October 16, 2012

Hon. Jack M. Sabatino
Appellate Division
Hughes Justice Complex
25 W. Market St., P.O. Box 977
Trenton, New Jersey, 08625

Re: Proposed Amendments to N.J.R.E. 104 and 702

Dear Judge Sabatino:

On behalf of the New Jersey Lawsuit Reform Alliance, I write the Court to recommend amendments to New Jersey Rules of Evidence ("N.J.R.E.") 104 and 702. These amendments are intended to provide our trial courts with clear procedural authority to evaluate the admissibility of expert testimony in a predictable and consistent manner in civil litigation.[1] If adopted, these proposed amendments would ensure that expert testimony presented in New Jersey courts would be based upon sound scientific principles and reliable methodology. The amended rules would codify our Supreme Court's developing jurisprudence with respect to the admission of expert opinion.

These two proposed amendments are summarized as follows:

N.J.R.E. 104: The addition of a new section (f) regarding expert qualification hearings. A copy of the proposed rule is attached to this letter as Exhibit A.

N.J.R.E. 702: The addition of three new factors to be considered by trial courts when reviewing the admissibility of expert testimony. A copy of the proposed rule is attached to this letter as Exhibit B.

[1] This proposal is not intended to apply to criminal cases, in which the reliability of expert testimony continues to be evaluated under the standard articulated in the seminal decision of Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923), which requires that an expert's methodology achieve "general acceptance in the scientific community" in order to be admissible. See, e.g., State v. Harvey, 151 N.J. 117, 169-170 (1997); State v. Doriguzzi, 334 N.J. 530, 539 (App. Div. 2000).

These changes are essential because in the modern courtroom expert testimony has increasingly become a fundamental component of a party's success.[2] Today, more than ever, expert testimony can have a profound effect on persuading juries and influencing verdicts.[3] Experts often provide vital testimony regarding causation, the mechanisms of harm, and other essential proofs. Moreover, they typically are given wide latitude compared to fact witnesses and can offer opinions based on otherwise inadmissible evidence.[4] If improperly admitted, expert testimony poses grave risks to the integrity of the trial process. In light of the unique nature and potential impact of expert testimony, our state's jurisprudence has long recognized the importance of only allowing reliable expert testimony based on sound scientific principles.[5] Indeed, New Jersey was one of the first jurisdictions to recognize the increasing importance of expert testimony in modern litigation, one of the first to stress the importance of judicial gatekeeping, and one of the first to adopt a more structured multi-factor test for examining the scientific validity of expert testimony.[6]

Ten years ago, in Kemp v. State, 174 N.J. 412 (2002), our state's highest court acknowledged this long standing record and reiterated the importance of judicial gatekeeping to ensure the scientific validity of a proposed expert's methodology and reasoning.[7] In doing so, the Court expanded on the flexible standard first set forth in Rubanick v. Witco Chemical Corp., applying it to a negligence case involving the administration of a vaccine and, by implication, to all tort cases.[8] Moreover, the Court in Kemp also reiterated the importance of providing the proponent of the expert's opinion an opportunity to establish the admissibility and scientific basis of the opinion at a hearing before trial.[9] Over the past ten years, these expert evidentiary hearings, first advocated by the Supreme Court in Rubanick, have become known simply as

---

[2] See, e.g., David L. Faigman, Legal Alchemy: The Use and Misuse of Science in the Law (W. H. Freeman, 2000); Sheila Jasanoff, Science at the Bar: Law, Science and Technology in America (Harvard University Press, 1997)). It is important to note that courts and commentators have long expressed concern over expert testimony and that this concern continues to today; see also, Winans v. New York & Erie R.R., 62 U.S. 88, 101 (1858); Learned Hand, Historical and Practical Considerations Regarding Expert Testimony, 15 Harv. L. Rev. 40 (1901); and Jennifer L. Mnookin, Expert Evidence, Partisanship, and Epistemic Competence, 73 Brook. L. Rev. 1009 (2008).

[3] See Id. Also, Associate Justice Stephen Breyer recently noted that the law "increasingly requires access to sound science….because society is becoming more dependent for its well-being on scientifically complex technology,…[T]his technology," he went on to state, "underlies legal issues of importance to all of us." Stephen Breyer, Address at the 1998 Meeting of American Association for the Advancement of Science's; see also Stephen Breyer, The Interdependence of Science and Law, Science, 280 (April 24, 1998).

[4] Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 592 (1993).

[5] See, e.g., State v. Kelly, 97 N.J. 178, 209 (1984); Bowen v. Bowen, 96 N.J. 36, 49 (1984); State v. Cavallo, 88 N.J. 508, 519-20 (1982); State v. Hurd, 86 N.J. 525, 536 (1981); State v. Carey, 49 N.J. 343, 352 (1967). Additionally the proposition that the expert testimony and the scientific principles underlying it must be "reasonably reliable" in order to be admissible was recognized as implicit in Rule 56(2), which preceded the current rule.

[6] In Rubanick v. Witco Chem. Corp., 125 N.J. 421, 432 (1991) and Landrigan v. Celotex, 127 N.J. 404, 413 (1992), the New Jersey Supreme Court fashioned a more liberal standard to meet the special challenges in toxic tort cases.

[7] Kemp, 174 N.J. at 427.

[8] In Rubanick, the New Jersey Supreme Court held that a novel causation theory "may be found to be scientifically 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." 125 N.J. at 449.

[9] Kemp, 174 N.J. at 428 (noting that "failure to hold such a hearing may be an abuse of discretion"), see also, Landrigan, 127 N.J. at 411; Rubanick, 125 N.J. at 424.

"Kemp Hearings" continue to be an accepted and routine mechanism for determining the admissibility of expert opinion in New Jersey's trial courts.[10]

The language of our evidence rules, however, has lagged behind the case law. And as a result, despite the now long-standing case law indicating that trial judges should conduct pretrial evidentiary hearings to determine the reliability of proposed expert testimony, the rules make no mention of the practice. And trial courts, in turn, have not been consistent in their pretrial hearing practice.

Instead, despite clear directives from the New Jersey Supreme Court, our evidence rules regarding the admissibility and review of proposed expert testimony have remained unchanged since 1991. In this same period the Federal Rules of Evidence ("F.R.E."), the Uniform Rules of Evidence, numerous state evidence rules, and our own jurisprudence have all advanced to reflect the fact that recent developments in science and technology have increased the importance and use of expert testimony.[11] Despite this distinct transformation, New Jersey's rules have remained static.

When the rules committee last considered whether it should amend N.J.R.E. 702 to reflect the Daubert standard, it opted instead to recommend a more limited amendment which would have merely added the phrase "provided that the basis for the testimony is generally accepted or otherwise shown to be reliable" to N.J.R.E. 702. While the committee's proposed language gestured in the direction of enhancing scientific reliability, the vagueness of the wording was problematic, as it left open the question of what might constitute "otherwise" reliable testimony without any guidance on the criteria to be applied. In the end, the court declined to make any changes to the rule, which in our view merely postponed the task of bringing its rules governing expert testimony into conformity with existing practice.

However, we believe it is essential that the Rules codify the flexible standard that governs the admissibility of expert testimony and the procedures regarding pre-trial expert qualification hearings outlined in Kemp. Recognizing the importance of the flexible multi-factor approach to reviewing expert testimony, the Court in Kemp not only expanded its application, but also held that the proponent of expert testimony must be afforded an opportunity to be heard regarding their offer. Although Kemp did not specifically set out the exact procedures that should be followed or expressly adopt a fixed set of factors to use when assessing the admissibility of expert testimony, our state courts have unquestionably embraced the more flexible test formulated in Kemp.[13]

Thus, as more fully outlined below, New Jersey's Supreme Court has already embraced the substance of these two proposed amendments. These proposed amendments to New Jersey's

---

[10] See, e.g., State v. Taylor, 2008 WL 3164718 (N.J. Super. App. Div. 2008) (recognizing that, in light of Kemp, a trial judge should conduct an N.J.R.E. 104 hearing even if the proponent of the challenged evidence fails to request such a hearing); Koruba v. American Honda Motor Co., Inc., 396 N.J. Super. 517, 523 (App. Div. 2007) (noting that the trial court, relying on Kemp, held a pre-trial hearing on a motion for summary judgment and determined that plaintiff's expert's opinion was a net opinion); Padillas v. Stork-Gamco, Inc., 186 F.3d 412, 418 (3rd Cir. 1999) (holding that, on a summary judgment motion, the lower court should have held a hearing to determine the

admissibility of an expert's opinion regarding guarding of blades in defendant's machine where the grounds for the expert's opinion were "insufficiently explained and the reasons and foundations for them inadequately and perhaps confusingly explicated"); and In re Diet Drug Litigation, BER-L-7718-03, slip op. p36, (April 13, 2005) (noting that "Kemp hearing now mandated in these type of cases by the New Jersey Supreme Court") (available at http://www.judiciary.state.nj.us/mass-tort/dietdrug/diet_expertsopinion_041404.pdf).

[11] Federal Rule of Evidence 702 was amended in 2000 in response to the Supreme Court's decisions in Daubert. Since then, some 34 states have amended their state's rules of evidence to reflect and reiterate the court's gatekeeping function: Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, Georgia, Hawaii, Idaho, Indiana, Iowa, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Mississippi, Montana, Nebraska, New Hampshire, New Mexico, Ohio, Oklahoma, Oregon, Rhode Island, South Dakota, Tennessee, Texas, Utah, Vermont, West Virginia, and Wyoming, Arizona and Wisconsin. Likewise, New Jersey's case law has long recognized the significance of the trial court's gatekeeping function.

[12] See 2000 - 2002 Report Of The Supreme Court Committee On The Rules Of Evidence, page 3 **(**February 8, 2002) (available at http://www.judiciary.state.nj.us/reports/evidence.pdf).

[13] See footnote 10.

rules are an important step forward. New Jersey has a long history of respecting the importance of the court's gatekeeping function. By providing our state's trial courts with a more uniform process for the review of expert testimony, and by requiring the review of proposed expert testimony in a timely manner, these proposed amendments would confirm our court's gatekeeping function and promote predictability and certainty in this area of the law.

Therefore, we respectfully submit that clarification of the rules and procedures governing motions and hearings on the qualifications of expert witnesses will supply the necessary guidance to courts as well as counsel and will establish comprehensive guidelines for resolution of expert testimony issues in the future. Accordingly, we set forth below the rationale, as well as recommend language, for each of these proposed rule changes.

The Background: Rubanick, Daubert, and the Amendment of Federal Rule of Evidence 702

Two years before the United State's Supreme Court's landmark decision in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), the New Jersey Supreme Court, in Rubanick, first adopted its own flexible standard for the admission of expert testimony. In doing so, the Court recognized that the "general acceptance" standard, first articulated in Frye v. United States, 293 F. 1013 (D.C. Cir. 1923), and later adopted by New Jersey's courts, was inapplicable in toxic tort matters and therefore needed to be replaced. Specifically, the Court in Rubanick held that a novel causation theory "may be found to be scientifically 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."[14] Under the previous "general acceptance" standard, the Court imposed a stringent weight on experts to demonstrate that their proposed testimony had gained general acceptance in the scientific community.

Thereafter, in Daubert, the United States Supreme Court determined that the "general acceptance" test had been superseded by changes to the language of F.R.E. 702. The Daubert Court further determined that a more flexible standard incorporating a non-exclusive checklist for trial courts to use when assessing the admissibility of scientific expert testimony was required in light of the growing importance of expert testimony. In doing so, the Supreme Court recognized that "[e]xpert evidence can be both powerful and quite misleading because of the difficulty in evaluating it."[15] The United States Supreme Court then expanded the gatekeeper function in Kumho Tire Company v. Carmichael, 526 U.S. 137 (1999), which stated that the flexible standard: [a]pplies to the testimony of other experts who are not scientists and expands the court's reliability and relevancy obligation to all expert testimony that is based on "technical" and "other specialized" knowledge, which likely are in turn based in great part "on skill or experience-based observations."[16]

In 2000, the Federal Rules of Evidence were amended to reflect these United States Supreme Court cases. The amendments were not an attempt to "codify" the specific factors outlined in Daubert, but were rather an affirmation of the trial court's role as gatekeeper;

[14] Rubanick, 125 N.J. at 449.
[15] 509 U.S. at 595.
[16] Kumho Tire, 526 U.S. at 141.

providing some general standards that the trial court must use to assess the reliability and helpfulness of proffered expert testimony.[17]

In New Jersey, Federal Courts have rigorously applied these revised rules, which incorporate the principles of both Daubert and Kumho Tire. In doing so, our Federal Courts have already established a body of case law and precedent on these issues. Likewise, the New Jersey Supreme Court in Kemp also recognized that trial judges are charged with the responsibility of ensuring that expert testimony is based on reliable methodology and corresponds to the facts of the case. In addition, while the Court in Kemp did not directly adopt the Daubert factors or the principles of Kumho Tire, it undoubtedly looked at them favorably and as analogous to New Jersey's own jurisprudence.

The Import of Kemp: A Standard for Expert Opinion in All Tort Cases

As the Supreme Court made clear in Kemp, the trial court's obligation to evaluate the reliability of expert testimony in accordance with these standards should apply to all types of experts and the full range of civil litigation.[18] The standard articulated in Rubanick and Kemp is not, and should not be, confined to the circumstances of these cases. Indeed, in Kemp, the Supreme Court noted that the practical concerns that prompted Rubanick also arise in tort litigation outside the toxic tort context in which Rubanick arose.[19] Accordingly, the Supreme Court confirmed that the expert testimony supporting the Kemp plaintiffs' negligence claims would be evaluated under an objective standard with the trial court assigned the role of gatekeeper:

> [The trial court must] ascertain whether the scientific medical community accepts the process by which [the expert] arrived at his conclusion as one that is consistent with sound scientific principles. It is [the expert's] analysis and reasoning process (applied to the facts of this case) that is at issue in determining whether his testimony is scientifically reliable.

174 N.J. at 430.

As Kemp confirms, there is no reason to restrict the trial court's function as gatekeeper to a specific type of expert or category of litigation. N.J.R.E. 702, the foundation for the Kemp opinion, applies equally to experts of every profession. The scrutiny that Kemp requires, which is a critical review of the expert's methodology, may be applied with equal facility to the work of expert epidemiologists, physicians, accountants, economists and engineers. In Kumho Tire, the United States Supreme Court rejected an artificial distinction between the "scientific" testimony of the epidemiologist evaluated in Daubert and the "technical" and "other specialized" testimony to which F.R.E. 702 and its New Jersey counterpart refer. Considering the testimony of an engineering expert, the Supreme Court held that F.R.E. 702 "applies its reliability standard to all 'scientific', 'technical' or 'other specialized' matters within its scope" and noted:

---

[17] See Committee Notes on Rules - 2000 Amendment.
[18] Kemp, 174 N.J. at 430.

> Neither is the evidentiary rationale that underlay the Court's basis Daubert 'gatekeeping' determination limited to 'scientific' knowledge. Daubert pointed out that Federal Rules 702 and 703 grant expert witnesses testimonial latitude unavailable to other witnesses on the 'assumption that the expert's opinion will have a reliable basis in the knowledge and experience of his discipline.' The Rules grant that latitude to all experts, not just to 'scientific' ones. Finally, it would prove difficult, if not impossible, for judges to administer evidentiary rules under which a gatekeeping obligation depended upon a distinction between 'scientific' knowledge and 'technical' or 'other specialized' knowledge. There is no clear line that divides the one from the others."

526 U.S. at 147-48. Following Daubert and Kumho Tire, federal trial courts have ruled upon the admissibility of a broad variety of expert testimony, conducting hearings and sometimes relying on the advice of independent experts. Federal judges have become increasingly comfortable with their "gatekeeping" role in a broad variety of civil litigation.

Likewise, since Landrigan and its expansion in Kemp, New Jersey's Law Division judges have become increasingly familiar with their "gatekeeper" role and comfortable with the Kemp process. Consistent with Kemp, that process should apply to all expert disciplines in civil litigation.

The Proposed Amendments to N.J.R.E. 104.

In light of the Supreme Court's decision in Kemp and our state's jurisprudence, and in an effort to ensure that our trial courts address motions challenging the admissibility of expert testimony in a uniform fashion, we propose adding a new subsection to N.J.R.E. 104 as follows:

> **(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.

N.J.R.E. 104(f) will help make certain that expert testimony is carefully reviewed for reliability before it is presented at trial. The amendment codifies the Supreme Court's mandate and the practice of "Kemp Hearings," which have become routine in New Jersey courts.[20] While some of the procedures addressed by this rule change are also addressed by our current Court Rules, we believe that this amendment is desirable, as it would efficiently consolidate the trial court's gatekeeping responsibilities in one rule. Since the Supreme Court's decision in Kemp,

[20] See footnote 10.

trial courts have increasingly encouraged litigants to file pre-trial motions and participate in pre-trial hearings regarding the admissibility of the proposed expert testimony.[21] These pre-trial "Kemp Hearings" provide an opportunity for the judges to fulfill their gatekeeping obligations and ensure that testimony is consistent with generally accepted scientific principles and methodologies.

Moreover, these hearings alert trial judges to potential disputes among the parties concerning their expert witnesses and reduce the risk of evidentiary problems at trial or the late or nondisclosure of experts. The proposed rule would also provide litigants an opportunity to evaluate the strength of their cases, which would promote settlements and encourage the dismissal of weak claims.

Finally, this amendment is consistent with the federal practice of what has become known as the "Daubert hearing." By ensuring that our state process is similar to that used in federal court, the proposed amendment to N.J.R.E. 104(f) will eliminate any perceived incentive that a litigant, whose claim rests on nothing but "junk science", may have to file a cause of action in our already overburdened state court system. The Supreme Court, in Rowe v. Hoffmann-La Roche Inc., recently observed that our state's judicial system is awash in out-of-state mass tort plaintiffs. The Court in Rowe acknowledged that out-of-state residents had filed more than 90% of the active mass tort claims in New Jersey.[22] Today, the share of New Jersey claims brought by out-of-state residents is estimated at a chilling 93%.

New Jersey has become a national target for "litigation tourism." Unlike New Jersey's traditional forms of tourism, this activity burdens our state's economy and strains our judicial system.[23] These non-residents are attracted to New Jersey for its perceived plaintiff-friendly legal environment.[24] For example, the law firm of Weitz & Luxenberg, in connection with the Vioxx litigation, actively promoted the notion that New Jersey employed a more lax application of the standards of admissibility for scientific evidence, thus making New Jersey a "better venue" for cases that might otherwise not withstand judicial gatekeeping in other jurisdictions.[25]

Our state's Supreme Court has sent a clear message that the public policy of New Jersey "is not to encourage tort recoveries."[26] N.J.R.E. 104(f) will eradicate the notion that New Jersey's jurisprudence and Rules of Evidence are somehow advantageously more relaxed than those of other jurisdictions. As amended, N.J.R.E. 104 will oblige trial courts to recognize their

---

[21] Id.
[22] Rowe v. Hoffman-La Roche, Inc., 189 N.J. 615, 621. (2007).
[23] See Gantes v. Kason Corp., 145 N.J. 478, 507 (1996) (Garibaldi, J., dissenting).
[24] Beth S. Rose & Steven R. Rowland, Preference for New Jersey Law in Products Liability Claims Draws Out-of-State Plaintiffs, 184 N.J.L.J. 363 (May 1, 2006). Indeed, a recent survey conducted by the Eagleton Institute of Politics found that tort litigation is making New Jersey a hostile environment for in-state corporations and that the vast majority of New Jersey corporations think this state is on the "wrong track." Rutgers University Eagleton Institute of Politics, Attitudes Towards Litigation Climate in New Jersey, A Representative Survey Among Business in New Jersey (December 2007). Furthermore, the survey noted that 89% of respondents believed that lawsuits are driving up the cost of doing business in New Jersey, and nearly 25% have considered relocating outside of New Jersey. Id.
[25] See Weitz & Luxenberg Letter, dated December 29, 2004, attached hereto as Exhibit C.
[26] Rowe, 189 N.J. at 626.

obligations under New Jersey law to ensure that testimony is consistent with reliable scientific principles and methodologies.

The Proposed Amendments to N.J.R.E. 702.

Our Supreme Court has repeatedly recognized that New Jersey's jurisprudence requires that judges act as gatekeepers and that this responsibility necessitates trial judges to evaluate proffered expert testimony for reliability.[27] Yet as noted at page five above, the importance of this gatekeeping function extends beyond novel theories of causation, beyond toxic torts, and beyond pharmaceutical cases. The realities of modern litigation require that all expert testimony be reliable and based on accepted methodologies. It is in this light that we propose the following amendment to N.J.R.E. 702:

> 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, **if (1) the data and information is of the type reasonably relied on by experts in the field, (2) if the witness' testimony is consistent with reliable scientific principles and methodologies, and (3) the witness has applied these principles and methodologies reliably to the facts of the case.**

The standard for the admission of expert testimony contained in the proposed amendment above is consistent with the standards for admission of expert testimony in our jurisprudence.[28] While these amendments are similar to the revised F.R.E. 702, they do not incorporate the Daubert factors wholesale, nor do they copy the Federal Rules verbatim. Instead, what the proposed rules contain are practical guidelines derived from the complex reasoning that comes from our state's own jurisprudence. Thus, the amendment preserves New Jersey's precise standard for admissibility and clarifies the differences between the New Jersey and federal approaches to expert testimony. The proposal is not an attempt to upset the established role of the fact finder as determiners of the weight of testimony. The proposed amendment only incorporates the guidelines expressed by our Supreme Court, which already requires trial courts, when requested, to consider if the proffered testimony is based on data and information of the type reasonably relied on by experts in the field and is consistent with reliable scientific principles and methodologies.[29]

Thus, the amended rule embodies several general considerations. First, as noted in Section III, the rule is intended to be applied to all expert testimony. In this respect, the rule follows federal law as announced in Kumho Tire, which was noted favorably by the New Jersey

---

[27] Kemp, 174 N.J. at 430-435.

[28] The Court in Kemp held that the trial court's role is to "determine whether the expert's opinion is derived from a sound and well founded methodology" which is supported by "data and information of the type reasonably relied on by experts in the scientific field." Id. at 425-427 (citing Rubanick and Landrigan). The court went on to note that "[s]upport for an expert's methodology may be found in professional journals, texts, conferences, symposia, or judicial opinions accepting the methodology." Id.

[29] Id.; Hisenaj v. Kuehner, 194 N.J. 6 (2008) (recognizing that "trial courts are expected to act as gatekeepers").

Supreme Court in Kemp. Next, in combination with N.J.R.E. 104(f), the proposed rule reaffirms our trial judges' gatekeeper responsibilities to screen out unreliable expert testimony.

Likewise, it reinforces the notion that trial courts should confront proposed expert testimony with rational skepticism and a focus on the scientific basis of the proposed testimony. As such, the amendment is broad enough to allow testimony that is the product of competing principles or methods in the same field of expertise to reach the jury. Contrary and inconsistent opinions may simultaneously meet the threshold if they are based on sound scientific principles. The amendment to N.J.R.E. 702 is also consistent with, although not identical to, federal practice. This amendment officially recognizes that New Jersey trial courts have the same discretion in making expert determinations as those courts in other jurisdictions that have adopted multifactor tests for analyzing expert testimony, and eliminates the erroneous notion that New Jersey's jurisprudence permits "junk science."

Unfortunately, since the last time the Court has considered adopting this proposed rule, the unpredictability of the courts' rulings has persisted and continued to feed New Jersey's reputation for "junk science." That inconsistency has been especially pronounced in the Accutane litigation, where federal MDL courts have repeatedly rejected expert testimony[1] even as New Jersey state court allow similar testimony on the same scientific record.[2] The disparity continues to draw litigation from other jurisdictions to New Jersey's state courts, to the point that the MDL Court has actually criticized the manner in which plaintiffs have been allowed to present one crucial aspect of their causation case in state court trials.[3]

Combined with the amendments to N.J.R.E. 104 this amendment would ensure that trials courts are given the proper foundation to examine expert testimony and exclude unreliable opinions when necessary. The rule also clarifies the duty of our trial courts to act as gatekeepers to make certain that unreliable evidence and "junk science" do not taint the jury. This would improve the quality of expert testimony presented to jurors and help guarantee that the testimony presented is based on sufficient facts and reliable scientific principles.

We would be happy to attend a meeting with the Committee, to provide additional authority, or to be of assistance in any way possible as the Committee considers this important issue.

Respectfully Submitted,

Marcus Rayner
Executive Director
New Jersey Lawsuit Reform Alliance

cc: Hon. Stuart Rabner, C.J.
Hon. Glenn A. Grant, J.A.D

[1] See, e.g., In re Accutane Products Liability 2009 WL 2496444 (M.D.Fla.)
[2] McCarrell v. Hoffman-LaRoche, Inc. 2009 WL 614484 (N.J. Super.A.D.)
[3] Id.