

Alabama Rules of Evidence

Article VII. Opinions and Expert Testimony

Rule 702.

Testimony by experts.

(a) If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to 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.

(b) In addition to the requirements in section (a), expert testimony based on a scientific theory, principle, methodology, or procedure is admissible only if:

- (1) The testimony is based on sufficient facts or data;
- (2) The testimony is the product of reliable principles and methods; and
- (3) The witness has applied the principles and methods reliably to the facts of the case.

The provisions of this section (b) shall apply to all civil state-court actions commenced on or after January 1, 2012. In criminal actions, this section shall apply only to nonjuvenile felony proceedings in which the defendant was arrested on the charge or charges that are the subject of the proceedings on or after January 1, 2012. The provisions of this section (b) shall not apply to domestic-relations cases, child-support cases, juvenile cases, or cases in the probate court. Even, however, in the cases and proceedings in which this section (b) does not apply, expert testimony relating to DNA analysis shall continue to be admissible under Ala. Code 1975, § 36-18-30.

(c) Nothing in this rule is intended to modify, supersede, or amend any provisions of the Alabama Medical Liability Act of 1987 or the Alabama Medical Liability Act of 1996 or any judicial interpretation of those acts.

[Amended 11-29-2011, eff. 1-1-2012.]

Advisory Committee's Notes

Historically, expert witnesses have been permitted to give opinions only upon subjects that are held to be beyond the understanding of the average layperson. The theory underlying this common law principle is that the jurors, on subjects of common knowledge, are just as qualified to draw their own conclusions and it would be a

preemption of their role and function to allow an expert to testify as to those subjects. See Ala. Code 1975, § 12-21-160 (superseded by adoption of the present rule). Rule 702, identical to the corresponding Federal Rule of Evidence, changes the focus from whether the subject of the testimony is beyond common understanding to whether the expert's opinion or testimony will assist the trier of fact. Under this rule it is possible that an expert opinion or testimony on a question of common knowledge would be admitted by the trial judge as helpful to the trier of fact.

The phrase "assist the trier of fact," used by Rule 702 as the threshold test for expert testimony, is not new to Alabama. Alabama historically and generally has refused expert testimony or opinion on a subject that is within the understanding of the average layperson. Recent decisions dealing with expert testimony on such subjects, however, have departed from this position and in speaking of expert testimony have increasingly used the words "helpful to" or "assist" the trier of fact. See, e.g., *Baker v. Edgar*, 472 So.2d 968 (Ala.1985) (expert opinions admitted because they would "greatly assist the members of the jury"); *Price v. Jacobs*, 387 So.2d 172 (Ala.1980) (using the term "helpful" in ruling on admissibility of expert opinion); *Glaze v. Tennyson*, 352 So.2d 1335 (Ala.1977) (declaring that the test is whether the expert opinion will aid the trier of fact). See also C. Gamble, *McElroy's Alabama Evidence* § 127.01(5) (4th ed. 1991).

Rule 702, by using the term "or otherwise," recognizes the admissibility of expert testimony in nonopinion form. The advisory committee's note to Fed.R.Evid. 702 states:

"Most of the literature assumes that experts testify only in the form of opinions. The assumption is logically unfounded. The rule accordingly recognizes that an expert on the stand may give a dissertation or exposition of scientific or other principles relevant to the case, leaving the trier of fact to apply them to the facts."

Much discretion remains vested in the trial judge to determine whether a proffered witness qualifies as an expert. See *Griffin v. Gregory*, 355 So.2d 691 (Ala.1978) (observing that whether to allow a witness to testify as an expert is largely in the trial court's discretion and that the exercise of this discretion will not be disturbed except for abuse). The applicable law on this subject should remain largely as it was before the adoption of Rule 702. For example, under Rule 702 "qualification" should continue to be defined broadly, so that one may gain an expertise through practical experience as well as through formal training or education. See, e.g., *International Telecommunications Sys. v. State*, 359 So.2d 364 (Ala.1978) (recognizing that experience and practical knowledge, as fully as formal education, qualify one to make technical judgments).

Experts often base their opinions and other testimony upon the results of scientific tests. Rule 702 does not undertake to answer the question whether such tests possess sufficient reliability to be admissible. The standard applied in *Frye v. United States*, 293 F. 1013 (D.C.Cir.1923), has become the standard adopted by Alabama. See *Ex parte Perry*, 586 So.2d 242, 247 (Ala.1991). Scientific tests are admissible only

when they have gained general acceptance in the particular field. *Kent v. Singleton*, 457 So.2d 356 (Ala.1984); *Ex parte Dolvin*, 391 So.2d 677 (Ala.1980). Further development of Alabama law on this subject is left to the case law. See C. Gamble, *McElroy's Alabama Evidence* § 490.01 (4th ed. 1991).

As under preexisting Alabama law, both questions – whether a witness is qualified as an expert and whether, if so qualified, that witness may give expert opinion or testimony on the subject in question – are left largely to the discretion of the trial judge. *Hagler v. Gilliland*, 292 Ala. 262, 292 So.2d 647 (1974).

The committee, in recommending this Rule 702, gave due consideration to the latest suggested amendment to Fed.R.Evid. 702, one proposed in 1991 by the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States. The committee agreed that there are problems in the present use of expert witnesses but that the proposed amendment to the federal rule raises more questions than it answers. See J. Weinstein, *Rule 702 of the Federal Rules of Evidence Is Sound: It Should Not be Amended*, 138 F.R.D. 631 (1991). Consequently, the committee did not recommend incorporating the terms of that proposed federal amendment into Ala.R.Evid. 702.

Advisory Committee's Notes to Amendment to Rule 702 Effective January 1, 2012

Rule 702 was amended in response to a 2011 amendment to § 12-21-160, Ala. Code 1975, see Act No. 2011-629, Ala. Acts 2011, which establishes new admissibility criteria for expert scientific testimony. Act No. 2011-629 provides:

"Section 1. Section 12-21-160 of the Code of Alabama 1975, is amended to read as follows:

"§ 12-21-160.

"(a) Generally. If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to 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.

"(b) Scientific evidence. In addition to the requirements set forth in subsection (a), expert testimony based on a scientific theory, principle, methodology, or procedure is only admissible if:

"(1) The testimony is based on sufficient facts or data,

"(2) The testimony is the product of reliable principles and methods, and

"(3) The witness has applied the principles and methods reliably to the facts of the case.

"Section 2. Nothing in this act shall modify, amend, or supersede any provisions of the Alabama Medical Liability Act of 1987 and the Alabama Medical Liability Act of 1996, commencing with Section 6-5-540 of the Code of Alabama 1975, et seq., or any judicial interpretation thereof.

"Section 3. This act shall apply to all civil state court actions commenced on or after the effective date of this act. In criminal actions, this act shall only apply to non-juvenile felony proceedings in which the defendant that is the subject of the proceeding was arrested on the charge that is the subject of the proceeding on or after January 1, 2012. This act shall not apply to domestic relations, child support, juvenile, or probate cases.

"Section 4. The provisions of this act, where inconsistent with any Alabama Rule of Civil Procedure, Alabama Rule of Criminal Procedure, or Alabama Rule of Evidence, including, but not limited to, Ala. R. Evid. 702, shall supersede such rule or parts of rules.

"Section 5. This act shall become effective on January 1, 2012."

To promote uniformity and avoid confusion, Rule 702 has been amended to adopt the admissibility standard for scientific evidence set forth in Section 1 of Act No. 2011-629, amending § 12-21-160. To promote clarity, this amendment divides Rule 702 into subsections. The text of Rule 702, as it read before this amendment, has been placed unchanged in section (a), and the new admissibility standard for scientific evidence is set forth in section (b).

Section (a) Generally. The amendment merely places the text of the former rule in a separate section. No changes have been made to the text, and preexisting judicial authority interpreting Rule 702 remains applicable to Rule 702(a).

Section (b) Scientific Evidence. The language in subsections (b)(1), (b)(2), and (b)(3) is identical to language added to Rule 702 of the Federal Rules of Evidence in response to the United States Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). The amendment adopts the approach taken in *Daubert* for determining the admissibility of scientific evidence. Consequently, the *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), general-acceptance test has been supplanted, with few exceptions. The amendment requires trial judges to act as "gatekeepers" and determine whether the scientific evidence is both "relevant and reliable." See *Daubert*, 509 U.S. at 597.

The *Daubert* test is not new to Alabama. By statute, the admissibility of scientific expert testimony based on DNA analysis has been governed by the test set forth in *Daubert* since 1994. See Ala. Code 1975, § 36-18-30. This amendment is not intended to effect any change in the line of well developed judicial authority that has applied and interpreted the *Daubert* test pursuant to § 36-18-30. See generally *Turner v. State*, 746 So. 2d 355 (Ala. 1998) (discussing § 36-18-30 and the requirements of the *Daubert* test); 1 C. Gamble & R. Goodwin, *McElroy's Alabama Evidence* § 490.01(11) (6th ed. 2009)(discussing the admissibility of DNA evidence under the *Daubert* standard). The admissibility criteria imposed generally on all scientific evidence by Rule 702(b) is the same *Daubert* criteria imposed on DNA evidence by § 36-18-30.

Court Comment to Amendment to Rule 702 Effective January 1, 2012

The Advisory Committee recommended to the Court that the legislative exceptions set out in Section 3 of Act No. 2011-629, Ala. Acts 2011, not be incorporated into the amendment to Rule 702. The Court, however, disagreed and incorporated those exceptions into Rule 702(b). By doing so, the Court did not intend to affect the applicability of Ala. Code 1975, § 36-18-30, which provides that the admissibility of scientific expert testimony based on DNA analysis is governed by the test set forth in *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and added a sentence to clarify that § 36-18-30 still governs the admissibility of scientific expert testimony based on DNA analysis, even in domestic-relations cases, child-support cases, juvenile cases, and cases pending in the probate courts.

The provisions of section (a) apply in all cases where Rule 702 was previously applied. The provisions in section (b), however, do not apply in all cases. Except as otherwise noted in the rule, they apply in all civil state-court actions commenced on or after January 1, 2012. In criminal actions, section (b) applies only in nonjuvenile felony proceedings in which the defendant who is the subject of the proceeding was arrested on the charge that is the subject of the proceeding on or after January 1, 2012. In addition, except as to expert testimony governed by § 36-18-30, the provisions of section (b) do not apply to testimony in domestic-relations cases, child-support cases, juvenile cases, or cases in the probate court.

The provisions of the Alabama Medical Liability Act of 1987 and the Alabama Medical Liability Act of 1996, § 6-5-540 et seq., Ala. Code 1975, and any judicial interpretation of those provisions remains unaffected by this amendment.

Note from the reporter of decisions: The order amending Rule 702, Alabama Rules of Evidence, effective January 1, 2012, and adopting the Advisory Committee's Notes to Amendment to Rule 702 Effective January 1, 2012, and the Court Comment to Amendment to Rule 702 Effective January 1, 2012, is published in that volume of *Alabama Reporter* that contains Alabama cases from ___ So. 3d.