other

civil actions and proceedings the compensation shall be paid by the parties in such proportion and at such time as the court directs, and thereafter charged in like manner as other costs.

(c) Disclosure of appointment.

In the exercise of its discretion, the court may authorize disclosure to the jury of the fact that the court appointed the expert witness.

(d) Parties' experts of own selection.

Nothing in this rule limits the parties in calling expert witnesses of their own selection.

ARE 706 differs from its federal counterpart only in the treatment of expert compensation. As noted in Arizona's comment, however, the Court expressly considered and rejected current [FRE 706\(b\)](#). Thus, the subcommittee recommends no substantive change to ARE 706, except for adding a provision that a court-appointed expert is entitled to reasonable compensation. The subcommittee also recommends restyling as appropriate in accordance with the federal restyling and adding the date of the comment—1977. We would also note that in the federal restyling of FRE 706, a new subsection (b), Expert's Role, has been added and other subsections have been re-lettered accordingly. Restyled ARE 706 would read as follows:

Rule 706. Court-Appointed Expert Witnesses

(a) Appointment Process. On a party's motion or on its own, the court may order the parties to show cause why expert witnesses should not be appointed and may ask the parties to submit nominations. The court may appoint any expert that the parties agree on and any of its own choosing. But the court may only appoint someone who consents to act.

(b) Expert's Role. The court must inform the expert of the expert's duties. The court may do so in writing and have a copy filed with the clerk or may do so orally at a conference in which the parties have an opportunity to participate. The expert:

- (1)** must advise the parties of any findings the expert makes;
- (2)** may be deposed by any party;
- (3)** may be called to testify by the court or any party; and
- (4)** may be cross-examined by any party, including the party that called the expert.

(c) Compensation. The expert is entitled to a reasonable compensation, as set by the court. Except as otherwise provided by law, appointment of an expert by the court is subject to the availability of funds or the agreement of the parties concerning compensation.

(d) Disclosing the Appointment to the Jury. The court may authorize disclosure to the jury that the court appointed the expert.

(e) Parties' Choice of Their Own Experts. This rule does not limit a party in calling its own experts.