

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

Friday, September 17, 2010

Arizona Courts Building

1501 W. Washington, Conference Room 109

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

Members Present:

The Honorable Andrew Hurwitz, Chair
The Honorable Michael Miller
The Honorable Samuel Thumma
Mr. Paul Ahler
Prof. Dave Cole
Mr. Timothy Eckstein
Mr. Milton Hathaway
Mr. Carl Piccarreta
Ms. Patricia Refo

Members Not Present:

Staff Present:

Mark Armstrong

Quorum:

Yes

1. Call to Order—Justice Hurwitz

Justice Hurwitz called the meeting to order at 9:05 a.m.

2. Approval of Minutes from 8/20/2010 Meeting—Justice Hurwitz

The committee voted unanimously to approve the draft minutes.

3. Revisit Rule 609(a) in terms of whether to adopt the federal version of Rule 609(a)(2)—Justice Hurwitz

The committee voted unanimously to adopt the federal version of Rule 609(a)(2).

4. Revisit Rule 804(b)(1) in terms of whether to adopt the federal version of Rule 804(b)(1)—Justice Hurwitz

The committee voted unanimously to adopt the federal version of Rule 804(b)(1).

5. Report of Article VII Undesignated Rules Subcommittee—Justice Hurwitz and Judge Armstrong

Judge Armstrong reported that the only undesignated rules in Article VII in which there are significant differences between the state and federal versions are Rules 701, 704, 706 and the Introductory Note to the Arizona rule. The committee reached consensus to amend the Introductory Note and Rule 706 in accordance with the report of the Subcommittee on Undesignated Rules in Article VII, dated August 24, 2010. The recommended changes to Rules 701 and 704 were deferred to the October meeting to allow committee members to further consider them. Judge Armstrong suggested, however, that FRE 704(b) is consistent with existing Arizona law. *See State v. Lindsey*, 149 Ariz. 472, 475 (1986).

6. Report of Subcommittee on Providing Notice of September-October Meetings to Interested Groups—Justice Hurwitz

Justice Hurwitz stated that notice of the September and October meetings was distributed electronically to all members of the State Bar of Arizona. Like the September meeting, the October meeting will be devoted exclusively to discussion of Article VII, with emphasis on Rule 702. The October meeting, at which Prof. Mauet, John Canby, and others will speak, will be held in Tucson at the University of Arizona, James E. Rogers College of Law from 10:00 am– 2:00 pm. Interested persons may again speak at the October meeting.

7. Discussion of Rule 702 with Judges Susan Bolton and Nanette Warner, and Justice Stanley Feldman

The judges discussed their experience with *Frye* and/or *Daubert* hearings.¹ Judge Bolton recommends the adoption of FRE 702 to achieve consistency and because of the benefits

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.

inherent in the gatekeeper concept. In her experience, there has not been a profusion of hearings because of *Daubert*.

Judge Warner stated her opinion that the *Frye* test is adequate to prevent the admission of “junk science.” She believes the *Frye* test is efficient and easy to understand, and she trusts juries to make correct decisions. The key for her is that FRE 702 would apply to all expert testimony and not merely scientific testimony. She does not favor the adoption of FRE 702. In her words, “if it ain’t broke, don’t fix it.”

Justice Feldman stated he is satisfied with *Logerquist*. He believes that *Frye* works and that juries may be trusted. He emphasized that adopting *Daubert* brings along with it *Daubert*’s progeny. He believes adopting *Daubert* would generate controversy, increased expense and increased litigation. He stated there is no unanimity in the federal courts about the meaning of “reliability.” He believes the adoption of *Daubert* may be unconstitutional, noting that under the Arizona constitution, judges may not comment on the evidence and issues of contributory negligence and assumption of risk are always for the jury to decide. He noted recent statistics showing that 25 states have adopted *Daubert*, 15 have adopted *Frye*, 6 have adopted a hybrid, and 4 have adopted their own test. He distributed several handouts to the committee, including a copy of *Dodge v. Cotter Corporation*, 328 F.3d 1212 (10th Cir. 2003); “An Essay on the Good (*Frye*), the Bad (*Daubert*), and the Unconstitutional (Senate Bill 1189), dated October 2010 by David L. Abney; “Post-*Daubert* Standards for Admissibility of Scientific and Other Expert Evidence in State Courts,” 90 A.L.R. 5th 453 (originally published in 2001); “The *Daubert* Trilogy in the States,” 44 *Jurimetrics J.* 351 (Spring 2004); and “Procedural Issues Under *Daubert*,” 36 *Hous. L. Rev.* 1133 (Winter 1999).

All three judges answered questions by committee members.

8. Discussion of Rule 702 with John Curtin on behalf of AAJ and Richard Langerman on his own behalf

These speakers largely agreed with the comments of Justice Feldman. Mr. Curtin emphasized that he strongly supports the *Logerquist* decision. Mr. Langerman emphasized that judges should not be engaging in fact-finding and that juries may be trusted to determine the facts. Both oppose the adoption of FRE 702 or *Daubert*.

9. Call to the Public—Justice Hurwitz

Leo Masursky, Deputy Pima County Public Defender, spoke to the committee and offered that FRE 702 would provide a helpful framework for judges to consider behavioral and experiential-based “dry” or “cold” expert testimony offered by the State in criminal cases. He favors the adoption of FRE 702.

10. Next Meeting—Judge Armstrong

The next committee meeting will be held on October 15, 2010, from 10:00 a.m. – 2:00 p.m., at the University of Arizona, James E. Rogers College of Law, Tucson, Arizona.

11. Adjournment—Justice Hurwitz

Justice Hurwitz thanked the committee and adjourned the meeting at 1:30 pm.