

# ***SEISINGER V. SIEBEL:*** **SEPARATION OF POWERS AND EXPERT** **WITNESS QUALIFICATIONS**

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## **INTRODUCTION**

In *Seisinger v. Siebel*,<sup>1</sup> the Arizona Supreme Court held in a 4-1 decision that Arizona Revised Statutes (A.R.S.) section 12-2604(A),<sup>2</sup> governing proof of the standard of care in medical malpractice cases, did not violate the separation-of-powers doctrine.<sup>3</sup> Although finding that A.R.S. section 12-2604 conflicted with Arizona Rule of Evidence 702 (Rule 702), which defines expert witness qualifications, the court held that the statute was within the province and power of the legislature to enact. Although the court seemed to leave open the possibility of a constitutional challenge on other grounds, a successful challenge seems unlikely.

## **I. FACTS**

Scott Siebel, M.D., administered a spinal epidural to Laura Seisinger as her anesthesiologist in 2002.<sup>4</sup> Two years later, Seisinger filed a malpractice complaint against Siebel, and she disclosed that her standard-of-care expert would be J. Antonio Aldrete, M.D., a retired anesthesiologist.<sup>5</sup> A.R.S. section 12-2604(A) requires that an expert witness, testifying on the standard of care, have devoted the majority of his time to clinical practice or teaching, in the same specialty, during the year prior to the incident. The Defendant contended that the retired anesthesiologist was not qualified to testify as an expert witness on the standard of care. Seisinger did not dispute the assertion, but argued that A.R.S. section 12-2604(A) was unconstitutional because it conflicted with Rule 702,<sup>6</sup> and as a result violated the separation-of-powers clause of the Arizona Constitution.<sup>7</sup>

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1. 203 P.3d 483 (Ariz. 2009).

2. ARIZ. REV. STAT. ANN. § 12-2604(A) (2009).

3. *Seisinger*, 203 P.3d at 495.

4. *Id.* at 485.

5. *Id.*

6. Rule 702 states that “an expert by knowledge, skill, experience, training, or education” may testify to specialized knowledge if it will assist the trier of fact.

7. *Seisinger*, 203 P.3d at 485–86.

The superior court found the statute constitutional and granted Siebel's motion to dismiss after Seisinger failed to disclose another expert.<sup>8</sup> The court of appeals reversed, holding that the statute violated the separation-of-powers doctrine by infringing on the court's rulemaking authority.<sup>9</sup> The Arizona Supreme Court granted certiorari and reversed, holding the statute constitutional and within the province of the legislature to enact.<sup>10</sup>

## II. SEPARATION OF POWERS APPLIED TO EXPERTS IN MEDICAL MALPRACTICE ACTIONS

The Arizona Constitution requires that the legislative, judicial, and executive departments "shall be separate and distinct, and no one of such departments shall exercise the powers properly belonging to either of the others."<sup>11</sup> The Constitution vests in the court the power "to make rules relative to all procedural matters in any court."<sup>12</sup>

Although the Constitution leaves rulemaking in the hands of the court, it would be an oversimplification to label the power exclusive.<sup>13</sup> Statutory rules that encroach upon the judiciary's rulemaking power are not necessarily unconstitutional.<sup>14</sup> When "reasonable and workable[.]" a statutory rule that supplements the judicial rules of procedure may be valid.<sup>15</sup> More clearly stated, both the court and legislature have procedure altering power, but when a procedural rule and statute conflict, the rule must prevail.<sup>16</sup>

The court generally applies a two-part test when reviewing a separation-of-powers issue arising from the conflict between a procedural rule and statute. First, it determines whether the rule and statute conflict.<sup>17</sup> Second, if there is a conflict, the court determines whether the statute unduly infringes on the court's rulemaking power.<sup>18</sup>

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8. *Id.* at 486.
  9. *Id.*
  10. *Id.* at 494. The Legislature did not declare the statute retroactive. *Id.* Because the statute was enacted after Seisinger's claim, it is not applicable to her case. *Id.*
  11. ARIZ. CONST. art. III.
  12. ARIZ. CONST. art. VI, §5(5).
  13. *Seisinger*, 203 P.3d at 486.
  14. *See State ex rel. Collins v. Seidel*, 691 P.2d 678, 682 (Ariz. 1984). The court states that rules of evidence "have generally been regarded as procedural in nature." *Id.* at 681. But it also notes that because it has "rule-making power does not imply that [it] will never recognize a statutory-rule." *Id.* at 682.
  15. *Seisinger*, 203 P.3d at 487 (quoting *Seidel*, 691 P.2d at 682). For a statute to be "reasonable and workable" it must not explicitly repeal or effectively abrogate a rule. *Id.* Thus, the legislature cannot enact any statute that "provides an analytic framework contrary to the rules' of evidence." *Id.* (quoting *Barsema v. Susong*, 751 P.2d 969, 974 (Ariz. 1988)).
  16. *Id.*
  17. *Id.* *See infra* Part II.A.
  18. *Seisinger*, 203 P.3d at 489.

### A. Conflict Between a Statute and a Rule

“[A] statute that ‘provides an analytical framework contrary to the rules of evidence’ is unconstitutional.<sup>19</sup> The legislature cannot repeal a rule of procedure or evidence, or effectively abrogate a rule.<sup>20</sup> Previous cases can provide some guidance.

In *Readenour*, the court evaluated an alleged conflict between A.R.S. section 12-686(2) and Arizona Rule of Evidence 407, and found that there was no conflict between the rule and statute.<sup>21</sup> The relevant issue in the products liability case was whether evidence of product changes was admissible.<sup>22</sup> The statute barred, as direct evidence of a defect, evidence of changes by the manufacturer after a product’s sale.<sup>23</sup> The rule barred only changes after the injury to prove negligence or culpable conduct.<sup>24</sup>

Beginning with the proposition that its duty is to construe statutes as constitutional where possible,<sup>25</sup> the court ultimately concluded that the statute supplemented the rule and was constitutional. The court reasoned that there was no express abrogation since the rule was silent on the additional prohibitions in the statute.<sup>26</sup> Moreover, the purpose of the rule and the statute were the same: both encouraged remedial measures. Considering these factors along with the low probative value of the evidence prohibited by the statute, the court found the statute constitutional.<sup>27</sup>

Although the court will construe statutes as constitutional where possible, some statutes cannot be harmonized with a rule. In *Barsema*,<sup>28</sup> the court found that A.R.S. section 12-569, prohibiting admission of certain insurance evidence for any purpose, unconstitutionally conflicted with Arizona Rule of Evidence 411, allowing such evidence as proof of bias or prejudice where its probative value was not substantially outweighed by danger of prejudice.<sup>29</sup> The statute suspended a case-by-case analysis of the issue and, as a result, created an irreconcilable conflict.<sup>30</sup> Rather than supplement the rule, the statute provided “an analytical framework contrary to the rules.”<sup>31</sup>

In *Seisinger*, the court of appeals held that A.R.S. section 12-2604(A) and Rule 702 conflicted “because the statute [could not] be harmonized with the

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19. *Id.* (quoting *Barsema*, 751 P.2d at 974).

20. *Id.* (citing *Seidel*, 691 P.2d at 691).

21. *Readenour v. Marion Power Shovel*, 719 P.2d 1058, 1064 (Ariz. 1986).

22. *Id.*

23. *Id.* at 1061.

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.* at 1062.

28. *Barsema v. Susong*, 751 P.2d 969 (Ariz. 1988).

29. *Id.* at 974.

30. *Id.*

31. *Id.*

rule.”<sup>32</sup> The Supreme Court of Arizona agreed.<sup>33</sup> The analysis of the rule–statute conflict was straightforward and the court unanimously accepted the lower court’s decision on the issue.<sup>34</sup>

Rule 702 permits expert testimony when a witness is qualified and his testimony would “assist the trier of fact to understand evidence or determine a fact in issue.”<sup>35</sup> Witnesses qualify as experts if they can help the jury on a particular issue.<sup>36</sup> The rule of evidence does not evaluate admissibility on the degree of qualification, but rather on the helpfulness to the fact finder.<sup>37</sup>

Expert qualifications are more stringent under A.R.S. section 12-2604 than under Rule 702.<sup>38</sup> Sections 12-2604 does not simply enforce Rule 702,<sup>39</sup> but requires that an expert witness “possess the qualifications required by Rule 702 and satisfy the additional requirements of section 12-2604(A).”<sup>40</sup> This means that “§ 12-2604(A) precludes a witness who is otherwise qualified under Rule 702 . . . unless he or she meets the additional criteria set forth in the statute.”<sup>41</sup> Because an expert may be qualified under the rule but not under the statute, the rule and statute may, at times, conflict.<sup>42</sup>

32. *Seisinger v. Siebel*, 195 P.3d 200, 206 (Ariz. Ct. App 2009). The court here appears to accept the court of appeals’ conflict analysis. The court of appeals noted that there are generally “three ways . . . statutes and rules can be harmonized to co-exist: (1) the policies behind the rule and statute are complimentary, (2) the statute does not interfere with admission of highly relevant evidence, and (3) the statute has a substantive component.” *Id.* at 206.

33. *Seisinger v. Siebel*, 203 P.3d 483, 488 (Ariz. 2009).

34. *Id.* at 494 (Eckerstrom, J., concurring in part and concurring in result). Judge Eckerstrom, sitting for Chief Justice McGregor, concurred with the majority opinion that Rule 702 and A.R.S. section 12-2604 conflict. *Id.*

35. ARIZ. R. EVID. 702.

36. *Seisinger*, 203 P.3d at 488.

37. *Id.* “The degree of qualification goes to the weight given the testimony, not its admissibility.” *State v. Davolt*, 84 P.3d 456, 475 (Ariz. 2004).

38. ARIZ. REV. STAT. ANN. § 12-2604(A) (2009) establishes the following criteria for specialist testimony:

2. During the year immediately preceding the occurrence giving rise to the lawsuit, devoted a majority of the person’s professional time to either or both of the following:

(a) The active clinical practice of the same health profession as the defendant and, if the defendant is or claims to be a specialist, in the same specialty or claimed specialty.

(b) The instruction of students in an accredited health professional school or accredited residency or clinical research program in the same health profession as the defendant and, if the defendant is or claims to be a specialist, in an accredited health professional school or accredited residency or clinical research program in the same specialty or claimed specialty.

39. *Seisinger*, 203 P.3d at 488.

40. *Id.*

41. *Id.* (quoting *Seisinger v. Seibel*, 195 P.3d 200, 204 (Ariz. Ct. App. 2008)) (implicitly accepting the *Seisinger* court’s analysis of the conflict between rule and statute).

42. *Id.*

*B. Undue Infringement on the Court's Rulemaking Power: Substantive vs. Procedural*

The second step in a separation-of-powers analysis, after concluding that a rule and statute cannot be harmonized, is “determining whether the challenged statutory provision is substantive or procedural.”<sup>43</sup> This question is one of law and cannot turn on a record made in legislative hearings.<sup>44</sup> “The legislature has plenary power to deal with any topic unless otherwise restrained by the Constitution.”<sup>45</sup> Once the court determines that a statute conflicting with a court-promulgated rule is substantive, not procedural, the statute must prevail.<sup>46</sup>

Both the court and the legislature play roles in the development of substantive law and procedural rules. Despite constitutional grants of rulemaking power to the legislature, the court also plays a role in the development of substantive law: the American legal tradition relies on the development of court-made common law. Similarly, despite the constitutional grant to the court to make procedural rules, the legislature may enact procedural statutes.<sup>47</sup> But just as a statute prevails over a common-law substantive rule, a procedural rule must prevail against a conflicting procedural statute.<sup>48</sup>

In practice, the substantive–procedural line is difficult to draw. The Arizona Supreme Court has stated that substantive law “creates, defines, and regulates rights; whereas . . . procedural law is that which prescribes the method of enforcing the right or obtaining redress for its invasion.”<sup>49</sup> The difficulties arise when a statute contains both substantive and procedural aspects, as is often the case with rules of evidence. The ultimate question is whether the relevant part of a challenged statute “creates, defines, and regulates rights.”<sup>50</sup>

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[W]hen the standard of care has not materially changed during the period after a physician left active practice or teaching, a trial judge might . . . conclude that the witness remains qualified through “knowledge, skill, experience, training, or education” to assist the jury through expert testimony. As to such a witness, the statute automatically produces a different result than the Rule might produce.

*Id.*

43. *Id.* at 489 (citing *State v. Hansen*, 160 P.3d 166, 168 (Ariz. 2007) (“[W]hen a statute and a rule conflict, we traditionally inquire into whether the matter regulated can be characterized as substantive or procedural, the former being the legislature’s prerogative and the latter the province of this Court.”)).

44. *Id.* at 490.

45. *Id.*

46. *Id.* Once a statute is classified as substantive, it is outside of the powers delegated to the judicial department by the constitution. If it classified as procedural, then it is restrained by separation of powers and the grant of procedural rule-making power to the judicial department. See discussion *supra* notes 14–17 and accompanying text.

47. *Seisinger*, 203 P.3d at 490.

48. *Id.*

49. *State v. Birmingham*, 392 P.2d 775, 776 (Ariz. 1964).

50. *Seisinger*, 203 P.3d at 491.

Within the scope of the legislature's power to enact substantive rules is: (1) the power to modify burdens of proof,<sup>51</sup> (2) the power to modify elements of common-law causes of actions,<sup>52</sup> and (3) the power to amend common-law privileges.<sup>53</sup> *Readenour* teaches that statutes, which provide for the exclusion of evidence, are not necessarily entirely procedural, as privilege statutes exclude highly relevant evidence, yet are both procedural and substantive.<sup>54</sup>

### *C. Expert Qualifications in Medical Malpractice Cases Are Substantive*

The *Seisinger* court's reasoning rests heavily on the evolution of the common law expert requirement, which demands that doctors testify to the standard of care in medical malpractice cases. The court juxtaposed this evolution with the adoption of the rules of evidence and ultimately concluded that the statute substantively modified the cause of action and, consequently, did not violate the separation-of-powers doctrine.<sup>55</sup>

At common law, a plaintiff bringing a malpractice suit must ultimately prove duty, breach, causation, and damages.<sup>56</sup> A.R.S. section 12-2604 changes the burden of proof for the duty element—the standard of care to which a physician should be held.<sup>57</sup> In medical malpractice cases, Arizona courts have long required that expert testimony from a physician establish the standard of care.<sup>58</sup> A plaintiff who fails to provide such testimony has failed to meet his burden of production, mandating judgment for the defendant.<sup>59</sup> Because the Rules of Evidence were adopted after the common-law requirement, the requirement cannot have come from the rules as a temporal issue.<sup>60</sup>

More critical to the court's analysis, Rule 702 is not nearly as strict as the common law.<sup>61</sup> Under the common law, plaintiffs fail to meet their burden of

51. *Id.* For example, the court in *State v. Fletcher* held that the burden of proof of insanity was substantive and the legislature could alter it. 717 P.2d 866, 870–72 (Ariz. 1986).

52. *Seisinger*, 203 P.3d at 491.

53. *Id.*

54. *Id.* (citing *Readenour v. Marion Power Shovel*, 719 P.2d 1058, 1062 (Ariz. 1986)).

55. *Id.* at 493.

56. *Id.* at 492.

57. *Id.* at 493 (section 12-2604 “regulates rights,” by modifying the common law to increase a plaintiff's burden of production with respect to a statutory element of the tort, departure from the standard of care.”) (internal citation omitted).

58. *Id.* at 492 (citing *Rice v. Tissaw*, 112 P.2d 866, 869 (Ariz. 1941)). *Rice* was decided in 1941, suggesting that this practice was established before the rules of evidence were adopted. The plaintiff does not need expert testimony to prove the standard of care in cases based on the theory of *res ipsa loquitur*.

59. *Rice*, 112 P.2d at 869.

60. *Seisinger*, 203 P.3d at 492.

61. *Id.* A Dean at the University of Arizona College of Nursing testified that a registered nurse could often know the applicable standard of care, but the court of appeals instead permitted testimony only from a doctor. *Rodriguez v. Jackson*, 574 P.2d 481, 484–85 (Ariz. Ct. App. 1977). In contrast, Rule 702 allows any expert, including non-

production by not using a doctor as their expert witness.<sup>62</sup> In contrast, Rule 702 allows any expert, including non-physicians, to establish the standard of care if the testimony is helpful to the fact finder.<sup>63</sup> While a plaintiff's case would be dismissed under the common law if a non-physician expert witness established the standard of care, the same expert would be acceptable under Rule 702. The common law, by requiring physician testimony, effectively establishes an element of the medical malpractice cause of action, and is therefore substantive.<sup>64</sup>

A.R.S. section 12-2604 is substantive in much the same sense because it alters the plaintiff's burden of production as to an element of the cause of action.<sup>65</sup> Before the statute, a long-retired physician could establish the standard of care.<sup>66</sup> Therefore, the statute "did not merely alter court procedures, but rather changed the substantive law as to what a plaintiff must prove in medical malpractice actions."<sup>67</sup> Because the statute is more substantive than procedural, the legislature did not violate separation of powers by modifying evidence requirements in this case.

### III. IS THE STATUTE REALLY SUBSTANTIVE?

The court's holding was not uncontested. Judge Eckerstrom's concurrence challenged the court's use of a substantive-procedural dichotomy. He argued that the dichotomy is unnecessary because statutes that conflict with evidentiary rules are usually unconstitutional.<sup>68</sup> Other courts addressing constitutionality of similar statutes have reached conflicting conclusions.

The Supreme Court of Michigan considered a similar conflict between the state's statute and evidentiary rule in *McDougall v. Schanz*,<sup>69</sup> and its holding was consistent with *Seisinger*.<sup>70</sup> Like *Seisinger*, the *McDougall* court found a conflict between the statute and the rule of evidence.<sup>71</sup> After finding a conflict, the court

physicians, to establish the standard of care if the testimony is helpful to the fact finder. *Seisinger*, 203 P.3d at 492-93.

62. *Id.* at 492.

63. *Id.* at 492-93

64. *Id.* at 493.

65. *Id.*

66. *Id.*

67. *Id.* (citing *Peck v. Tegtmeyer*, 834 F. Supp. 903, 909 (W.D. Va. 1992) ("In other words, under the statutory scheme, the standard of care is that which is testified to by an expert qualified under the statute.")).

68. *Id.* at 495.

69. 597 N.W.2d 148 (Mich. 1999).

70. *Id.* at 159. The statute at issue required a physician to specialize in the same field as the defendant now or at the time of the incident, and have "devoted at the time of the occurrence . . . a substantial portion of his or her professional time to the active clinical practice . . . or to the instruction of students." MICH. COMP. LAWS § 600.2169 (1991). Michigan Rule of Evidence 702, said to be in conflict, states "[i]f the court determines that . . . specialized knowledge will assist the trier of fact . . . a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise."

71. *McDougall*, 597 N.W.2d at 153-54. The court's analysis was similar to the Arizona Supreme Court's analysis in *Seisinger*.

considered whether the statute was substantive or procedural, substantive law being the realm of the legislature and procedural rules in the court's domain.<sup>72</sup> As the Arizona court did, the Michigan court noted that rules of evidence are not always completely procedural.<sup>73</sup> It concluded that the statute effectively modified the elements of negligence.<sup>74</sup>

While the court in Michigan took a nearly identical approach to the *Seisinger* court, West Virginia has taken an alternative position.<sup>75</sup> In *Mayhorn v. Logan Medical Foundation*, the court held that the rules of evidence are "the paramount authority in determining the admissibility of evidence."<sup>76</sup> It held that the statute under consideration was unconstitutional because it "indicates that the legislature may by statute determine when an expert is qualified to state an opinion."<sup>77</sup> The court based its decision on the constitutional grant of rulemaking authority to the courts and the lack of a provision allowing statutory modification of expert qualifications in West Virginia Rule of Evidence 702.<sup>78</sup> Thus in West Virginia, when a statute conflicts with a rule of evidence, it is unconstitutional unless the rule provides for statutory modification.<sup>79</sup>

Judge Eckerstrom agreed with the majority that A.R.S. section 12-2604(A) and Rule 702 conflict, but, following the logic of West Virginia, he could not find the statute constitutional. He reasoned that once the judicial power is properly exercised, it cannot belong to two branches at once.<sup>80</sup> Judge Eckerstrom took the position that Arizona's Constitution endows the judicial department with the primary authority to establish rules governing evidence, particularly when they "pursue goals at the core of judicial function."<sup>81</sup> Rule 702 is one such rule.<sup>82</sup> If Rule 702 is an exercise of constitutional judicial power, then a conflicting statute

72. *Id.* at 154.

73. *Id.* at 158-59.

74. *Id.* at 159. "Section 2169 essentially modifies that element to require that proof of malpractice 'emanate from sources of reliable character as defined by the legislature.'" *Id.* (quoting *McDougall v. Eliuk*, 544 N.W.2d 56 (Mich. App. 1996) (Taylor, J., dissenting)).

75. West Virginia Rule of Evidence 702 states: "[I]f 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." The statute in question required that a medical expert be "engaged or qualified in the same or substantially similar medical field as the defendant." W. VA. CODE § 55-7B-7(a) (1986).

76. 454 S.E.2d 87, 94 (W. Va. 1994).

77. *Id.*

78. *Id.* Rule 702 lacks a provision for statutory modification; in contrast West Virginia Rule of Evidence 601 provides that a witness is competent unless "otherwise provided for by statute or these rules." The court makes clear that competency is not the same thing as qualification of a witness. *Mayhorn*, 454 S.E.2d at 94.

79. *See id.*

80. *Seisinger v. Siebel*, 203 P.3d 483, 495 (Ariz. 2009) (Eckerstrom, J., concurring in part and concurring in result).

81. *Id.* (Eckerstrom, J., concurring in part and concurring in result) (asserting that statute could not be retroactively applied to the case at issue).

82. *Id.* at 496 (Eckerstrom, J., concurring in part and concurring in result). The majority contests this point. *Id.* at 492 n.6.



on the same subject is an unconstitutional encroachment of legislative powers on judicial powers.<sup>83</sup> Following this reasoning, the statute is unconstitutional since Rule 702 is a proper exercise of the judicial powers, which cannot simultaneously belong to the legislature.

Standing alone, the concurring position is quite appealing. Judge Eckerstrom argues that section 12-2604(A) “prescribes *the method* by which litigants must prove their entitlement to relief under that substantive law.”<sup>84</sup> And he finds support in *State v. Birmingham*.<sup>85</sup> Under his approach there is no gray area between substantive and procedural laws: if a statute conflicts with a rule, then those conflicting features are necessarily procedural.<sup>86</sup>

In order for Judge Eckerstrom’s approach to work, a rule of evidence must be strictly within the province of the court. *Readenour*, however, held that some rules of evidence have substantive components and those components are open to statutory modification.<sup>87</sup> Additionally, the *State v. Robinson* court noted that Rule 702 “does not involve a ‘core’ judicial function.”<sup>88</sup> Once it is established that substantive components of evidentiary rules are open to legislative changes, and the core judicial function is not usurped, the concurrence is fighting a steep uphill battle.

The difficulty of that battle is amplified because the court held that the common law requirement for physician testimony was substantive. The majority saw the line between a rule or a statute being primarily procedural or substantive as the line between a primarily judicial or legislative constitutional grant of authority, respectively. The court already created a common law requirement that physicians establish the standard of care in medical malpractice claims. The *Seisinger* court found this requirement substantive because it modified the plaintiff’s burden of production.<sup>89</sup> Likewise, section 12-2604(A) “modif[ie]d the common law to increase plaintiff’s burden of production” with respect to the standard of care.<sup>90</sup> If the substantive common law established a requirement that an expert testify to the standard of care, then it is difficult to argue that requiring specific expert testimony is not substantive. If it was substantive when the common law created the requirement, it should be substantive when the legislature modifies that requirement to demand an even more specific expert. Because of the legislature’s constitutional grant of substantive law making power, it can modify the substantive common law, including increasing the plaintiff’s burden of production.

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83. *Id.* at 496 (Eckerstrom, J., concurring in part and concurring in result).

84. *Id.* at 497 (Eckerstrom, J., concurring in part and concurring in result).

85. *Id.* (citing *State v. Birmingham*, 392 P.2d 775, 776 (Ariz. 1964)) (Eckerstrom, J., concurring in part and concurring in result). The concurrence notes that under the test articulated in *Birmingham*, laws that provide “the method” for asserting a specific substantive right are procedural in nature. *Id.* at 498 (Eckerstrom, J., concurring in part and concurring in result).

86. *Id.* at 498 (Eckerstrom, J., concurring in part and concurring in result).

87. *Readenour v. Marion Power Shovel*, 719 P.2d 1058, 1062 (Ariz. 1986).

88. *State v. Robinson*, 735 P.2d 801, 807 (Ariz. 1987).

89. *Seisinger*, 203 P.3d at 493.

90. *Id.* at 493.

Both the dissent and the majority in *Seisinger* cited other jurisdictions for their position. Both used the same premises to reach their conclusions. The path forked when evaluating who properly sets expert witness qualification standards, but the majority's malleable approach fits better in this foggy region of law.

#### IV. OTHER POTENTIAL CONSTITUTIONAL CHALLENGES

Considering only a separation-of-powers argument, the Arizona Supreme Court held A.R.S. section 12-2604(A) constitutional. But other constitutional challenges may exist.<sup>91</sup> There are two potential avenues still available to challenge section 12-2604(A): (1) the constitutional prohibition of special laws, and (2) a requirement that Arizona plaintiffs have unrestricted access to the courts.

##### A. Special-Law Challenges

Arizona's Constitution states that no "special laws shall be enacted . . . [w]hen a general law can be made applicable."<sup>92</sup> This prohibition is intended to prevent legislative enactment of special benefits and favors to certain groups or locations.<sup>93</sup> "A law is not a 'special' law if (1) the classification is rationally related to a legitimate government objective, (2) the classification encompasses all members of the relevant class, and (3) the class is flexible, allowing members to move into and out of the class."<sup>94</sup> A law is not special legislation if it treats all class members alike and the classification is not "palpably arbitrary."<sup>95</sup>

Although at least one other state has been receptive to the argument that a law similar to section 12-2604(A) was a special law,<sup>96</sup> it seems a difficult argument to win in Arizona. In *Zeier*, the Oklahoma Supreme Court considered whether a law similar to A.R.S. section 12-2604(A) was a special law prohibited by the state constitution.<sup>97</sup> While the challenge was successful, Oklahoma's special-law test differs from Arizona's. In Oklahoma, a law is a prohibited special law if the "statute upon a subject enumerated in the constitutional provision targets for different treatment less than an entire class of similarly situated persons or things."<sup>98</sup> This test is far less flexible than Arizona's, which allows for special laws if three criteria are met.

Under the first prong of Arizona's three-prong test for special laws, section 12-2604(A) is probably rationally related to a legitimate government objective of discouraging frivolous malpractice suits. There is some debate

91. See, e.g., *Zeier v. Zimmer, Inc.*, 152 P.3d 861, 873–74 (Okla. 2006).

92. ARIZ. CONST. art. IV, pt. 2 § 19(20).

93. *State v. Bonnewell*, 2 P.3d 682, 685 (Ariz. Ct. App. 1999).

94. *Id.*

95. *Id.* (quoting *Tucson Elec. Power Co. v. Apache County*, 912 P.2d 9, 17 (Ariz. Ct. App. 1995)).

96. *Zeier*, 152 P.3d at 866.

97. *Id.* Oklahoma's constitution provides "where a general law can be made applicable, no special law shall be enacted." OKLA. CONST. art. 5, §59. In *Zeier*, the court conflates the general negligence cause of action with the medical malpractice cause of action in order to realize disparate treatment within the group of tort plaintiffs. *Id.* at 867.

98. *Zeier*, 152 P.3d at 867 (emphasis removed).

whether such protection is necessary,<sup>99</sup> but that debate is better suited for the legislature and not the courts.

Under the second prong, the classification must encompass all members of the relevant class. One could argue that requiring qualified expert testimony creates a class of medical malpractice plaintiffs within the encompassing class of all tort plaintiffs. But it is unlikely that Arizona will conflate medical malpractice claims with general negligence claims. The court has already distinguished medical malpractice cases from other negligence claims by requiring only expert witness testimony from physicians to establish the standard of care, a requirement that departs from Rule 702.<sup>100</sup> This suggests that the court sees medical malpractice as a different cause of action than a traditional negligence tort. It appears that the court would consider the class to be medical malpractice plaintiffs, in which case every member of the class that uses a medical expert for the standard of care is treated identically.<sup>101</sup>

Under the third prong, the class is flexible. A medical malpractice plaintiff is not immutable. People are free to move between this classification and other classifications. Although section 12-2604(A) seemingly targets plaintiffs in medical malpractice cases for treatment different from the rest of plaintiffs in negligence tort claims, such an argument would be difficult to ultimately win in Arizona.

### ***B. Access to the Courts***

In Arizona, plaintiffs are guaranteed the right to obtain access to state courts.<sup>102</sup> The Supreme Court of Arizona has stated that article 18 section 6 of the Arizona Constitution is an “open court” provision, intended to “constitutionalize the right to obtain access to the courts and a remedy for damages sustained.”<sup>103</sup>

One potential argument against A.R.S. section 12-2604 is that it creates a monetary barrier to court access.<sup>104</sup> In Oklahoma, such a challenge was successful because the statute “condition[ed] one’s right to litigate . . . and close[d] the court house doors to those financially incapable of obtaining a pre-petition medical opinion.”<sup>105</sup> In Arizona, the requirement that a qualified expert testify in most medical malpractice cases might impose a prohibitive burden on those without the

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99. See Kim Smith, *Medical-Malpractice Suits Drop Sharply; Experts Dispute Why*, ARIZ. DAILY STAR, Jun. 7, 2009, available at <http://www.azstarnet.com/sn/fromcomments/296049.php>.

100. See discussion *supra* Part II.C.

101. See ARIZ. REV. STAT. ANN. § 12-2604(A) (2009). The statute treats every malpractice plaintiff the same, mandating that: “[i]n an action alleging medical malpractice, a person shall not give expert testimony on the appropriate standard of practice or care unless . . .” *Id.*

102. See ARIZ. CONST. art. 18 § 6 (“The right of action to recover damages for injuries shall never be abrogated, and the amount recovered shall not be subject to any statutory limitation.”).

103. *Boswell v. Phoenix Newspapers, Inc.*, 730 P.2d 186, 190 (Ariz. 1986).

104. See *Zeier v. Zimmer, Inc.*, 152 P.3d 861, 869 (Okla. 2006).

105. *Id.* at 873.

financial wherewithal to provide one.<sup>106</sup> While it is unlikely that the mere requirement that an expert testify closes the courthouse doors,<sup>107</sup> the requirement that physician expert witnesses actively practice medicine raises costs further by reducing the number of qualified witnesses. Reluctance of physicians to testify against colleagues compounds the issue. If a plaintiff cannot find a willing qualified witness or the expense of finding one is prohibitive, then a court must dismiss the suit.<sup>108</sup>

The monetary-bar argument should not work in Arizona. The statute only requires an affidavit where expert testimony is otherwise required, so a plaintiff must still hire a medical expert even before the qualification statute.<sup>109</sup> It doesn't impose an additional cost, such as in *Zeier* where a *res ipsa loquitur* plaintiff was forced to hire an expert that would never testify.<sup>110</sup> Because Arizona requires expert testimony only when an expert would be required, the same scenario cannot arise. If the common law requirement is not a monetary barrier, then the additional cost of finding a specific type of witness may not be.

### CONCLUSION

The medical malpractice statute questioned in *Seisinger* has negative implications for plaintiffs. Expert witnesses for the standard of care must now satisfy temporal teaching or practice requirements in a specialized field. Implications for plaintiffs include rising litigation costs in malpractice cases and the potential inability to find a satisfactory witness, which could result in dismissal. The dissent poses a valid argument, but is undermined by Arizona precedent. While these effects are unwanted by plaintiffs, they are nonetheless most likely constitutional.

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106. Like Oklahoma, Arizona requires that plaintiffs file an affidavit of merit before initiating a medical malpractice lawsuit. ARIZ. REV. STAT. ANN. § 12-2602(A) (2009).

107. See discussion *supra* Part II.C. The evolution of a common law expert requirement where standard of care proof is necessary suggests constitutionality.

108. See Smith, *supra* note 99. A superior court judge in Arizona states that he is forced to dismiss malpractice cases when plaintiff cannot find a willing expert. *Id.*

109. ARIZ. REV. STAT. ANN. § 12-2603(B) (2009) (If “expert opinion testimony is necessary, the claimant shall serve a preliminary expert opinion affidavit.”).

110. See *Zeier*, 152 P.3d at 867.