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April 10, 2015

Glenn A. Grant, J.A.D.

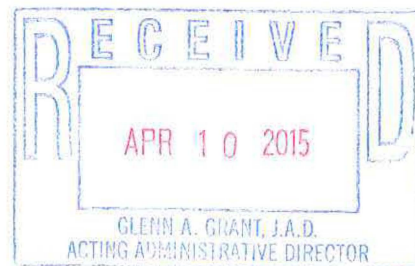
Acting Administrative Director of the Courts

Rules Comments

Hughes Justice Complex

P.O. Box 037

Trenton, New Jersey 08625-0037



**RE: N.J.R.E. 702 Subcommittee Report**

Dear Judge Grant:

The New Jersey Association for Justice is an organization of over 2,400 attorneys, most of whom represent plaintiffs in personal injury cases. Our members are regularly involved in the civil justice system including the discovery and litigation of tort and other claims requiring expert testimony. As a result, we are intimately familiar and deeply concerned with the New Jersey Rules of Evidence.

NJAJ has reviewed the N.J.R.E. 702 Subcommittee Report. We agree with the conclusions of the Committee that (1) "the trial courts are not applying inconsistent standards in admitting expert testimony" and (2) that "there is no definite or conclusive evidence that the current law is creating other problems, such as attracting a disproportionate number of negligence cases or other civil litigation matters to be venued in this state."

The Federal standard for determining the admissibility of expert testimony was established in 1923 in Frye v. United States, 293 F. 1013 (D.C. Civ. 1923). The Frye test provides that expert opinion is admissible only where the technique is generally accepted as reliable in the relevant scientific community.

In 1973, the United States Supreme Court adopted the Federal Rules of Evidence. Rule 702 stated that:

If 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.

*Protecting People's Rights.*



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In 1984, the New Jersey Supreme Court established guidelines to determine the admissibility of expert testimony. In State v. Kelly, 97 N.J. 178 (1984), the Court created a three-part test:

1. The intended testimony must concern a subject matter that is beyond the ken of the average juror;
2. The field testified to must be at a state of the art such that an expert's testimony could be sufficiently reliable; and
3. The witness must have sufficient expertise to offer the intended testimony.

In 1992, the New Jersey Supreme Court adopted N.J.R.E. 702 which followed the 1973 Fed. R. Evid. 702 verbatim. Nonetheless, the official comment notes that "this rule intends to incorporate New Jersey case law establishing the general criteria for admissibility of expert testimony articulated by State v. Kelly."

In 1993, the United States Supreme Court held that the Frye test was superseded by Fed. R. Evid. 702. In Daubert v. Merrill Dow Pharmaceuticals, 509 U.S. 579 (1993), the Court created a new standard for the admissibility of the testimony of an expert witness:

1. Whether the scientific knowledge can or has been tested;
2. Whether the methodology relied on has been subject to peer review or publication;
3. Whether there is a known or potential rate of error; and
4. Whether the theory or technique enjoys general acceptance in the scientific community.

In order to incorporate Daubert, the United States Supreme Court amended the Federal Rules of Evidence in 2000. The current rule states that:

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:





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(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

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

Since Daubert in 1993 and the revised Federal Evidence Rule 702 in 2000, the New Jersey courts have continued to apply the three-part Kelly test. In Kemp v. State, 174 N.J. 412 (2002), the New Jersey Supreme Court stated that New Jersey Rule 702 tracks the 1973 version of the Federal rule and does not "incorporate the Daubert factors into N.J.R.E. 702."

In 2000 and 2008, the New Jersey Supreme Court directed the Supreme Court Committee on the Rules of Evidence to study Rule 702. The Committee's 2000-2002 report concluded that the Court should take no action because "federal case law interpreting Daubert was then still unsettled and New Jersey's jurisprudence regarding the admission of expert testimony remained sound law." The 2007-2009 report recommended that "the reliability aspect of the standard evolving from our State's case law should be expressly incorporated into the Rules of Evidence."

Recently, the New Jersey Supreme Court directed the Committee on the Rules of Evidence to provide the Court with a report to determine:

1. If "Rule 702 and related case law are so unclear that New Jersey's trial courts are applying inconsistent standards in admitting expert testimony;" and

2. "Whether current law is creating other problems, such as attracting a disproportionate number of negligence cases to this State, especially mass tort cases, that might otherwise be filed in other jurisdictions."



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At the outset, the Rule 702 Subcommittee noted that it was not being asked to consider “whether the 2000 version of Fed. R. Evid. 702 should be adopted” or “whether the federal Daubert standard should be adopted as part of our expert witness admissibility jurisprudence.” Instead, the Subcommittee was only being asked “whether current N.J.R.E. 702 and related case law are ‘so unclear’ that ‘inconsistent standards’ are being applied by trial judges and whether our current law is creating other problems, such as being so lax as to render New Jersey a magnet for foreign-based tort litigation.” In other words, the Committee was given “a very pointed fact-finding task rather than a directive to propose a rule change.”

In furtherance of its charge, the Committee gathered information from court statistics, reported and unreported cases, a comparison of other states, the history of Kelly, the responses of various groups, and research articles on the present criteria for Federal Evidence Rule 702. The Subcommittee noted that Kelly has been cited in over 430 cases. (Document 2 refers to 484 published and unpublished cases before the Appellate Division).

Based upon the above data, the Committee concluded that the Court’s development of the jurisprudence on the issue of the admissibility of expert testimony “has been very clear in its cases” and “the Court’s current case-law standards...are clear.” (Emphasis added).

In addition, the Committee reviewed statistics from the AOC which revealed that “there is a statewide decrease in new filings” from 2004 (25,574) to 2013 (21,028). There was a decrease in Toxic Tort cases from 2004 (480) to 2013 (43); however, the statistics do not indicate how many cases were filed by non-New Jersey residents. In any event, the Committee concluded that “there is no definite or conclusive evidence that the current law is creating other problems, such as attracting a disproportionate number of negligence cases or other civil litigation matters to be venued in this state.”

NJAJ agrees with the conclusions of the Committee that the language of N.J.R.E. 702 is clear, that the courts are not applying inconsistent standards and that the current law is not attracting a disproportionate number of negligence cases to the State of New Jersey.

The N.J.R.E. 702 Subcommittee noted that “the impetus for the Court’s directive appears to be the renewed requests from various civil litigation defense and





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business groups.” The Subcommittee attached as Document 5 a letter from the New Jersey Civil Justice Institute dated May 8, 2014. The NJCJI is comprised of many of the largest business associations, professional organizations and employers including the New Jersey Business and Industry Association, the New Jersey Chamber of Commerce and the Commerce and Industry Association of New Jersey.

The New Jersey Civil Justice Institute has been relentless in pursuing its agenda to close the courthouse doors in the State of New Jersey to litigants in mass tort and other civil cases including toxic torts and pharmaceuticals. The Institute has attempted to narrow the laws that protect the rights of victims and expand the laws that provide immunities to businesses. In addition, the Institute has attempted to bar access to the New Jersey court system to non-residents.

The report of the N.J.R.E. 702 Subcommittee has rejected that agenda. There is no conclusive evidence that our current Rules of Evidence are being misused to promote the filing of a disproportionate number of negligence cases in the State of New Jersey.

Sincerely,

Thomas Comer, Esq.  
President

cc: Daniel E. Rosner, Esq.  
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Gerald H. Baker, Esq.  
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Cornelius J. Larkin, CAE CMP, Executive Director  
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