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## The Physician's Guide to the Arizona Medical Board Complaint Process

**By Gordon Lewis**

Physicians can have many anxious moments when dealing with the challenges and complications of their patients' conditions. But the event likely to cause the most anxiety for any physician is receiving a complaint from the Medical Board. Physicians are typically unfamiliar with the process, and a complaint can affect the physician's reputation and livelihood. This article provides a guide through the Medical Board's investigative process, and some strategy tips for each step along the way.

### I. THE COMPLAINT

The Arizona Medical Board generates complaints in two ways: (1) a patient, physician or other citizen reports conduct they believe is concerning; or (2) the Board receives notice of a malpractice settlement, legal judgment, hospital privileges action, or action from another agency (DEA, FDA, etc). In each instance, the Board's staff will review the facts of the complaint briefly to determine if there is a possible violation of the Board's statute. If so, the Board will send the complaint to the

*Continued on Page 6*

## Will A.R.S. § 12-2203 Survive? Judges Conflict Over Constitutionality Of New Expert Witness Statute

**By Donn Alexander**

Two Arizona state court judges have issued contradictory rulings on whether Arizona's new law governing the admissibility of expert opinion testimony is constitutional, and the Arizona Supreme Court is now being asked to decide the matter. At issue is whether A.R.S. § 12-2203, which provides judges greater authority to scrutinize the credibility and admissibility of expert witness testimony, violates the separation of powers doctrine by improperly infringing upon the judiciary's authority to promulgate procedural rules. Resolving this constitutional issue will significantly impact the admission of expert testimony in both civil and criminal cases in Arizona state court.

Before A.R.S. § 12-2203 became effective on July 29, 2010, Arizona state courts relied primarily on *Frye v. United States*, 293 F. 1010 (D.C. Cir. 1923), to evaluate the admissibility of expert opinion testimony under Rule 702 of the Arizona Rules of Evidence. Rule 702 permits

*Continued on Page 9*

## In This Issue

# The Carriage of Goods by Sea Act Trumps the Carmack Amendment in Governing Losses Incurred During Multimodal Shipments of Cargo Originating Overseas

**By Michael W. Halvorson**

As most involved in the transportation industry are well-aware, the United States has enacted various laws meant to govern the liability of those who ship cargo both domestically and internationally. One such law, the Carmack Amendment, was enacted by Congress to govern cargo shipped domestically over land by rail carriers, motor carriers and freight forwarders. *See* 42 U.S.C. § 14706. Under the Carmack Amendment, the shipper's maximum recovery for a loss is typically limited to the actual damages or loss to the property. The Carmack Amendment also allows a carrier to further limit its liability by: (1) maintaining a tariff within the prescribed guidelines of the Interstate Commerce Commission, (2) obtaining the shipper's agreement as to his choice of liability, (3) giving the shipper a reasonable opportunity to choose between two or more levels of liability, and (4) issuing a receipt or bill of lading prior to moving the shipment. The courts will void attempts to limit liability in the bill of lading (typically cents-per-pound) that do not properly comport with the Carmack Amendment.

Ocean carriage is somewhat different, however, as it is typically subject to a separate federal statute known as the U.S. Carriage of Goods by Sea Act (COGSA). One key distinction between COGSA and the Carmack Amendment is that, by its terms, COGSA limits a carrier's liability to just $500 per shipping package:

> Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package lawful money of the United States, or in case of goods not shipped in packages, per customary freight unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading. . .

46 U.S.C.A. § 1304(5). Although the statute allows shippers the choice of declaring a higher value for the cargo and paying a higher freight rate, the $500 liability limit set forth in the Act is typically contained in most bills of lading. Consequently, if given the choice, most carriers would rather be governed by COGSA, at least to the extent they intend to limit their liability under this section.

Given the nature of our current global economy, goods are routinely transported through multimodal means - the cargo travels by ocean, rail and road to reach its final destination. As a result, the interplay between COGSA and the Carmack Amendment has often left parties confused as to which act applies to liability for losses. Indeed, in a typical shipping scenario, the cargo often originates from a foreign, overseas country destined to be delivered under a single bill of lading to a final, inland location in the United States. Which law applies in determining the parties' rights when the loss occurs during the inland portion of the journey has been the subject of considerable debate among lower courts. In an effort to create uniformity and bring order to the multimodal transportation industry, the U.S. Supreme Court finally addressed the issue in *Norfolk Southern Railway Co. v. Kirby*, 543 U.S. 14 (2004).

## Announcements

JS&H is pleased to announce that **Jaleh Najafi** and **Amy L. Nguyen** have joined the firm as associates.

**Georgia Staton** has become a Fellow of the American College of Trial Lawyers (ACTL), one of the premier legal associations in America.

**Don Myles** wsa elected a Vice President for the Federation of Defense and Corporate Counsel (FDCC). Don was also appointed the Council on Litigation Management's (CLM) Arizona State Chair for 2010-2011.

**Josh Snell** was selected to serve on the 2010-2011 DRI Young Lawyers Steering Committee.

To the relief of many carriers, *Kirby* held that an ocean carrier's $500 per package liability limitation under COGSA is rightfully extended to surface carriers under the theory that the railroad or motor carrier are servants or agents of the ocean carrier who are necessary to fulfilling the maritime contract of carriage. *Kirby* was hailed as a landmark case for removing the uncertainty as to which law governed the limitation of liability for surface carriers who operate pursuant to ocean bills of lading. The *Kirby* decision provided clear guidance to enable the industry to effectively manage the attendant risks involved in international shipments … or so we thought.

While many in the industry believed *Kirby* settled the question of whether COGSA applied to an inland leg of an intermodal shipment, the primary dispute in that case was whether COGSA or state law governed the subject shipment. In other words, *Kirby* never addressed whether the Carmack Amendment should have applied instead. Thus, there remained some uncertainty as to whether the Carmack Amendment would trump COGSA as applied to the inland segments of international shipments, which again resulted in inconsistent rulings among lower courts addressing the issue. As a result, the U.S. Supreme Court recently stepped in once again to clarify the law. *See Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp*, 130 S.Ct. 2433 (2010). In examining a virtually identical fact pattern as in *Kirby*, albeit from a different legal perspective, *Regal-Beloit* confirmed that COGSA is **the** exclusive remedy for determining the liability of an inland carrier when goods transported under a "through intermodal bill of lading" are lost or damaged while in the inland carrier's possession.

The *Regal-Beloit* case arose out of damage to cargo during a train derailment in Oklahoma. The cargo was shipped under a "through intermodal bill of lading" from China to the interior of the United States using a combination of sea and rail carriage. The question before the Court was whether the inland portion through Oklahoma was governed by COGSA or the Carmack Amendment. In reaching its decision, the Court recognized that applying the Carmack Amendment to the inland segment would make cargo disputes more difficult to resolve, as it would require courts to determine precisely where the damage occurred to decide which law applied. The Court reasoned that the uncertainty created by applying two sets of laws would only serve to undermine COGSA, as well as international multimodal transport in general. Consequently, the Court held that the Carmack Amendment does not apply to a shipment originating overseas under a "through bill of lading."

The Court also explained that although COGSA applies as a matter of law to all bill of lading contracts of common carriage involving foreign shipments originating overseas, it nevertheless allows parties the option of extending its terms by contract to cover the entire period during which the goods will be under a carrier's responsibility, including periods of inland transport. In contrast, the Carmack Amendment governs the terms of bills of lading issued by domestic carriers, and requires a carrier that "receives [property] for transportation" within the United States to issue a bill of lading. Under the Carmack Amendment, a "receiving" carrier is the initial carrier, which "receives" the property for domestic transportation at the journey's point of origin. The Court explained that the carrier at issue in *Regal-Beloit* did not receive the cargo at its point of origin (China) but, rather, in California. Thus, the carrier was not required to issue a bill of lading under Carmack. Instead, the carrier received the cargo under a COGSA-authorized "through bill of lading" and chose to use rail transport to complete one segment of the journey under what the Court deemed to be an "essentially maritime" contract. The carrier was not within the Carmack Amendment's reach and was therefore not required to issue Carmack bills of lading.

Armed with this decision, the industry now has some clear guidelines to help it consistently assess and manage the risk of loss using a single legal scheme. In light of these opinions, inland carriers acting as subcontractors for ocean carriers in multimodal cargo shipments should review the ocean carrier's "through bill of lading" so they can make informed decisions about whether they are willing to be bound by the terms of that document. Certainly, COGSA's per-package liability limitations ($500 per package or customary freight unit, subject to higher limits if declared for insurance purposes) are typically quite beneficial to the inland carrier. But many of these bills of lading include clauses mandating venue in foreign forums, which was the issue raised in *Regal-Beloit*. Inland carriers should be aware of this reality so they can make educated decisions as to whether they wish to be bound by such provisions. ◆

# Notice of Claim Defenses - Raise Early or Risk Waiving Entirely

**By Shannon Bell**

An assertion that the plaintiff has not complied with the notice of claim statute, A.R.S. § 12-821.01, is an affirmative defense to a complaint, and a public entity's failure to plead it in an answer constitutes a waiver of that defense. Even if properly pled, however, a public entity can still waive a notice of claim defense through its conduct.

Applying the principle of waiver in the context of failure to comply with A.R.S. § 12-821.01 has become increasingly important in the wake of uncertainty created by *Deer Valley Unified Sch. Dist. No. 97 v. Houser*, 214 Ariz. 293, 294, 152 P.3d 490, 491 (2007), and *Backus v. State*, 220 Ariz. 101, 104, 203 P.3d 499, 502 (2009).[1]

The first case to really address waiver in this context was *Jones v. Cochise County*, 218 Ariz. 372, 187 P.3d 97 (App. 2008). Although *Jones* also addressed the "sufficiency" element discussed in *Deer Valley* and *Backus*, it determined that Cochise County had waived its ability to challenge the sufficiency of the notice of claim in that case. The Arizona Supreme Court followed suit, also finding waiver in *City of Phoenix v. Fields*, 219 Ariz. 568, 201 P.3d 529 (2009). Since then, where waiver has been argued, it has generally been found. *See Fred Nackard Land Co. v. City of Flagstaff*, ___ Ariz. ___, 238 P.3d 149 (App. 2010); *County of La Paz v. Yakima Compost Co., Inc.*, 224 Ariz. 590, 233 P.3d 1169 (App. 2010); *Feavel v. State*, 2009 WL 791317 (Ariz. App. Div. 1) (unpublished memorandum decision).

So what factors determine whether a public entity has waived a notice of claim defense? Both conduct and time.

**Active litigation over a period of time constitutes waiver**

The plaintiffs in *Jones v. Cochise County* filed their complaint in April 2006. The County timely answered, but failed to assert A.R.S. § 12-821.01 as an affirmative defense. In April 2007, after having participated in more than six months of disclosure and discovery, the County sought leave to amend its answer to assert § 12-821.01. The court granted the request. Judgment was ultimately entered in the County's favor and plaintiffs appealed, arguing that the notice of claim complied with A.R.S. § 12-821.01 and, in any event, that the County waived its right to challenge the notice of claim. The County argued it did not waive the defense because it was granted leave to amend its answer. The Court of Appeals disagreed, finding the County had indeed waived the notice of claim defense.

In analyzing waiver, *Jones* distinguished between a party's failure to plead an affirmative defense and waiver by conduct. Waiver by conduct is established "by evidence of acts inconsistent with an intent to assert the right," and assertion of a defense in a party's pleadings does not guarantee the defense. *Jones* held that waiver may be found when a governmental entity has taken substantial action to litigate the merits of the claim that would not have been necessary had the entity promptly raised the defense. In *Jones*, the court noted that before moving to dismiss for failure to comply with § 12-821.01, the County had provided plaintiffs with a disclosure statement, answered interrogatories, and participated in seven depositions, including the three plaintiffs and six depositions the County had noticed. Moreover, one year had passed since the complaint was filed. The court found the County's conduct inconsistent with an intention to assert the notice of claim statute as a defense, and it observed that had the County actually intended to assert the defense, there would have been no need for it to

***Continued on Page 8***

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[1] *Deer Valley* dismissed a complaint for failure to strictly comply with § 12-821.01(A), giving public entities hope that state courts would strictly enforce the notice of claim requirements. Since then, however, numerous cases have relaxed compliance with the statute, particularly *Backus*, which held that that § 12-821.01(A) does *not* require the claimant: 1) to provide "sufficient" facts to support the settlement amount, 2) to itemize his damages, 3) to set forth the theories supporting the claimed amount, and/or 4) to set forth every possible fact supporting his offer.

A.R.S. § 12-821.01 provides in part that "[t]he claim shall contain facts sufficient to permit the public entity or public employee to understand the basis upon which liability is claimed. The claim shall also contain a specific amount for which the claim can be settled and the facts supporting that amount."

# Appellate Highlights

**Yeung v. Maric**
*AZ Court of Appeals*
Witnesses in arbitration proceedings are afforded the same absolute privilege as witnesses in judicial proceedings.

**Simon v. Maricopa Medical Center**
*AZ Court of Appeals*
A plaintiff's failure to timely serve a notice of claim pursuant to A.R.S. § 12-821.01 on each individual police officer defendant was not excused by actual notice, substantial compliance and/or excusable neglect.

**Ramsey v. Yavapai Family Advocacy Center**
*AZ Court of Appeals*
Nurse and counselor defendants were entitled to qualified immunity under the mandatory abuse reporting statute, A.R.S.§ 13-3620, where they reasonably believed a child was being abused by his father and their investigation and report of the abuse were not motivated by malice.

**Tarron v. Bowen Machine & Fabricating, Inc.**
*AZ Supreme Court*
In determining whether an employer ceded the right to control a borrowed employee, contractual provisions provide some evidence but are not determinative. Courts must evaluate the objective nature of the employment relationship based on the totality of the facts and circumstances of each case.

**Porter v. Spader**
*AZ Court of Appeals*
Under Rule 60(c)(1), Ariz. R. Civ. P., "excusable neglect" does not justify relief from a judgment based upon failure to comply with the applicable statute of limitations.

**Estate of Mary Winn v. Plaza Healthcare, Inc.**
*AZ Court of Appeals*
An estate cannot recover damages for the "inherent value" of its decedent's life under the Adult Protective Services Act.

**McReynolds v. ACIC**
*AZ Court of Appeals*
When presented with multiple claims in excess of policy limits, an insurer may meet its duty to equally consider settlement offers by promptly and in good faith interpleading its policy limits and continuing to provide a defense to its insured.

PHYSICIAN'S GUIDE continued from Page 1

physician and ask for a narrative response and/or an investigative interview.

**II. THE NARRATIVE RESPONSE**

A request for a narrative response is the most common way the Board initiates contact with the physician following a complaint. Typically, the Board will ask the physician to provide a written response to the complaint's allegations, and to provide the medical records relating to the case. The Board generally gives the physician about 3 weeks to provide a narrative response, but 2-3 week extensions on the Board's initial deadlines are routinely granted.

**Practice Tip:** A physician **must** take the narrative response seriously. Physicians often view Board complaints as mettlesome intrusions by crazy/disgruntled/financially irresponsible former patients. As a result, physicians sometimes respond with short, curt, disrespectful letters that attack the credibility and character of the patient. These types of responses are unhelpful and place the physician in a poor light with the Board. The narrative response should focus on the physician's conduct, not the patient's conduct. The response should demonstrate the reasonableness of the physician's assessment, plan, and fund of knowledge. The Board is statutorily authorized to receive all patient records, so a physician should not withhold medical records from the Board based on privacy claims.

**III. THE INVESTIGATIVE INTERVIEW**

After receiving the narrative response (or sooner depending on the nature of the allegation), the Board may schedule an investigative interview with the physician. An investigative interview is a meeting with a Board investigator, a Board medical consultant and the physician. These interviews can last anywhere from 20 minutes to 2 hours, they are tape recorded by the Board staff, and the physician is placed under oath.

Although titled an "interview," it is more like a deposition: the investigator and medical consultant will ask the physician about his conduct in the particular case at issue, ask about the physician's general medical knowledge on the subject, and ask about the physician's familiarity with the statutes or standards implicated in the complaint. Although a lawyer can assist in preparing the physician for the topics the interview will address, the physician's lawyer does not typically interject or object during the investigative interview. At the conclusion of the interview, the staff will give the physician an opportunity to make a statement if the physician feels there were topics not adequately addressed by the interview.

**Practice Tip:** As with the narrative response, the physician's testimony in the investigative interview should focus on the physician's conduct, not on the irresponsibility/bias/unreasonableness of the patient. The physician should review and be knowledgeable about the case, history and records, and should try to answer the interviewers' questions directly and succinctly. The physician should remain calm and respectful toward the medical consultant during the interview, even if difficult (i.e.: don't be a jerk).

**IV. THE MEDICAL CONSULTANT'S REPORT**

After the Board has received the physician's narrative response, received the records relevant to the case and/or conducted an investigative interview, the matter will be sent to a medical consultant for review. The medical consultant is a physician contracted by the Board to review the physician's conduct and advise on whether it was within the standard of care. This consultant will be different from the consultant who participated in the investigative interview. The medical consultant will prepare a report delineating the consultant's factual findings, the standard of care, any deviations from the standard of care (in the consultant's opinion), aggravating and mitigating factors, and a summary/conclusion. When the consultant completes his report, it is sent to the physician who then has an opportunity to respond to the report.

**Practice Tip:** If the Complaint arose from a malpractice claim, many physicians are tempted to use the expert witness testimony that supported their defense to rebut the medical consultant's report. Expert witness testimony, however, has little influence on the Board. If there is a question regarding the standard of care for a physician, it is far more effective to provide peer-review journal articles than to rely on "expert" testimony. The Board is primarily comprised of physicians who typically believe they can determine the standard of care as well as someone hired for the purpose of providing expert testimony.

**V. THE STAFF INVESTIGATIONAL REVIEW COMMITTEE**

After the Board receives the medical consultant's report and any response, the complaint is forwarded to the Staff Investigational Review Committee. This

committee is comprised of the Board Operations Manager, the Chief Medical Consultant, and the Case Review Manager. The committee reviews the case, makes a recommendation on whether there has been a violation, and recommends one of the following resolutions:

**A. Dismissal of the Complaint**

If the committee recommends dismissal, the executive director has the power to dismiss the case. A dismissal letter would be sent to the complainant, who would have the opportunity to appeal the dismissal to the Medical Board.

**B. Advisory Letter**

If the committee recommends an advisory letter, that recommendation will be placed on the Board's agenda for consideration. Both the physician and the complainant can appear before the Board to argue for or against the advisory letter.

For either of these two recommendations, an appearance before the Board is optional. If a physician chooses to discuss the recommendation with the Board, the discussion would be held at the "Call to the Public." The "Call to the Public" is an opportunity for any member of the public to address the Board regarding any matter on the Board's agenda. It occurs at the beginning of the Board's regular meeting, and participants are limited to a three minute presentation. Board members do not make comments during the Call to the Public; rather, they listen to the parties' presentations and then consider the recommendations at some other point during the Board meeting.

**C. Discipline**

If the Staff Investigational Review Committee recommends discipline (letter of reprimand, censure, probation, etc.), the physician will typically be offered the opportunity to resolve the matter through a consent agreement. A consent agreement is a negotiated determination of the facts, violation, and penalty between the physician and the staff. If the parties agree, then the consent agreement is presented to the Board for approval.

**VI. THE FORMAL INTERVIEW**

If the physician does not reach a consent agreement, he will be invited to a formal interview. A formal interview is a timed appearance before the Medical Board where the case will be discussed in detail in public with the Board members. At a formal interview, the investigative staff will read a prepared summary of the case to the Board. The physician then has an opportunity to make a five minute statement to the Board. Following the statement, the Board members will ask the physician questions regarding the case. One Board member is typically selected to lead the questioning, and that member will have thoroughly reviewed the circumstances surrounding the case. Other Board members may also have questions for the physician, and all Board members are typically well-prepared for all formal interview cases. After all Board members have completed their questioning, the Board gives the physician's attorney (if one is present) the opportunity to make a five minute summary statement. The Board then deliberates in front of the physician and determines how it will resolve the case.

**Practice Tip:** As with the narrative response and investigative interview, it is important to take the formal interview seriously. The physician should dress professionally for her appearance before the Board, and should be respectful toward Board members at all times. A physician should focus on her conduct, and avoid the temptation to denigrate the complainant or minimize the matter. The Board is chiefly concerned with protecting the public, so the physician needs to demonstrate her competence, professionalism and fund of knowledge during the interview.

**VII. FORMAL HEARING**

If the investigation produces a recommendation that a physician's license should be suspended for over one year or revoked, the Board will refer the matter to a formal hearing. A formal hearing is a trial before an administrative law judge where witnesses present evidence to support the recommended action. At the conclusion of the hearing, the administrative law judge will produce findings of fact and a recommendation that are returned to the Board for approval and consideration. A physician may also request a formal hearing in lieu of a formal interview.

**Practice Tip:** Call your lawyer. ◆

NOTICE OF CLAIM continued from Page 4

engage in disclosure or discovery. It could, and should, have asserted the defense immediately. Thus, *Jones* found waiver not only based on the County's timing but also on the fact that the County **actively** investigated and proactively defended the claim.

In *City of Phoenix v. Fields*, a putative class representative filed a complaint against the City on October 21, 2002. On March 5, 2007, more than four years after the complaint and more than three years after class certification, the City moved for summary judgment alleging that the 2002 notices failed to comply with A.R.S. § 12-821.01. Because a government entity may entirely avoid litigating the merits of a claim with a successful notice of claim defense, the Court held that waiver should be found when, as in *Fields*, the government entity engages in substantial action to litigate the claim. The Court found that the City engaged in extensive briefing as to the propriety of class certification without once suggesting that the claims were barred by § 12-821.01. Even after class certification, the City filed various motions entirely unrelated to the sufficiency of the notice of claim and engaged in discovery.

Although the facts supporting waiver in *Fields* were more compelling than in *Jones* and other cases, the analysis is the same. Courts have made it very clear that little, if anything, will excuse the failure to plead **and** assert a notice of claim defense at the onset of litigation and before actively litigating the case over a period of time.

**Recent Cases Finding Waiver**

In the most recent cases addressing waiver, the analysis and results were the same as in *Fields* and *Jones*. In *Fred Nackard Land Co. v. City of Flagstaff*, the court found waiver where the City permitted an amendment of the complaint, participated in trial management conferences, and actively pursued discovery and disclosure for more than three years before seeking a ruling on the notice of claim defense. Similarly, in *County of La Paz v. Yakima Compost Co., Inc.*, the court found waiver where the County sought judgment as a matter of law under § 12-821.01 during a bench trial 30 months after it asserted its counterclaim. And in *Feavel v. State* (unpublished), the court found waiver where the State actively litigated the case and failed to file a motion to dismiss on the notice of claim defense until one year after the complaint was filed.

The lesson from these cases is clear. Assert notice of claim defenses *early* in the litigation. A successful notice of claim defense can spare both parties and the judiciary considerable expense, but failure to raise and litigate the defense immediately may very well result in the harsh consequence of waiver. ◆

# Speaking Engagements

**Ed Hochuli** will be presenting "How to Sell Your Point of View" to the Arizona chapter of the American Subcontractors Association on November 16, 2010. On December 1, 2010, **Ed** will moderate the "60 Minutes of IADC Law Ball" panel at the International Association of Defense Counsel's (IADC) regional meeting in New York. **Ed** also presented "The Average Joe Principle - Motivate Yourself to Be the Best!" to the Arizona Self Insurers Association on October 20, 2010.

**Don Myles** will be a presenter at the American Board of Trial Advocates' (ABOTA) "Masters in Trial" program on November 5, 2010 in Las Vegas, Nevada. **Don** also presented "You've Been Sued: Now What?" at the 2010 USLAW Client Conference on October 8, 2010 in Colorado Springs, CO.

**Barry Uhrman** presented, "Experts, *Frye*'d and Tested," to the Horace Rumpole Inn of Court on October 14, 2010.

**Lori Voepel** co-chaired the Arizona Women Lawyers Association's First Leadership and Professional Development Seminar & Workshop featuring national speaker and facilitator, Lauren Stiller Rikleen, on September 24, 2010.

**Les Tuskai** presented at the Industrial Commission of Arizona's (ICA) annual seminar on workers' compensation bad faith at the Wig Wam Resort on August 13, 2010.

**Georgia Staton** taught and demostrated effective closing arguments at the Arizona Trial College on August 10-14, 2010. Georgia has been teaching at the College since 1991.

## A.R.S. § 12-2203 continued from Page 1

the use of expert testimony to "assist the trier of fact to understand the evidence or to determine a fact in issue" when a witness is "qualified as an expert by knowledge, skill, experience, training, or education." Under what ultimately became known as the "*Frye* standard," judges merely had to ensure that an expert's proposed testimony was based upon science that had gained "general acceptance" in the relevant field. Questionable expert opinions and "junk science" were rarely excluded under this liberal test. Making matters worse, *Frye* did not apply to experts who claimed to have reached opinions "by inductive reasoning based on his or her own experience, observation, or research." *See Logerquist v. McVey*, 196 Ariz. 470, 490, 1 P.3d 113 (2000).

Arizona was one of a small minority of jurisdictions that followed the *Frye* approach. The vast majority of states had adopted a much more stringent standard set forth by the United States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993). The "*Daubert* standard," which is based upon Rule 702 of the Federal Rules of Evidence, encourages judges to assume a more active "gatekeeping" role in examining the merits and admissibility of expert testimony in an attempt to prevent unreliable evidence from reaching the jury. Unfortunately, the Arizona Supreme Court repeatedly declined to adopt the prevailing *Daubert* standard and instead followed the much weaker *Frye* test.

A.R.S. § 12-2203 was enacted to supplement Rule 702 of the Arizona Rules of Evidence by establishing a more rigorous standard similar to *Daubert*. Pursuant to A.R.S. § 12-2203(A), only a qualified witness may offer expert opinion testimony concerning scientific, technical or other specialized knowledge, and the testimony is admissible if the court determines that all of the following apply:

1. The witness is qualified to offer an opinion as an expert on the subject matter based on knowledge, skill, experience, training, or education.
2. The opinion will assist the trier of fact in understanding the evidence or determining a fact in issue.
3. The opinion is based on sufficient facts and data.
4. The opinion is the product of reliable principles and methods.
5. The witness reliably applies the principles and methods to the facts of the case.

The law also requires the court to consider the following factors, if applicable, in determining whether the expert testimony is admissible:

1. Whether the expert opinion and its basis have been or can be tested.
2. Whether the expert opinion and its basis have been subjected to peer reviewed publications.
3. The known or potential rate of error of the expert opinion and its basis.
4. The degree to which the expert opinion and its basis are generally accepted in the scientific community.

It did not take long for the new statute to face constitutional challenges. In *State of Arizona v. Escalante-Orozco*, the constitutionality of A.R.S. § 12-2203 was challenged in a criminal action pending in Maricopa County Superior Court. The State argued that the statute was unconstitutional because it usurped the rulemaking authority of the Arizona Supreme Court and violated the separation of powers doctrine. It also alleged that § 12-2203 contradicted Article 6, § 27 of the Arizona Constitution by making the trial judge the arbiter of witness credibility. On September 23, 2010, Judge Douglas Rayes declared the statute unconstitutional. Although he rejected the State's argument that § 12-2203 improperly invaded the province of the jury, Judge Rayes found the statute to be procedural in nature and ruled that it irreconcilably conflicts with Rule 702 of the Arizona Rules of Evidence by imposing additional requirements that must be satisfied before an expert may testify at trial. Judge Rayes rejected arguments that the statute was merely intended to supplement the requirements of Rule 702.

In *State of Arizona v. Whiteway*, a Pinal County Superior Court judge reached the opposite conclusion in evaluating the constitutionality of A.R.S. § 12-2203. Judge Boyd Johnson ruled that the statute does not improperly usurp the Arizona Supreme Court's rulemaking authority, that it supplements rather than engulfs Rule 702 of the Arizona Rules of Evidence, and that it is therefore not an unconstitutional statutory enactment. This decision was based in large part upon

***Continued on Page 10***

A.R.S. § 12-2203 continued from Page 8

well-established Arizona law holding that courts will recognize legislature-made rules if they are "reasonable and workable" statutory enactments that supplement rather than conflict with evidentiary rules promulgated by the Arizona Supreme Court. *See State ex rel. Collins v. Seidel*, 142 Ariz. 587, 591, 691 P.2d 678, 682 (1984). Judge Johnson rejected the State's argument that § 12-2203 irreconcilably conflicts with Rule 702.

Because the constitutionality of A.R.S. § 12-2203 is a matter of statewide importance impacting all criminal and civil state court proceedings, a special action was recently filed asking the Arizona Supreme Court to decide the issue. It is beyond the scope of this article to provide a detailed constitutional analysis or attempt to predict whether the statute will ultimately be upheld. Until the constitutional question is resolved by the courts, counsel should continue to rely upon A.R.S. § 12-2203 to challenge expert evidence and seek the dismissal of ungrounded lawsuits. Counsel should expect constitutional challenges to be raised, however, and must be prepared for the possibility that the statute could ultimately be deemed unconstitutional by Arizona's appellate courts.◆

# About The Authors

**Donn Alexander**

Mr. Alexander joined Jones, Skelton & Hochuli as an associate in 2002, and has been a partner since 2008. He concentrates his practice on civil litigation, including medical malpractice defense, drug and medical device litigation, defense of long term care facilities, and healthcare litigation. Prior to joining Jones, Skelton & Hochuli, Mr. Alexander was an associate at Doyle Winthrop, P.C. and Alverson, Taylor, Mortensen, Nelson & Sanders, P.C. He received his law degree from the University of Arizona College of Law in 1998 and is admitted to practice in Arizona, Nevada, the United States District Court and the U.S. Court of Appeals 9th Circuit.

**Shannon Bell**

Ms. Bell joined Jones, Skelton & Hochuli in 2005 and concentrates her practice on governmental liability, education law, general insurance defense and employment law. She is a member of the American Bar Association and the Arizona Association of Defense Counsel. Ms. Bell received her law degree from the University of Arizona College of Law in 1997 and is admitted to practice in Arizona.

**Michael W. Halvorson**

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