

**Testimony of Marcus Rayner  
Executive Director, the New Jersey Lawsuit Reform Alliance  
Before the NJ Supreme Court  
Tuesday, May 21<sup>th</sup> 2013**

Good morning, your honors. I want to first thank you for the opportunity to speak here today. My name is Marcus Rayner and I am executive director of the New Jersey Lawsuit Reform Alliance (NJLRA). This is my second time speaking before this Court and, as was the case before, it is a particular honor since I am not an attorney.

As you may know, NJLRA is a statewide group of over 90 corporations, professional organizations and individuals dedicated to advocating for reforms to the state's civil justice system in the legislature and in the courts.

I am here today to ask the Court to amend New Jersey's Rules of Evidence to provide our trial courts with the clear procedural authority and responsibility to evaluate the admissibility of expert testimony in a predictable and consistent manner in civil litigation.

Specifically, we ask the Court to amend Rule 104 to require a sidebar hearing on the qualifications of an expert at the motion of either party, which we believe will clarify the court's role as "gatekeeper." And we also ask the Court to add a three-part test to expert evidence introduced at trial in Rule 702.

The Evidence Committee was kind enough to include our written request and justification for this in its report, and we very much appreciate that. As the Evidence Committee report mentions, we petitioned the Committee and this Court in 2009 for similar changes to the Rules of Evidence. I hope the Court will view our respectful persistence on these proposed amendments as a testament to the significance of this issue to the business and medical provider communities in the state.

In 2002 this Court's Evidence Committee first studied this issue and concluded that New Jersey should not move toward the federal standard before that standard was "well-defined." Seven years later the Committee also recommended against adopting the federal rule, and argued that federal cases 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."

We believe that this is precisely the problem. As the trend continues toward nation-wide adoption of the now well-established federal standard, New Jersey becomes a greater outlier.

Unlike four years ago, New Jersey now finds itself in the small minority of states that have yet to update our rules of evidence to reflect a more structured reliability test for expert testimony. Today, 34 states have amended their rules to adopt all or part of the federal Daubert standard. As we speak, Florida Governor Rick Scott is considering legislation passed in that state which would adopt the federal rule via statute.

The Rules of Evidence in nearly 35 other states are moving toward uniformity with the federal rules. And while our own jurisprudence has advanced significantly to reflect the increased importance and use of expert testimony, our rules have not changed since 1991. We believe that the time is right for New Jersey to codify this Court's developing jurisprudence within the Rules of Evidence.

Today, more than 90% of the plaintiffs in New Jersey's pharmaceutical mass torts come from outside of New Jersey. Indeed, this Court has observed in some of its decisions that our state's judicial system is awash in out-of-state mass tort plaintiffs.

The reasons for this are many. But our members believe that one important reason is the perception that New Jersey's standard for the admissibility of expert testimony is low, and that testimony which might be barred as unreliable in federal court and in the growing majority of state courts can often be admitted in our courts.

We are concerned that this perception draws cases into our court system which should properly be adjudicated elsewhere, and we have seen that it reduces predictability when it comes to how a trial judge will screen expert evidence. Unfortunately, the vagueness of our current standard leads to a variety of interpretations, and much of this disparity is simply not reviewable. And those decisions that exceed the scope of discretion are costly to appeal, take time and strain court resources.

We believe that a clear rule reflecting long-standing New Jersey case law will enhance predictability, ensure uniformity with the majority of other jurisdictions in the nation, reduce the need for appellate review and reduce the flood of out-of-state plaintiffs into our courts.

At a time when our state is working to protect scientific investment, create biomedical and pharmaceutical jobs and encourage the health care sector, it is imperative that our judicial system not add to the challenges our employers face by permitting the unreliable opinion testimony that is soundly rejected in many competing states.

The Evidence Committee has studied this issue twice and is now looking to this Court for guidance. In 2002, as in 2009, New Jersey arguably would have been at the forefront of the nationwide shift towards a Daubert-style approach to expert testimony. Today, we are among 15 to 16 states that have yet to update their rules in this regard. As a result, we believe that New Jersey's attractiveness to litigation which turns on scientific evidence is becoming an acute problem.

We therefore respectfully request that this Court clarify the rules and procedures governing admissibility of expert testimony and provide the necessary guidance to courts as well as counsel that will establish comprehensive and comprehensible guidelines for resolution of expert testimony issues in the future.