

**AG Presentation 9-30-15**  
**Suggested Answers to Evidence Hypotheticals**

1. The objection is sustained. There is no right to a pretrial evidentiary hearing under ARE 702. ARE 104(b) gives the court the discretion to hold such a hearing outside of the presence of a jury, but does not require such a hearing in this context. *See Arizona State Hosp. v. Hon. Klein*, 231 Ariz. 467, 296 P.3d 1003 (Ct. App. Div. 2 2013).
2. The objection is overruled. An expert's testimony relying on work completed by a non-testifying expert does not violate Rule 703 or the Confrontation Clause as long as the testifying expert is offering their own (independent) opinion and is subject to cross examination.
3. The objection is overruled. Fingerprint evidence has been received in courts for more than a century. In Arizona, fingerprint evidence was first found admissible more than 90 years ago. In *Moon v. State*, 22 Ariz. 418, 423, 198 P. 288, 290 (1921), the Arizona Supreme Court observed: "It seems to be well settled, both in England and in this country, that evidence of the correspondence of finger print impressions for the purpose of identification, when introduced by qualified finger print experts, is admissible in criminal cases; the weight and value of such testimony always being a question for the jury." New ARE 702 does not appear to change this conclusion. The *Daubert* factors are non-exclusive and may not all be in play (i.e., error rate).
4. The objection is overruled. "Anyone with relevant expertise enabling him to offer responsible opinion testimony helpful to judge or jury may qualify as an expert witness." *TUF Racing Products v. American Suzuki Motor Corp.*, 223 F.3d 585, 591 (7<sup>th</sup> Cir. 2000).
5. The objection is probably overruled. In *State v. Hon. Bernstein/Herman et al.*, 237 Ariz. 226, 349 P.3d 200 (2015), vacating 234 Ariz. 89, ¶¶ 19-28, 317 P.3d 630 (Ct. App. Div. 1 2014), the supreme court held the trial court erred in holding that the State failed to show by a preponderance of evidence that Scottsdale Crime Lab BAC test results (obtained using gas chromatography) complied with Rule 702(d), which requires that "the expert has reliably applied the principles and methods to the facts of the case." "The trial court

properly considered defendants' challenges as part of its gatekeeping inquiry. But the court applied the wrong legal standard under Rule 702(d) and thereby abused its discretion in excluding the evidence." *Id.* ¶ 19. Quoting extensively from the comment to Rule 702 and rejecting a bright line approach, the supreme court clarified that "[e]rrors in the application of a generally reliable methodology [] should not serve to exclude evidence unless they are so serious as to render the results themselves unreliable." "In close cases, the trial court should allow the jury to exercise its fact-finding function, for it is the jury's exclusive province to assess the weight and credibility of evidence." *Id.* ¶ 18.

The supreme court let stand ¶¶ 1-18 of the court of appeals' opinion, including the court's treatment of Rule 702(a)-(c). The court of appeals observed that Rule 702 does not codify the *Daubert* factors, which "focus on general principles and methods" and thus "are discussed in the context of Ariz. R. Evid. 702(c). *Accord* 4 *Weinstein's Federal Evidence* § 702.05[2][c] at 702-93-103 (2d ed.2013) (citing cases using similar approach in construing Fed.R.Evid. 702(c))." 234 Ariz. at 96 ¶¶ 13-17, 317 P.3d at 637.

6. The objection is overruled. The *Daubert* factors are non-exclusive and may not all apply in every case, particularly a case involving testimony of a social or behavioral scientist. Similar testimony was found admissible in *Tyus v. Urban Search Management*, 102 F.3d 256 (7<sup>th</sup> Cir. 1996).