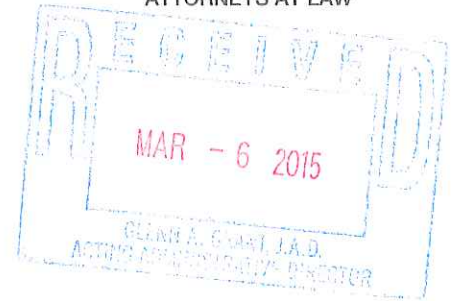


**McCARTER
& ENGLISH**
ATTORNEYS AT LAW



March 2, 2015

VIA EMAIL AND US MAIL

Honorable Glenn A. Grant
Judge, Appellate Division
Acting Administrative Director of the Courts
Rules Comments
Hughes Justice Complex
P.O. Box 037
Trenton, NJ 08625-0037

David R. Kott
Partner
T. 973-639-2056
F. 973-624-7070
dkott@mccarter.com

Re: 2013-2015 Report of the Supreme Court Committee on the Rules of Evidence
[Proposed Amendments to N.J.R.E. 702]

Dear Judge Grant:

I am chairman of the Legal Affairs Committee of The New Jersey Business & Industry Association (NJBIA), which is the State's largest employer association with over 21,000 members in New Jersey. This letter is submitted as a comment on the 2013-2015 Report of the Supreme Court Committee on the Rules of Evidence.

By way of background, Your Honor may recall that on April 26, 2013, Christine A. Stearns, Esq., Vice President of the NJBIA, wrote to Your Honor requesting that the Supreme Court adopt amendments to the New Jersey Rules of Evidence ("N.J.R.E.") 104 and 702 that were proposed by The New Jersey Lawsuit Reform Alliance (which is now known as the New Jersey Civil Justice Institute). Thereafter, it is our understanding the Supreme Court asked the Committee on the Rules of Evidence to provide a report whether N.J.R.E. 702 is unclear, resulting in trial courts applying inconsistent standards in admitting expert testimony and that the Supreme Court Committee on the Rules of Evidence also report to the Supreme Court its thoughts as to whether current laws creating other problems, such as attracting a disproportionate number of personal injury cases to the State, especially mass tort cases, that might be otherwise filed in other jurisdictions.

As a matter of simple jurisprudence, Rule 702 should be amended for two reasons. First, the current jurisprudence sets forth different standards in civil cases for the admissibility of opinion testimony based upon the type of case involved. The admissibility of expert testimony should not turn on the type of case at issue; rather, it should focus on the reliability of the testimony. Second, the current wording of Rule 702 does not reflect the case law on the admissibility of expert testimony. As a matter of jurisprudence, the text of Rule 702 should be consistent with the judicial precedents on the admissibility of expert testimony.

McCarter & English, LLP
Four Gateway Center
100 Mulberry Street
Newark, NJ 07102-4056
T. 973.622.4444
F. 973.624.7070
www.mccarter.com

- BOSTON
- HARTFORD
- STAMFORD
- NEW YORK
- NEWARK
- EAST BRUNSWICK
- PHILADELPHIA
- WILMINGTON
- WASHINGTON, DC

NEW JERSEY LAW CURRENTLY HAS FOUR DIFFERENT
STANDARDS FOR THE ADMISSIBILITY OF OPINION TESTIMONY

There is a significant body of law applying to routine cases (fall-down cases, security cases, etc.) New Jersey's "net opinion" rule. E.g., Buckelew v. Grossbard, 87 N.J. 512, 524 (1981). Other cases involving certain types of scientific evidence follow the Frye standard. E.g., Hisenaj v. Kuehner, 194 N.J. 6 (2008). In those cases involving "novel" theories of causation in drug or toxic tort cases the Court has invoked a "relaxed" standard that relaxes the Frye "general acceptance" standard. E.g., Rubanick v. Witco Chemical Corp., 125 N.J. 421 (1991). Having different standards for the admissibility of expert testimony in a civil case depending upon the type of case involved surely increases the risk the trial courts will apply inconsistent standards in admitting expert testimony. Moreover, the standard for admissibility of opinion testimony in civil cases should not turn on the type of case; rather, the overriding consideration should be that the fact finder only hear opinion testimony that is reliable. After all, our Court Rules require that a proper foundation be laid before a witness can testify as to an event, that hearsay is not admissible (absent an exception that it is otherwise reliable) and that experts giving opinion testimony only be allowed to give opinion testimony if they are qualified (in terms of education and experience) -- all of which are designed to make sure that the fact finder only hear testimony that is reliable. In fact, the adoption of Daubert will achieve that goal.

We note that the Report of the Supreme Court Committee on the Rules of Evidence concludes that Trial Courts are not incorrectly applying the current jurisprudence as to the admissibility of opinions of experts. While that might be true, that conclusion "begs the question." The question is not whether or not trial courts are incorrectly applying the existing jurisprudence on the admissibility of expert testimony; rather, the question is whether our existing jurisprudence allows unreliable opinion testimony to be placed before juries. It is plain that the opinions of experts are particularly important in trials. Indeed, many trials are characterized as "the battle of the experts." Moreover, juries tend to give significant weight to the opinions of experts, yet due to the highly technical subjects that experts address, jurors may not be in a position to evaluate the reliability of the opinions of the experts.

RULE 702, AS PRESENTLY WORDED, DOES NOT REFLECT CURRENT
NEW JERSEY LAW ON THE ADMISSIBILITY OF EXPERT TESTIMONY

Rule 702, as currently worded, is wholly untethered to the reported case law in New Jersey on the admissibility of expert testimony. It is plain that there should be some relationship between the text of the Evidence Rule and the judicial precedents setting forth the standards for the admissibility of opinion testimony. In short, the starting point for determining whether any evidence is admissible is the text of the applicable Evidence Rule. To the extent that the current wording of N.J.R.E. 702 does not embody the case law, there is a significant risk the trial courts will apply

inconsistent standards in admitting expert testimony. Of course, insofar as our case law sets forth four different standards in civil cases for the admissibility of opinion testimony, it would be virtually impossible for the text of the applicable Evidence Rule to reflect the existing case law on the admissibility of expert testimony. For this reason, the Evidence Rule should be modified so that it has a single standard for the admissibility of expert testimony, which should be Daubert.

* * *

The adoption of Daubert will provide a clearer standard for the admissibility of expert testimony that can be applied uniformly by all trial courts in all civil cases. Moreover, adoption of the Daubert standard will put New Jersey "in line" not only with the Federal Courts but with the overwhelming majority of State Courts that adopted Daubert. (We note in this regard that a significant majority of the States have adopted Daubert or have adopted rules very close to Daubert.) In addition, the adoption of Daubert will result in a significant savings of judicial resources insofar as the adoption of Daubert will take away the incentive for out-of-state plaintiffs to file lawsuits in New Jersey when they would not be able to "get to the jury" in their home states because their home states have adopted Daubert and hence the opinions of their experts would be inadmissible. The Report of the Supreme Court Committee on the Rules of Evidence confirms the study done by our law firm that in certain types of cases, particularly those pending in multi-county litigation, the overwhelming number of plaintiffs are from out of state.

For the foregoing reasons, NJBIA requests that the Supreme Court amend N.J.R.E. 702 to provide as follows:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

(a) 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;

(b) the testimony is based on sufficient facts or data;

(c) the testimony is the product of reliable principles and methods; and

Honorable Glenn A. Grant
March 2, 2015
Page 4

(d) the expert has reliably applied the principles and methods to the facts of the case.

Amending N.J.R.E. 702 as proposed in this letter will result in the New Jersey Rules of Evidence mirroring Federal Rule of Evidence 702 and thereby adopting the Daubert jurisprudence.

Respectfully Submitted,



David R. Kott

DRK/tas