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May 10, 2014

Honorable Jamie D. Happas, J.S.C.
Superior Court of New Jersey
Middlesex County Courthouse
56 Paterson Street, Chambers 401
New Brunswick, New Jersey 08903-0964

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

Dear Judge Happas:

I appreciate your committee's review of questions regarding the admissibility of expert testimony.

I have been writing about the evolution of state and federal standards for the admissibility of expert testimony since 1989. Among other things, I am the co-author of *The New Wigmore: Expert Evidence*, and a former chair of the Association of American Law School Section on Evidence. I am writing to offer my perspective on the merits of a closer alignment of New Jersey law with the federal rules for expert testimony.

Before the "*Daubert* revolution," the American judiciary traditionally permitted expert testimony almost without limit, provided it was relevant and within the scope of the witness's expertise. Of course, this approach ended in federal courts when the US Supreme Court adopted a reliability test for the admissibility of expert testimony with the so-called *Daubert* trilogy of opinions – *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, *General Electric Co. v. Joiner* and *Kumho Tire Co. V. Carmichael* – each of which tightened the standards for the admissibility of expert testimony. An amendment to the Federal Rule of Evidence 702 in 2000 then codified a stringent interpretation of the three decisions.

The result was a significant improvement in the clarity of the standard of admissibility for expert testimony. Prior to the amendments, there was considerable inconsistency in application of the *Daubert* rule, as some federal judges embraced the enhanced gatekeeping responsibilities entailed in the *Daubert* cases, while others who favored more permissive rules of admissibility were able to interpret *Daubert* narrowly and rely on ambiguities in *Joiner* and *Kumho Tire,* admitting questionable expert testimony while still remaining within the bounds of a reasonable interpretation of the case law. Even after *Daubert*, for example, an expert could plausibly argue that a very general methodology, such as extrapolating from animal studies, could be considered reliable, regardless of how competently, diligently, or honestly the expert had used the methodology in the case at hand. In other words, an expert could testify that a high-dose study on rats supports his conclusion that low-dose exposure caused human disease in a particular case, even though reputable scientific literature did not support drawing such an inference.

The adoption of the amendments to the federal Rule 702 largely resolved the controversy over the admissibility of such evidence, providing that expert testimony is admissible only if "the testimony is the

product of reliable principles and method" and "the witness has applied the principles and methods reliably to the facts of the case." Although there are still some federal judges who mistakenly cite earlier caselaw in preference to the text of Rule 702 and thus remain inclined to apply more lenient rules, courts nationwide are taking more seriously their obligation to serve as gatekeepers who filter unsound expert witness testimony in a wide range of areas.

The change is significant, because the role of the court as gatekeeper goes beyond merely excluding obvious junk science from the courts. Even well-credentialed scientists should not be permitted to speculate based on incomplete data. Even where such hypotheses might be relevant in the regulatory context, the dynamics of expert testimony in the courtroom necessitate a higher standard for reliability for expert testimony to be introduced. In the regulatory context, where government agencies are charged with proactively protecting the public health from potential toxic threats, for example, agencies often have no choice but to rely on scientists' best guesses in the face of scientific uncertainty. But such best guesses should not be admissible in toxic tort cases, where the law demands *reliable* expert testimony regarding causation because courts are charged with determining what more probably than not happened in the past, not what speculative risks may pan out in the future.

Moreover , serious scrutiny of the reliability of expert testimony is needed in the context of litigation for a reason that does not pertain to the regulatory context: parties to litigation control the selection of expert witnesses, and select them to serve as partisans. In the absence of rule requiring the experts to present objective evidence that their reasoning process is based on reliable science, the courts will be (and used to be) deluged with quacks, charlatans, hired guns, and mere "outliers," all chosen not for the soundness of their methodology and reason, but because they are willing to testify in support of a party's theory of the case.

Not surprisingly, the higher standards in federal court have also increased pressure on those jurisdictions that have not adopted some sort of more stringent test, comparable to that of the amended Federal Rule 702. As a result, in states where courts have failed to embrace the federal rule, plaintiff attorneys with dubious claims are engaging in heroic efforts to avoid diversity jurisdiction and bring their claims in state rather than federal court. And where plaintiffs have a choice of states in which to file, plaintiffs choose to file in those remaining state courts that have not adopted rules akin to amended federal rule 702. This includes states that have officially adopted *"Daubert,"* but have refused to adopt *Joiner*, *Kumho Tire*, and the amendment to Rule 702, because the *Daubert* decision, taken alone, can be interpreted far more liberally than is permitted under the full trilogy as elaborated upon by Rule 702.

New Jersey, unfortunately, is in the category of outlier jurisdictions that offer a more lenient standard for expert testimony. Despite the superficial resemblance of New Jersey's Rule 702 to the federal rule, as a practical matter, New Jersey is known to have less clarity in its threshold for expert testimony than does the federal rule. In some cases, expert testimony based on speculative hypotheses are properly excluded, while in others, extrapolations based on data that would not meet the standard of the federal rule is nevertheless permitted under the state rule. Absent amendments to clarify the factors to be considered in evaluating the reliability of proposed expert testimony, akin to the federal amendments, New Jersey courts are in a position similar to federal courts, post-*Daubert* but pre-2000 amendments.

As the trend towards requiring that experts be able to point to objective support for their expressed opinions continues in federal court and in other state courts, such inconsistent gatekeeping risks New

Jersey becoming a magnet for unreliable expert testimony. In the interests of avoiding such an outcome, I would urge committee to consider amending the New Jersey rule to mirror the enhanced clarity of Federal Rule of Evidence 702.

Sincerely,

David E. Bernstein
GMU Foundation Professor
George Mason University School of Law

Cc: The Honorable Carmen Messano, Chair, Committee on the Rules of Evidence