

New Standard for Scientific and Expert Testimony

Daubert Adopted in Arizona

BY TIM EIGO

On May 10, Governor Jan Brewer signed into law a change in the standard controlling the admissibility of expert opinion testimony in state courts. In shorthand, Arizona shifted from being a *Frye* state to being a *Daubert* state.

That legislation was passed amidst a number of disputes over some basic questions. Among them, what is the perceived and real impact of the change on lawsuits? And should the Legislature intrude on the Court's rule-making authority in the first place?

We spoke to experts and others about what the change might mean for litigants and lawyers.

Frye to Daubert

Previously, determinations regarding scientific evidence were made based on relevance and what was called the *Frye* test, named for a 1923 federal circuit court case.¹ In that case (regarding polygraph evidence), the court assessed whether the novel scientific evidence had "gained general acceptance in the particular field in which it belongs."

In a series of three cases in the 1990s² (which, taken together, are commonly considered the "*Daubert* standard"), the U.S. Supreme Court rejected the *Frye* test, holding that it was superseded by Rule 702 of the Federal Rules of Evidence:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Reading the plain language of the rule, the Court determined that "general accept-

ance" was not a required precondition for admissibility. Ironically, given the current proponents of and rationale for *Daubert* today, the Court in 1993 found the *Frye* standard too rigid and in conflict with the Federal Rules' emphasis on admitting all testimony that may aid the court. They expected *Daubert* to change that.

How a few decades change things. Today, *Daubert* is most often touted as a tool to limit the admission of testimony, which is sometimes viewed by civil defendants as "junk science." According to many commentators, *Daubert* has raised higher barriers against opinion testimony.

Now, Arizona is poised to join the federal courts and more than half of the other U.S. states as a *Daubert* jurisdiction.

Who's Pleased

Chambers of commerce, defense lawyers and certain associations are pleased with the shift to *Daubert*.

The Arizona Medical Association was a proponent of the change, and thinks it's about time that Arizona join the "37 other states that use *Daubert* or a version of it," says David Landrith, Vice President of Policy & Political Affairs at the association.

"We feel that the jury and the defense deserve the best possible information on which to make a decision. We felt that the *Frye* standard doesn't do that."

He said it is not the association's goal to say that doctors cannot be sued. Instead, "Our goal is to get at the frivolous suits. But we want to make sure that solid suits can still go forward."

Some have argued that *Daubert* may lead to a series of "mini-trials" on expert issues, and Landrith acknowledges that he's

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heard it slows the process down. But the result, he believes, is that "Verdicts are much more sustainable and valid."

Who's Not

On the other side, the trial lawyers group—recently renamed the Arizona Association for Justice—opposed the change and is troubled by its implications.

Executive Director Janice Goldstein says there are procedural and substantive problems with the law.

"The Legislature has overstepped its bounds by making court rules," she says. "And they are taking power away from jurors to make decisions."

Lloyd Rabb III, a Tucson attorney and the group's past president, is troubled at the bald desire of proponents to make court-houses more "business-friendly," when the goal should be to make them more fair.

"In Texas and in the federal system," Rabb says, "*Daubert* has been used as a sword by the defense bar." And it has raised the cost of litigation, he argues, for few plaintiffs have the resources to pay experts to testify two or three times for *Daubert* hearings.

Rabb adds that those who advocated for *Daubert* may not be pleased at the result. Despite other trends that have limited the discretion of judges, he says, *Daubert* broadens their discretion. He says decades of federal judges who have been favorable to business interests make *Daubert* advocates favor judicial discretion—now. But the pendulum could swing: "As soon as the discretion rules against business," he says, "they hate discretion."

Will Daubert Matter?

Legal scholars say it is unclear whether the change will have a large effect. Much of it will depend on individual judges.

Michael Saks, an evidence professor at ASU's Sandra Day O'Connor College of Law, says, "We can expect more successful challenges by defendants of plaintiff evidence."

After that, though, the outcomes are more murky.

Much of the time, says Saks, admissibility rulings under each standard would be the same. "Things that have a sound scientific basis should come to be generally accepted; things that lack a sound basis should not be generally accepted."

But, he adds, "Judges have become more aggressive in using *Daubert* to exclude tort plaintiffs' evidence."

That can lead to a serious problem, he says, where the defendant may be the only one in a position to research whether their product is harmful or not.

"That creates an incentive for defendants to not do the research, to not find out about the dangers of a product, and be rewarded for that in court by winning on summary judgment because the plaintiff has no science with which to go forward."

Professor Placido Gomez at the Phoenix School of Law agrees that *Daubert* "should subject expert testimony to more rigorous scrutiny."

Asked whether judges are well equipped to assess scientific evidence, Gomez says, "Judges are fairly effective gatekeepers, certainly more effective than experts, no matter how well trained the expert is. The great majority of expert witnesses are paid to give their opinion. The great majority of experts favor one party; they are inherently biased."

Professor David Cole, also at Phoenix Law, believes the change will be less significant than predicted.

"In spite of the dire predictions that issue from both (or all?) camps, the impact of replacing one standard with the other is not earth-shaking. Such a change may well have greater short-term implications than long-term ones."

Cole—a former superior court judge—said that judges are well equipped to take on this new function.

"A judge need not be an expert in a given field to be able to adequately, and

perhaps even admirably, discharge their 'gatekeeper' function."

More Work Ahead

Larry E. Coben has a personal injury practice and says, "There really was no need for the change." On the rule-making question, "Courts are in a better position to know if there is a need to modify the rule." But practitioners will adapt.

Those who have practiced in both *Frye* and *Daubert* jurisdictions, he says, come to make the necessary adjustments. "People learn to prepare their witnesses so they're '*Daubert*-proof.'"

The change may add uncertainty to litigation, though, Coben says, something proponents wanted to eliminate. Some judges will want many *Daubert* pre-hearings and others will not. "It comes down to the attitude of the particular judge, which isn't how it should be."

Lawyers also may cause problems, he adds. Some may seek mini-trial after mini-trial, which could "lead judges and litigants to the brink of exasperation."

Because most litigation is business-to-business, most lawyers will not want to raise the cost of litigation or extend it. Ultimately, he says, "I don't think *Daubert* will have a huge exclusive effect. It will just be makework. And that's too bad."

The Criminal Context

One part of the new standard that has caused significant heartburn is its expansion beyond the civil practice to include the criminal law side. Practitioners, particularly prosecutors, were surprised by that addition.

Elizabeth Ortiz, the interim Executive Director of the Arizona Prosecuting Attorneys' Advisory Council—APAAC—formally opposed the change and urged Governor Brewer to veto the bill.

Because the inclusion of the criminal side came late in the process, she says, "Criminal law stakeholders had not had an adequate opportunity to express their concerns." Those issues ranged from separation of powers and financial impact, to impacts on justice and victims.

This change will affect every type of case, Ortiz says, from simple DUIs to capital cases. And criminal defense attorneys will be affected too, perhaps most notably in death-penalty sentencing hearings.

The law is not prospective only, so parties may have to relitigate evidentiary issues in cases that are not yet final. Victims who believed their matters were complete except for an appeal may discover the opposite.

Given recent revelations in forensic evidence testimony,³ could there be benefits in a stricter criminal law evidence standard?


Professor Gomez does not believe a move to *Daubert* will affect admission significantly on the criminal law side:

Under *Daubert* expert testimony ... would be subject to more rigorous scrutiny. However, my experience is otherwise. Judges routinely admit expert testimony offered by the prosecution that, in my opinion, does not survive scrutiny regarding its reliability. I don't think that will change, regardless of whether the judge uses the *Frye* standard or the standard articulated by *Daubert*.

Professor Michael Saks suggests that a stricter standard in criminal law could be a good thing. Currently, he says, judges tend to let in prosecutor-proffered evidence even when it has significant weaknesses. "Some judges have been pretty candid about the double standard, though it is plainly contrary to evidence law."

A change in approach could lead to judges imposing limits on forensic expert testimony, especially when the expert seeks to assert "much more than their field's scientific foundations really can support."

Challenge

Commentators agree that a challenge to the new law is likely in the offing. Whether that comes from a litigant who loses an evidentiary hearing under the new standard, or an entity troubled by separation of powers issues, only time will tell. In the meantime, litigants will begin to assess their evidence—and the strength of their cases—under *Daubert*. 

endnotes

1. *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).
2. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); *General Elec. Co. v. Joiner*, 522 U.S. 136 (1997); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999).
3. See Tim Eigo, *True Crime Drama Unfolds: New Report Rates Forensic Fact, Fiction*, ARIZ. ATT'Y, April 2009, at 12.