

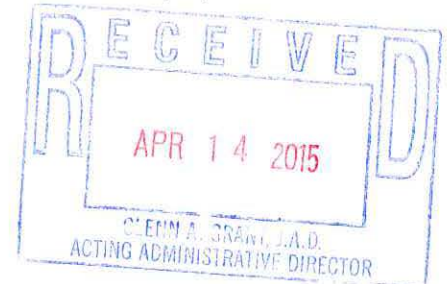
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April 9, 2015



VIA E-MAIL and REGULAR MAIL

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: 2013-2015 Report of the Supreme Court Committee on the
Rules of Evidence

Dear Hon. Judge Grant:

I am a New Jersey attorney, admitted to practice in 1987. I have practiced continuously in the State since 1988, first for the firm of Pitney Hardin (from 1988 through 1998) and then as a member of Traflet & Fabian, a firm based in Morristown, specializing in product liability and toxic tort law. I have read with interest the comprehensive 2013-2015 Report of the Supreme Court Committee on the Rules of Evidence, *N.J.R.E.* Subcommittee Report. The rules governing the admissibility of scientific and technical opinions are of particular significance to my area of specialization, and I would like to offer my brief comments for the Committee's consideration.

As a preliminary matter, as the Committee is aware, there is a substantial body of case law from both the federal and state courts following *Daubert* and Federal Rule of Evidence 702 (there are literally hundreds of favorable citations to *Daubert* from the highest courts in dozens of states), and expressly acknowledging the importance of the gatekeeper function of the courts in keeping unreliable or "junk" science out of the courtroom. For practitioners and courts alike, the factual and legal issues associated with the exercise of this gatekeeper function can be extremely challenging. "Expert evidence can be both powerful and misleading because of the difficulty in evaluating it." *Daubert*, 509 U.S. at 595. In my experience, this challenge is most effectively met by utilizing the *Fed. R. Evid.* 702 standards coupled with the substantial body of case law which has emerged following the *Daubert* trilogy of cases. By contrast, the standards of *N.J.R.E.*

702 and the *Kelly* three-part test are not sufficiently detailed and rigorous to provide meaningful guidance in certain cases.

Moreover, because of the divergence in criteria between New Jersey admissibility standards on the one hand, and the standards applied in federal court and most state courts on the other, there is unfortunately less ability to draw from a substantial body of case law from other jurisdictions that may apply directly and persuasively to the same set of facts as a case in New Jersey. (This divergence also presents a real risk of forum shopping, particularly where the testimony of specific experts have already been barred or limited in jurisdictions applying *Daubert*). For example, a review of the case law applying *Daubert* in fire and explosion cases reveals a plethora of cases involving almost every conceivable alleged product malfunction and theory of fire cause and origin. In general, experts in fire cases agree on the correct methodology, but diverge sharply on the need for testing and the proper application of the methodology to the facts of a particular case. In such cases, the admissibility/reliability concerns are tailor-made for application of *Rule 702/Daubert*; however, the New Jersey standards provide insufficient guidance for the courts to perform their essential gatekeeper function.

Relying on my own practice and experience, which focuses primarily on product liability cases (many of which involve fires and explosions), I would like to highlight what I consider to be two key deficiencies in *N.J.R.E. 702* and the *Kelly* standard. First, contrary to *Daubert*, the New Jersey standard does not focus, as I believe it must, on the issue of testability (the first *Daubert* factor). The essence of the scientific method is testability; if an expert posits a hypothesis, he must subject the hypothesis to rigorous testing, consistent with the scientific method. Second, *N.J.R.E. 702* ignores (at least on its face) the *Daubert/Rule 702* “fit” requirement: “the expert [must] reliably appl[y] the principles and methods to the facts of the case.” In federal and state opinions applying *Daubert*, the “fit” requirement is frequently the most important consideration in determining whether an expert opinion is sufficiently reliable to be admissible. In many of my cases involving expert testimony as to product defect and causation, there is no genuine issue as to whether the proffered testimony is “beyond the ken of the average juror;” or whether the field of expertise is at a sufficiently advanced “state of the art;” or whether the witness has “sufficient expertise to offer the intended testimony.” In other words, the factors set forth in *Kelly* (and repeated in *Landrigan*) offer little or no assistance in making admissibility determinations in these cases. Ideally, the applicable standard should focus, *inter alia*, on whether (1) the expert has advanced a testable hypothesis; (2) whether the hypothesis was subject to rigorous analysis and testing; and (3) whether accepted methodology was applied reliably to the facts of the case.

The risk, of course, in many cases is that the proffered expert will pay lip-service to the correct methodology but will not apply the methodology reliably and scientifically to the undisputed facts of the case. *Daubert* and *Fed. R. Evid. 702* not only provide a proven, workable framework for resolving these issues, but also offer a substantial and impressive body of jurisprudence which should, in my opinion, be utilized as helpful and

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persuasive precedent for cases in New Jersey presenting the same or similar fact patterns—and oftentimes the same expert witnesses offering the same or similar opinions. A refinement of current *N.J.R.E.* 702 to track the language of *Fed. R. Evid.* 702 would be beneficial to both trial judges and practicing attorneys, in terms of adding clarity and detail to the criteria for assessing expert opinion testimony, and advancing the objectives that are already part of our New Jersey evidentiary jurisprudence—*i.e.*, the well-recognized principle that courts must scrutinize proffered expert testimony to ensure that both the “factual bases for their conclusions” and their methodology are “scientifically reliable.” *Landrigan*, 127 N.J. at 417. Toward this objective, *Daubert* and *Fed R. Evid.* 702 have proven over the recent decades to be an effective and essential analytical framework.

I appreciate your consideration of my comments, and I applaud your efforts in addressing these important issues thoroughly and systematically.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read 'S. Traflet', with a stylized, flowing script.

STEPHEN G. TRAFLET

SGT:ts