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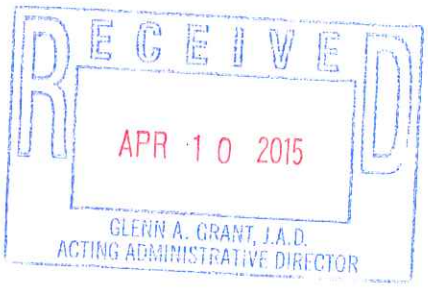

April 9, 2015

Glenn A. Grant, J.A.D.
Acting Administrative Director of the Courts
Rules Comments
Hughes Justice Complex; P.O. Box 037
Trenton, New Jersey 08625-0037

Re: Proposed Amendments to N.J.R.E. 702

Dear Judge Grant:

We appreciate the work of the Committee on the Rules of Evidence in producing their report and attempting to answer the questions presented by the New Jersey Supreme Court, and the Court's continued interest in examining this issue.

The question of whether New Jersey should update its rule on expert testimony has been under discussion for over a decade.

The Committee on the Rules of Evidence first discussed adopting the federal standard for admissibility of expert testimony reflected in Federal Rule 702 in the year 2000. The New Jersey rule had tracked the federal rule since 1992, so the federal update raised the question of whether the New Jersey rules should likewise be modified to remain consistent with the federal rule. However, there was a concern that the "federal case law interpreting *Daubert*" was then still "unsettled." The change to the federal rule had been made in response to a series of United States Supreme Court cases: *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, (1993); *General Electric Co. v. Joiner*, 522 U.S. 136, (1997); and *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, (1999). As a result, the committee concluded in its 2000-2002 report that "it would be a mistake to change our rule to conform with the federal standard before the standard is well-defined."

The Committee's concern was reasonable. The 2000 amendment to Federal Rule 702 was not a mere "housekeeping" update to codify the existing law. Rather, the language codified a particular, stricter, interpretation of the *Daubert* "trilogy." While *Joiner* held that district courts "may" scrutinize a proffered expert's reasoning process, Rule 702(d) now requires those courts to ascertain that "the expert has reliably applied the principles and methods to the facts of the case."

Nevertheless, the Committee's initial concern has long since been addressed. The case law under Federal Rule 702 has become settled – not only in federal court but also in the overwhelming majority of states that have adopted some version of the federal rule.

Moreover, states that have held out against *Daubert* have recently amended their law to track federal law. The most populous and prominent holdout, California, in 2012 endorsed *Daubert*'s gatekeeping requirement and stated, citing *Joiner*, that trial courts should scrutinize an expert's reasoning process before admitting the expert's testimony. *Sargon Enterprises, Inc. v. University of Southern Cal.*, 288 P.3d 1237 (Cal. 2012). Florida and Wisconsin, which had both rejected *Daubert*, adopted amended FRE 702 by statute in 2013 and 2011, respectively. In January 2015, the Virginia Supreme Court, though not explicitly adopt the federal rule, overturned a $14 million jury verdict, in the process citing *Joiner* for the proposition that "although experts may extrapolate opinions from existing data, a circuit court should not admit expert opinion 'which is connected to existing data only by the ipse dixit of the expert.'" *Hyundai Motor Co. v. Duncan*, 766 S.E.2d 893, 897 (2015).

Only six states remain that have not adopted some form of a *Daubert* standard. Kansas has adopted *Daubert*, evidently after the Committee's report was prepared. Massachusetts and Missouri are categorized in the Committee report as "other" – but have embraced the *Daubert* holding via case law. The remaining eight states in the "other" category have either recognized *Daubert* as helpful or instructive, or have adopted a rule similar to the current federal rule.

The *Daubert* trilogy and Federal Rule 702 now represent a settled and well-defined body of case law, applicable in all federal and the vast majority of state courts. Consistency and predictability in the admissibility of expert testimony would only increase if New Jersey were to adopt the standard now in use across so many jurisdictions.

Although New Jersey remains among the shrinking minority of states that have not yet updated their rule, the Committee now declines to recommend joining that majority, and emphasizes instead that New Jersey Supreme Court would be free to adopt a reliability standard akin to the federal rule but has declined thus far to independently do so.

The New Jersey Rule 702 is of course consistent with greater scrutiny of an expert's reasoning process. *Daubert*, *Joiner*, and *Kumho Tire* were all based on language identical to what is now the current New Jersey rule. A number of state courts have similarly adopted the *Daubert* standard while retaining the original version of Federal Rule 702.

But a significant result of the codification of the amended Federal Rule was the improvement in the clarity and predictability of the standard. Prior to the amendments, there was considerable inconsistency in application of the *Daubert* rule, as some judges embraced the enhanced gatekeeping responsibilities while others applied more permissive rules of admissibility. The 2000 amendments were meant to provide uniformity. See March 1, 1999 Memorandum from Dan Capra, Reporter, to Advisory Committee on Evidence Rules, available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Evidence/EV1999-04.pdf.

The existing case law from the New Jersey Supreme Court includes language recognizing the importance of scrutinizing "every step" of an expert's analysis, and emphasizing the importance of an "expert's ability to explain pertinent scientific principles and to apply those principles to the formulation of his or her opinion." *Landrigan v. Celotex Corp.*, 127 N.J. 404, 414 (1992) This language both anticipates and is consistent with the language of FRE 702. But that standard is not applied uniformly to guard against questionable expert testimony. Many appellate decisions articulate the prevailing standard in New Jersey without citing the relevant language from *Landrigan*, a problem of uniformity and consistency elided by the Committee. Because few trial court evidentiary rulings are published, it is hard to know precisely how often *Landrigan*'s language is ignored when such courts consider the admissibility of expert testimony. But given that New Jersey appellate courts often ignore *Landrigan*, it seems safe to assert that the Committee was overly optimistic in assuming that state supreme court precedent creates no significant uncertainly or inconsistency in New Jersey trial courts.

Even well-credentialed experts should not be permitted to speculate based on incomplete data. And the prospect of both sides to litigation having the opportunity to each select his own "outlier" expert, chosen not for the soundness of his methodology but for his willingness to testify in support of his party's theory of a case does not resolve the problem. It leads, rather, to the very problem of "adversarial bias" in which a jury is presented with testimony by non-representative experts selected by each side.

The federal courts and most states have moved toward a rule that is meant to ensure the reliability of expert testimony, because they understand, at least implicitly, the problem of adversarial bias. The federal rule actually requires scrutiny of the expert's reasoning. It is not enough that the underlying general methodology is sound; the expert must demonstrate that he has applied the principles and methods reliably to the facts of the case. This ensures that the jury will be basing its decision on reliable expert testimony, and not a hired expert's idiosyncratic speculation.

The case law under Federal Rule 702 is now established and well-defined, and is well-suited to addressing the problem of unreliable testimony and adversarial bias. We would urge the Court to consider amending the New Jersey rule to mirror Federal Rule of Evidence 702.

Thank you for the opportunity to comment on the report of the Committee on the Rules of Evidence. Please do not hesitate to contact us if we can provide additional information about our position on this issue.

Sincerely yours,

Marcus Rayner
President

Alida Kass
Chief Counsel