

Missouri Lawyers WEEKLY

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Impact of new expert witness rule yet to be seen

TORT TAKES



Missouri lawmakers enacted several changes to Missouri's tort laws this year. Starting Aug. 28, lawyers will face new statutes on subjects ranging from insurance to workers' compensation to employment, as well as new rules for submitting evidence to juries. This article is part of an occasional series to help lawyers navigate these new areas of the law.



“Plaintiffs and defense attorneys are going to make much more careful decisions about whom they retain as experts.”

Jon R. Gray, partner with Shook, Hardy & Bacon

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Missouri's new expert witness rule passed this year after a multiyear legislative effort. Opposed by judges across the state and vetoed by former Gov. Jay Nixon, it won early support from Gov. Eric Greitens and became one of the first bills he signed into law.

Now, as the new rule goes into effect, lawyers are wondering just how much of an effect it will have.

The new standard, effective today [Aug. 28], is similar to the so-called *Daubert* standard employed in federal courts. That standard, derived from a 1993 U.S. Supreme Court ruling, *Daubert v. Merrell Dow Pharmaceuticals*, requires judges to act as “gatekeepers” when admitting evidence from an expert witness.

Previously, Missouri allowed admission of opinions that are “of a type reasonably relied upon by experts in the field in forming opinions or inferences upon the subject” and are “otherwise reasonably reliable,” as stated in a 2003 Missouri Supreme Court ruling, *State Board of Registration for the Healing Arts v. McDonagh*.

Although that standard doesn't necessarily require expert opinion to be supported by controlled studies, state law did impose an “independent duty” on trial judges to determine whether the facts and data relied on are reasonably reliable.

Jon R. Gray, a partner with Shook, Hardy & Bacon and a former Jackson County circuit judge, testified in favor of the bill earlier this year. He said the practical effect would be minimal.

“Plaintiffs and defense attorneys are going to make much more careful decisions about

whom they retain as experts,” he said.

Gray said both the old and new standards allow judges to exclude unreliable experts. The major difference might be one of approach. Gray said that, when he was a judge, the tendency was to allow challenged experts to testify.

“I kind of described it as ‘Let the good times roll,’ and let the jury decide,” he said. If he were still on the bench, “under this statute, I'd feel more of an obligation to take a good hard look at any objections to the [witness'] credentials or the methodology [that led to the final opinion] and make a determination whether the methodology is reliable, whether the credentials truly make the person an expert witness.”

Gray said he's confident judges will make those calls as needed, but over time he sees there being fewer requests to disqualify witnesses who have already been admitted into other courtrooms.

“I think the overwhelming majority of determinations will be that the jury should hear the expert,” he said.

Under the revised version of section 490.065, judges will be asked to determine if:

- The expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue
- The testimony is based on sufficient facts or data
- The testimony is the product of reliable principles and methods, and
- The expert has reliably applied the principles and methods to the facts of the case

The new rule doesn't apply to matters in probate, juvenile and family courts or other cases that don't involve jury trials. It also specifies that property owners can testify about the reasonable market value of their land.

A major argument against the bill was that it could lead to fact-intensive and lengthy “*Daubert* hearings” where such issues are hashed out. Ken Barnes of the Barnes Law Firm in Kansas City said he doesn't think he'll have any trouble getting the experts he uses today to testify in cases under the new standard — he practices in both state and federal court, he said, so he takes the same approach to experts across the board.

“The biggest impact is going to be in terms of the amount of work the courts and counsel are asked to do, which is going to drive up the

costs for the parties involved,” Barnes said.

Some types of cases, he said, could be impacted more than others.

“If you've got a rear-end car accident, the orthopedics of those injuries are pretty well understood,” he said. “But if you've got a newly approved medical device or medicine, maybe the science on that is evolving and isn't nearly as well understood.”

Barnes, who testified against previous versions of the bill when he was president of the Missouri Association of Trial Attorneys, said he still thinks the new rule is unnecessary.

“This bill is not going to improve the quality of the expert testimony that happens in courtrooms across the state of Missouri,” he said. “It's just going to increase the costs and time associated with getting them over the bar so they can testify.”

As a procedural rule, the new standard likely will apply at upcoming trials, even if the case began before the law went into effect. For now, it's not clear how existing case law will be incorporated into the new rule.

Just last week, a criminal case in the Court of Appeals Eastern District described Missouri's current test for admissibility of expert testimony as “whether it will be helpful to the jury.” In that case, a defendant convicted of child molestation, Chad Allan Mosley, challenged the testimony from two investigators who spoke about sexual perpetrators who often groom their victims by giving them gifts and doing nice things for them and their families.

Although Mosley argued that the investigators were not child psychologists and should have been excluded, the Eastern District said the trial judge had the discretion to allow such testimony.

“When an expert witness defines or explains a little known or complex concept to the jury without opining as to how the concept applied to the defendant, this is not an expert opinion that must be based on specific knowledge of the facts of the case,” the court said.

It's not clear if the new standard, which wasn't mentioned in the opinion, would have affected the case had it been in effect at the time of the trial. A public defender for Mosley, Casey Taylor, didn't return a call seeking comment. **MO**