

1 ANDREW P. THOMAS
2 MARICOPA COUNTY ATTORNEY
3 (FIRM STATE BAR NO. 0003200)

4 PHILIP J. MACDONNELL
5 CHIEF DEPUTY COUNTY ATTORNEY
6 ANTHONY NOVITSKY
7 301 WEST JEFFERSON STREET, SUITE 800
8 PHOENIX, ARIZONA 85003
9 TELEPHONE: (602) 506-3800
10 (STATE BAR NUMBERS 003813 AND 006934)

11
12 IN THE SUPREME COURT OF THE STATE OF ARIZONA

13 IN THE MATTER OF:

R-08-0036

14 PETITION TO AMEND RULES 703
15 AND 705 OF THE ARIZONA RULES
16 OF EVIDENCE.

MARICOPA COUNTY ATTORNEY'S
COMMENT TO PETITION TO
AMEND RULES 703 AND 705 OF THE
ARIZONA RULES OF EVIDENCE

17 The Maricopa County Attorney's Office hereby opposes the Petition to Amend Rule
18 703 of the Arizona Rules of Evidence and supports the Petition to Amend Rule 705 of the
19 Arizona Rules of Evidence.
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21 Respectfully submitted this 19th day of May, 2009.

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23 ANDREW P. THOMAS
24 MARICOPA COUNTY ATTORNEY

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26 BY: Philip J. MacDonnell
27 PHILIP J. MACDONNELL
28 CHIEF DEPUTY

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 The State Bar of Arizona has proposed to amend Rules 703 and 705 of the Arizona
3 Rules of Evidence. The proposed changes would modify the rules with respect to the
4 scope of testimony of expert witnesses, modify the timing of disclosure of facts used by
5 experts in forming opinions, and allegedly bring the Arizona rules into conformity with
6 the Federal Rules of Evidence. The Maricopa County Attorney’s Office supports the
7 Petition with respect to Rule 705; however, it does not support the proposed amendments
8 to Rule 703.
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10 While the Arizona Rules of Evidence are generally modeled after the federal rules,
11 conformity between the Arizona Rules and their federal counterparts is not always
12 appropriate or desirable. Rule 703 is an example of a rule where conformity is not
13 provident due to a delicate balance between state and federal jurisprudence that has
14 developed over many years. For example, in 1993, the United States Supreme Court
15 adopted the so-called *Daubert* standard with respect to the admissibility of expert
16 testimony under the Federal Rules of Evidence. *Daubert v. Merrill Dow Pharmaceuticals,*
17 *Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L. Ed.2d 469 (1993). The Supreme Court ruled
18 that the “general acceptance” requirement for admission of scientific evidence would be
19 at odds with the Federal Rules of Evidence and their general approach of relaxing
20 traditional barriers to opinion testimony. In *Daubert*, the Supreme Court found that
21 “general acceptance” is but one factor that the trial judge should consider in determining
22 whether an expert opinion should be allowed to be presented to the jury. In essence, the
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1 Supreme Court found that under the Federal Rules of Evidence the trial judge should
2 function as the “gatekeeper” to decide whether scientific evidence or expert opinions are
3 both relevant and reliable.
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5 The Arizona Supreme Court has specifically rejected the *Daubert* standard under
6 the Arizona Rules of Evidence. *Logerquist v. McVey*, 196 Ariz. 470, 1 P.3d 113 (2000).
7 The Court instead ruled that the standard announced in *Frye v. United States*, 293 F. 1013
8 (D.C. Cir. 1923), and adopted in Arizona in 1962, would be retained under the Arizona
9 Rules of Evidence as written and interpreted by state case law. In *Logerquist*, the Arizona
10 Supreme Court found that the *Frye* standard, as limited by Arizona case law, works well
11 in the Arizona courts, and that the standard does not need liberalizing in Arizona. The
12 Court ruled that in Arizona, once relevance and general scientific acceptance have been
13 established, juries should be given the responsibility to determine the reliability and
14 weight of expert evidence.
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19 Amendment of Arizona Evidence Rule 703 to match its federal counterpart may be
20 construed by courts and practitioners as tacit acceptance of the *Daubert* standard in
21 Arizona, something that has not been considered on its merits by the Arizona Supreme
22 Court since *Logerquist*. Acceptance of the *Daubert* standard would be an unintended
23 consequence of amendment of Rule 703.
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25 There could be other unintended consequences as well. The proposed amendment
26 of the rule could be interpreted to mean that a trial court must hold a pre-trial hearing in
27 every case where an expert witness may testify to determine whether the expert’s
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1 opinions should be limited through a Rule 403 type of analysis. Creation of a new
2 responsibility to hold such hearings would place a strain on the already limited resources
3 of the courts, when such hearings are largely unnecessary. The petition generally asserts
4 that the current version of Rule 703 may be construed to always allow hearsay or other
5 inadmissible matters before a jury. However, nothing in Arizona jurisprudence suggests
6 that such a problem exists. Rather, judges already have ample authority to prevent the
7 admission of otherwise inadmissible or prejudicial evidence by virtue of Rules 104 and
8 403 of the Arizona Rules of Evidence. Modification of Rule 703 is simply not necessary,
9 and may lead to both unintended consequences and additional litigation.
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13 Furthermore, the language “facts or data that are otherwise inadmissible” as
14 proposed in the amendments to Rule 703 is ambiguous. Does it mean evidence for which
15 adequate foundation has not yet been laid? Does it mean only legally privileged evidence?
16 For example, an out of court statement (hearsay) that forms the basis for an expert’s
17 opinion should not be “otherwise inadmissible” if the declarant will later testify and be
18 subject to cross examination, or if the statement is introduced not to prove the truth of the
19 matter asserted but merely to explain the basis for the expert’s opinion (a limiting
20 instruction by the court is an adequate safeguard in many circumstances). Adoption of the
21 proposed amendment to Rule 703 will undoubtedly raise questions that will need to be
22 addressed in future litigation.
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27 Lastly, the proposal to add the language “in a criminal case, their disclosure to the
28 trier of fact would not violate a defendant’s constitutional rights” to Rule 703 is

1 superfluous. The Constitution and the rights it guarantees are the supreme law of the land.
2 No rule of evidence can possibly be construed to allow the admission of evidence that is
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4 contrary to or in violation of a person's constitutional rights. Addition of such superfluous
5 language into a rule only creates confusion in the application of the rule.

6 The colloquialism "if it isn't broken, don't fix it" is wisely applicable to the
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8 Petition to Amend Rule 703 of the Arizona Rules of Evidence. The Court is urged to
9 reject the proposed amendments.

10 Respectfully submitted this 19th of May, 2009.

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MARICOPA COUNTY ATTORNEY

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