2007 - 2009 REPORT OF THE

SUPREME COURT COMMITTEE ON

THE RULES OF EVIDENCE

January 30, 2009

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I. RULE AMENDMENTS RECOMMENDED FOR ADOPTION

A. Proposed Amendment to N.J.R.E. 702, Testimony by Experts

The Supreme Court Committee on the Rules of Evidence (Committee), at the suggestion of its chair, created a subcommittee to study whether N.J.R.E. 702, Testimony by Experts, should be amended to express a clear standard for the admission of expert testimony. After the subcommittee was formed, the Committee received letters from the New Jersey Lawsuit Reform Alliance, the New Jersey Defense Association, the Association of Corporate Counsel, and the Chemistry Council of New Jersey urging the Committee, among other things, to amend N.J.R.E. 702 to language similar to the current text of F.R.E. 702, which had been revised in 2000 in light of Daubert v. Merrell Dow Pharm., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). These organizations claimed that this change would "ensure that expert evidence admitted in civil trials is the product of sound methodology and sound scientific principles." Letter from the New Jersey Defense Association, November 7, 2008.

For many years, the exclusive standard in New Jersey for the admissibility of expert testimony was whether there was general acceptance of the expert's opinion or theory within the relevant scientific or professional community; a standard that was originally developed in Frye v. United States, 293 F. 1013 (D.C. Cir. 1923). State v. Moore, 188 N.J. 182, 206-07 (2006); Rubanick v. Witco Chem. Corp. 125 N.J. 421, 432-33 (1991). In Rubanick, supra, 125 N.J. at 449, the Supreme Court began to move away from this "general acceptance" standard, at least for expert testimony on causation in toxic tort cases. There, the Court held: "[I]n toxic-tort litigation, a scientific theory of causation that has not yet reached general acceptance may be found to be sufficiently reliable if it is based on a sound, adequately-founded scientific methodology involving data and information of the type reasonably relied on by experts in the scientific field." Ibid. Ten years later, the Court applied this more relaxed standard of Rubanik to the admission of expert testimony on causation in a medical malpractice case. Kemp v. State, 174 N.J. 412, 430 (2002).

Most recently, in Hisenaj v. Kuehner, 194 N.J. 6, 17-18 (2008), the Court considered the reliability of the expert testimony of a biomechanical engineer offered by the defendant in a personal injury automobile accident case. The Court succinctly set forth the standard for determining reliability:

> Scientific reliability of an area of research or expertise may be established in one of three ways. When an expert in a particular field testifies that the scientific community in that field accepts as reliable the foundational bases of the expert's opinion, reliability

> may be demonstrated. Scientific literature also can evidence reliability where that "literature reveals a consensus of acceptance regarding a technology." So long as "comparable experts [in the field] accept the soundness of the methodology, including the reasonableness of relying on [the] underlying data and information," reliability may be established. *Rubanick, supra*, 125 N.J. at 451, 593 A.2d 733. Finally, a party proffering expert testimony may demonstrate reliability by pointing to existing judicial decisions that announce that particular evidence or testimony is generally accepted in the scientific community.
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> [Hisenaj, supra, 194 N.J. at 17 (citations omitted, except Rubanick).]

The three ways of establishing reliability discussed by the Court are largely drawn from cases discussing the Frye general acceptance standard. However, the quotation from Rubanick makes clear that that multi-faceted reliability standard has been added as an alternative to the Frye general acceptance standard. See also State v. Jenewicz, 193 N.J. 440, 454 (2008) (applying reliability standards to the admissibility of an expert in a criminal case). So, the holdings in Rubanick and Kemp would appear to apply not only to determining causation in toxic tort and medical malpractice cases, but every civil and criminal case in which expert testimony is offered.

In light of these cases, the Committee decided it is time to explicitly incorporate this reliability standard evolving from our State's case law into the Rules of Evidence. The Committee recommends that N.J.R.E. 702 be amended to provide (additions underlined):

> 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, provided that the basis for the testimony is generally accepted or otherwise shown to be reliable.

In the Committee's opinion, this additional language accurately reflects the current state of the developing case law in New Jersey. This additional language continues general acceptance as a sufficient basis for the admission of expert testimony in New Jersey, but also acknowledges that under Rubanick, Kemp, and Hisenaj, novel or relatively new theories may be shown to be reliable

through other means. The Committee believes that explicitly articulating this reliability standard in the rule will promote consistency in the admission of expert testimony at the trial level. It will also be more convenient for trial lawyers and judges to have the standards of admissibility expressed more fully in the text of the Evidence Rules.

After much deliberation, the Committee rejected the suggestions of the above-listed organizations to amend N.J.R.E. 702 to follow the 2000 amendment to F.R.E. 702. The Committee reasoned that if the exact language of F.R.E. 702 was adopted, since the federal rule was intended to incorporate Daubert, it would create the erroneous impression that the Daubert standard governed the admission of expert testimony in New Jersey. Further, the Committee was concerned that New Jersey judges would be too inclined to be guided by the federal case law interpreting F.R.E. 702 and Daubert. The federal cases, the Committee thought, are sometimes overly restrictive in the admission of expert testimony, tending to exclude evidence that, under current New Jersey law, would be properly admitted as having a reliable basis. See e.g. Edward K. Cheng & Albert H. Yoon, Does Frye or Daubert Matter? A Study of Scientific Admissibility Standards, 91 Va. L. Rev. 471, 473 (2005).

In addition, the Committee agreed that a revision of N.J.R.E. 702 that did not literally track the text of the revised F.R.E. 702 would signal that our state courts were retaining the prerogative to develop and apply reliability and expert admissibility concepts in an independent fashion, without automatically following federal precedents under Daubert or the federal rule. Consequently, a particular expert's testimony barred by a federal court under Daubert might still be admissible in New Jersey under N.J.R.E. 702, or vice-versa.

B. Proposed Amendment to N.J.R.E. 102, Purpose and Construction

The Civil Union Law, L. 2006, c. 103, and the Domestic Partnership Act, L. 2003, c. 246, extend the legal protections of marriage to other types of familial relationships. N.J.S.A. 37:1-32; N.J.S.A. 26:8A-2. As part of the Civil Union Law, N.J.S.A. 37:1-33 provides:

> Whenever in any law, rule, regulation, judicial or administrative proceeding or otherwise, reference is made to "marriage," "husband," "wife," "spouse," "family," "immediate family," "dependent," "next of kin," "widow," "widower," "widowed" or another word which in a specific context denotes a marital or spousal relationship, the same shall include a civil union pursuant to the provisions of this act.

To comply with this statute, and to take into account the existence of civil unions and domestic partnerships, the Committee recommends that the

Supreme Court amend N.J.R.E. 102, Purpose and Construction, to add subsection (b) as follows (additions underlined):

> Rule 102. Purpose and Construction
>
> (a) These rules shall be construed to secure fairness in administration and elimination of unjustified expense and delay. The adoption of these rules shall not bar the growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.
>
> (b) As used in these rules, references to "marriage," "husband," "wife," "spouse," "family," "immediate family," dependent," "next of kin," "widow," "widower," "widowed," or to any other word or phrase that, in a specific context, denotes a marital or spousal relationship, shall include a civil union, as established by N.J.S.A. 37:1-28 to -32, and a registered domestic partnership, as established by N.J.S.A. 26:8A-1 to -10, and the persons in those relationships.

This recommendation is consistent with the one that the Civil Practice Committee is making to amend R. 1:1-2, Construction and Relaxation, so that the Rules of Court will be interpreted to include civil unions and domestic partnerships.

II. RULE AMENDMENTS CONSIDERED AND REJECTED

A. Amendment to N.J.R.E. 104, Preliminary Questions

As noted, the Committee received letters from the New Jersey Lawsuit Reform Alliance, the New Jersey Defense Association, the Association of Corporate Counsel, and the Chemistry Council of New Jersey asking that N.J.R.E. 104 be amended to add a new subsection that would deal exclusively with expert qualification hearings. Specifically, the organizations proposed the following addition to N.J.R.E. 104:

> (f) **Expert Qualification Hearing.** If a witness in a civil matter is testifying as an expert, then upon motion of a party, the court shall hold a hearing to determine whether the witness qualifies as an expert and whether the expert's testimony satisfies the requirements of Rule 702. The court should allow sufficient time for a hearing before the start of trial and shall rule on the qualifications of the witness to testify

> as an expert and on whether the proposed testimony satisfies the requirements of Rule 702. The trial court's ruling shall set forth the findings of fact and conclusions of law upon which the order to admit or exclude the expert evidence is based.

The Committee rejected this proposal. The Committee believed that this amendment would unduly restrict a trial court's ability to manage cases. It is important that a court has the discretion to determine when and if it would be helpful to hold N.J.R.E. 104 hearings on expert testimony. The proposed amendment would take that discretion away. The Committee concluded that the current text of N.J.R.E. 104 and existing case law, see, e.g., Hisenaj v. Kuehner, supra, 194 N.J. at 23, provides trial courts with the necessary flexibility and therefore should not be disturbed.

B. Amendment to N.J.R.E. 701, Opinion Testimony of Lay Witnesses

The Committee also considered whether it should amend N.J.R.E. 701, Opinion Testimony of Lay Witnesses, to conform to the current text of F.R.E. 701. N.J.R.E. 701 provides:

> If a witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences may be admitted if it (a) is rationally based on the perception of the witness and (b) will assist in understanding the witness' testimony or in determining a fact in issue.

This rule followed the pre-2000 version of F.R.E. 701. In 2000, the federal rule was amended to add subsection (c) (additions underlined):

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

After a discussion, the Committee came to the conclusion that the current text of N.J.R.E. 701 was adequate and that it was unnecessary to adopt the changes that had been made to F.R.E. 701.

C. Amendment to N.J.R.E. 703, Bases of Opinion Testimony by Experts

The Committee considered adding the language from F.R.E. 703, adopted in 2000, to N.J.R.E. 703. N.J.R.E. 703 provides:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

New Jersey adopted F.R.E. 703 verbatim in 1993. In 2000, additional language was added to F.R.E. 703 (additions underlined):

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

The Committee considered whether it should add the language from the 2000 amendment to the federal rule to allow New Jersey to stay consistent with the federal provision. The Committee reached a consensus that although the additional language is consistent with current New Jersey law, there is no problem with the current version of N.J.R.E. 703. Therefore, the Committee concluded that no amendment was needed at this time.

D. Amendment to N.J.R.E. 705, Disclosure of Facts or Data Underlying Expert Opinion; Hypotheses Not Necessary

The Committee considered whether it should amend N.J.R.E. 705 to conform to F.R.E. 705. The main difference between the two rules is the third sentence in N.J.R.E. 705, which followed N.J. Evid. R. 58 verbatim and has no federal analogue. N.J.R.E. 705 provides:

> The expert may testify in terms of opinion or inference and give reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination. Questions calling for the opinion of an expert witness need not be hypothetical in form unless in the judge's discretion it is so required.

In contrast, F.R.E. 705 provides:

> The expert may testify in terms of opinion or inference and give reasons therefor without first testifying to the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

The third sentence in N.J.R.E. 705 reflects the slightly more flexible approach of the New Jersey evidence rules on the matter of framing questions to expert witnesses. Nonetheless, the New Jersey rule maintains the discretion of the judge to require hypothetical questions, if that would be more helpful to the jury. The Committee concluded that N.J.R.E. 705 should not be amended.

E. Adoption of N.J.R.E. 706, Court Appointed Experts

The Committee considered whether to adopt a New Jersey rule parallel to F.R.E. 706, Court Appointed Experts, which provides:

> (a) Appointment. The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection. An expert witness shall not be appointed by the court unless the witness consents to act. A witness so appointed shall be informed of the witness' duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of the witness' findings, if any; the witness' deposition may be taken by any party; and the witness may be called to testify by the court or any party. The witness shall be subject to cross-examination by each party, including a party calling the witness.
>
> (b) Compensation. Expert witnesses so appointed are entitled to reasonable compensation in whatever sum the court may allow. The compensation thus fixed is payable from funds which may be provided by law in criminal cases and civil actions and proceedings involving just compensation under the fifth amendment. In other civil actions and proceedings the compensation shall be paid by the parties in such proportion and at such time as the court directs, and thereafter charged in like manner as other costs.
>
> (c) Disclosure of appointment. In the exercise of its discretion, the court may authorize disclosure to the jury of the fact that the court appointed the expert witness.
>
> (d) Parties' experts of own selection. Nothing in this rule limits the parties in calling expert witnesses of their own selection.

In 1991, during the major revision of the New Jersey Rules of Evidence, the Committee decided not to adopt this federal rule. The Committee reasoned, at that time, that the power of a court to appoint expert witnesses is one of practice and procedure, not part of the law of evidence. The Committee stated in its 1991 rule comment that the court rules and case law adequately provided for the power of a court to appoint experts.

In revisiting this issue, the Committee reached the same conclusion that it did in 1991, deciding that a New Jersey analogue to F.R.E. 706 is unnecessary.

F. Amendment to N.J.R.E. 803(c)(2), Excited Utterance Exception to the Hearsay Rule—State v. Branch, 182 N.J. 338 (2005)

In State v. Branch, 182 N.J. 338, 371-72 (2005), the Supreme Court asked the Committee to study whether the excited utterance exception to the hearsay rule should be altered so that such hearsay is admissible only if the declarant testified or was unavailable. After extensive discussion, the Committee concluded that there was no need to amend N.J.R.E. 803(c)(2), in light of Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), and its progeny. In a criminal trial, under Crawford, if the excited utterance is testimonial and offered by the State against the accused, then it may not be admitted unless the accused had had a prior opportunity to cross-examine the declarant and the declarant was unavailable at trial.

E. Sanitization of Prior Convictions, State v. Hamilton, 193 N.J. 255 (2008)

N.J.R.E. 609 permits the introduction of certain prior criminal convictions of a witness: "For the purpose of affecting the credibility of any witness, the witness' conviction of a crime shall be admitted unless excluded by the judge as remote or for other causes. Such conviction may be proved by examination, production of the record thereof, or by other competent evidence." In State v. Brunson, 132 N.J. 377, 391 (1993), the Supreme Court held that in those cases where a defendant had previously been convicted of crimes that are the same or similar to the crime charged, the State may introduce evidence of those prior convictions limited to the date, degree and number of the offenses.

In State v. Hamilton, 193 N.J. 255, 257 (2008), defendant was convicted of third-degree drug possession. At trial, defendant asked the court to sanitize his recent prior convictions for manslaughter and weapons charges, because his arrest for drug possession took place in connection with the suspicious death of a woman, who was later found to have died of a drug overdose. Id. at 257-58. Defendant feared the prior conviction evidence would unduly prejudice the jury against him. Ibid. The trial court held that it could not sanitize the conviction, because it was not the same or similar to the one with which defendant was charged. Id. at 261.

The Court reversed, holding that although sanitization was not mandatory under Brunson, the trial court had discretionary authority to control undue prejudice to defendant. Id. at 268-69. The Court then referred to this Committee the following question:

> In holding as we do, we do not suggest at this juncture that *Brunson* should be extended expansively to require sanitization for all prior convictions or even for a particular subcategory of offenses, such as those that do not involve dishonesty, false swearing and the like. *See supra* at note 7 (noting that some jurisdictions differentiate between types of offenses when allowing convictions to be used for permissible impeachment purposes). We are ill-equipped in this appeal to consider such steps, which were not advanced by defendant, and about which we lack the benefit of the experience and views of relevant interest groups. However, the subject of sanitization, and its appropriate use by the trial courts, would benefit from a full examination. Our Evidence Rules Committee is well-suited to take up that task. Accordingly, we refer to the Committee the

> question whether sanitization of prior convictions should be expanded and, if so, the extent to which the Committee recommends an expanded category of mandatory, or of discretionary, sanitization of prior convictions.
>
> [Brunson, supra, 132 N.J. at 269-70.]

The Committee considered this question at length. It decided not to consult outside interest groups on this issue, in so much as the relevant groups have representatives on the Committee. The Committee concluded that it would be difficult to draft a rule that would set forth the exact parameters of a sanitization rule, either mandatory or discretionary, and recommends that these parameters continue to be developed, as they have up to this point, through case law. The Committee also concluded that the need for a rule revision would be reviewed as experience warrants.
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III. MATTERS HELD FOR CONSIDERATION

A. Proposed Amendment to N.J.R.E. 704, Opinion on Ultimate Issue

The Committee held for consideration the issue of whether N.J.R.E. 704 should be amended to add subsection (b), as was added to F.R.E. 704 in 1984 (additions underlined):

> (a) Except as provided in subsection (b), [t]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact
>
> (b) No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.

In 1991, the Committee decided not to include subsection (b) in the New Jersey rule, because it thought that the subsection was contrary to New Jersey law. The current Committee, however, decided to revisit this issue in its next term.

B. Proposed Amendment to the N.J.R.E. 504, Lawyer-Client Privilege

The Committee held for consideration the issue of whether N.J.R.E. 504, the Lawyer-Client Privilege, should be amended to protect information regarding whether and when a client consulted with a lawyer.

IV. CONCLUSION

The members of the Supreme Court Committee on the Rules of Evidence appreciate the opportunity to serve the Supreme Court in this capacity.

Respectfully submitted,

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