NOTICE TO THE BAR

2011-2013 REPORT OF THE SUPREME COURT COMMITTEE ON THE RULES OF EVIDENCE – PUBLICATION FOR COMMENT

This publishes for comment the **2011-2013 Report of the Supreme Court Committee on the Rules of Evidence**, as referenced in the earlier (February 1, 2013) notice publishing four other 2011-2013 Rule Committee reports for comment. This report also will be available on the Judiciary's internet web site at http://www.judiciary.state.nj.us/reports2013/index.htm.

Please send any comments on the Committee's proposed rule amendments or other recommendations in writing by **Wednesday, May 1, 2013** to:

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Comments may also be submitted via Internet e-mail to: Comments.Mailbox@judiciary.state.nj.us.

The Supreme Court will be considering the Evidence Rules Committee Report in June-July 2013. If the Court at that time determines to adopt amendments to any of the Rules of Evidence, there would then be a Judicial Conference scheduled for the beginning of September, consistent with the statutorily defined approval and adoption process for the Rules of Evidence.

/s/ Glenn A. Grant

Glenn A. Grant, J.A.D.
Acting Administrative Director of the Courts

Dated: March 21, 2013

2011 - 2013 REPORT OF THE

SUPREME COURT COMMITTEE ON

THE RULES OF EVIDENCE

March 15, 2013

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I. RULE AMENDMENTS RECOMMENDED FOR ADOPTION

A. Proposed Amendment to N.J.R.E. 609, Impeachment by Evidence of Conviction of Crime (Supreme Court Referral in State v. Harris)

In State v. Harris, 209 N.J. 431, 434 (2012), the Supreme Court considered whether the trial court had abused its discretion in ruling that two 14-year-old criminal convictions for drug possession were admissible under N.J.R.E. 609 for the purpose of impeaching defendant's credibility if he testified during trial. Specifically, the Court held that the trial court had not erred in finding that the convictions were not too remote since defendant had been convicted of numerous disorderly persons offenses during the intervening 14-year period and that the offenses served to "bridge the gap" between the older criminal convictions and the instant offenses. Id. at 444-45. The Court rejected defendant's argument that New Jersey should follow the approach set forth in Fed. R. Evid. 609 that convictions more than 10 years old are excluded unless the proponent can demonstrate that their probative value substantially outweighs its prejudicial effect. Ibid. The Court then referred the matter to this Committee: "The question of whether N.J.R.E. 609 should be modified is referred to the Supreme Court Committee on Evidence." Id. at 445.

The dissent in Harris argued that, as a matter of law, disorderly persons convictions may not be used to "render proximate otherwise remote criminal convictions." Id. at 447. The dissenters also urged that the issue of whether N.J.R.E. 609 should be amended should be forwarded to this Committee:

> Finally, I would refer this matter to the standing Committee on Rules of Evidence for a fresh look at Fed. R. Evid. 609 which, in my estimation, provides a more nuanced and fairer approach to impeachment by conviction. In particular, the Committee should study Fed. R. Evid.

> 609(b)(1), which provides a bright-line exclusion of convictions over ten years old unless the State bears the burden of proving, by specific facts, that the probative value of the conviction "substantially" outweighs its prejudicial effect. For me, such an approach best accommodates the truth seeking function.
>
> [Id. at 448-49.]

In response to the Court's referral, Judge Carmen Messano, Chair of the Evidence Committee, formed a N.J.R.E. 609 Subcommittee to study whether N.J.R.E. 609 should be modified, and, more specifically, whether it should be altered to conform more closely to Fed. R. Evid. 609. The Subcommittee, chaired by Dean Andrew Rossner, included members representing the Attorney General's Office and the Office of the Public Defender.

The Subcommittee undertook a comprehensive examination of the divergence between the New Jersey and Federal Rules of Evidence with respect to the admissibility of prior conviction evidence to impeach a witness. N.J.R.E. 609 currently provides: "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." Over the years, the standard the judge should use in making a determination whether the opponent of such evidence has met the burden has been extensively demarcated through case law. See, e.g., State v. Sands, 76 N.J. 127 (1978); State v. Brunson, 132 N.J. 377 (1993); State v. Hamilton, 193 N.J. 255 (2008).

In contrast, under Fed. R. Evid. 609(a)(1) prior convictions less than 10 years old must be admitted for impeachment of a non-defendant witness, subject to Fed. R. Evid. 403 balancing, and must be admitted against a testifying defendant, if the

probative value outweighs the prejudicial effect to that defendant or if they involve dishonesty or false statements. Further, under Fed. R. Evid. 609(b)(1) convictions over 10 years old are inadmissible unless the proponent proves, by specific facts, that the probative value of the conviction substantially outweighs its prejudicial effect.

Fed. R. Evid. 609 provides in relevant part:

> (a) In General. The following rules apply to attacking a witness's character for truthfulness by evidence of a criminal conviction:
> (1) for a crime that, in the convicting jurisdiction, was punishable by death or by imprisonment for more than one year, the evidence:
>
> (A) must be admitted, subject to Rule 403, in a civil case or in a criminal case in which the witness is not a defendant; and
> (B) must be admitted in a criminal case in which the witness is a defendant, if the probative value of the evidence outweighs its prejudicial effect to that defendant; and
> (2) for any crime regardless of the punishment, the evidence must be admitted if the court can readily determine that establishing the elements of the crime required proving--or the witness's admitting--a dishonest act or false statement.
>
> (b) Limit on Using the Evidence After 10 Years. This subdivision (b) applies if more than 10 years have passed since the witness's conviction or release from confinement for it, whichever is later. Evidence of the conviction is admissible only if:
>
> (1) its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect; and
> (2) the proponent gives an adverse party reasonable written notice of the intent to use it so that the party has a fair opportunity to contest its use.

The New Jersey and Federal Rules differ in several respects. First, the New Jersey Rule always places the burden of proving that the prejudicial effect of the

conviction outweighs any probative value on the opponent of the conviction evidence, irrespective of the age of the conviction or the nature of the underlying crime resulting in the conviction. In every case, the court has the responsibility and discretion to weigh the evidence in the context of the particular case. In contrast, the Federal Rule requires admission of crimes involving "a dishonest act or false statement," places the burden of proof upon the opponent of the evidence for other crimes that are not more than 10 years old and on the proponent if the conviction is more than 10 years old.

The Subcommittee focused its discussion on three issues in areas in which the language in the current New Jersey rule differed from the Federal Rule: 1) the federal distinction between crimes of dishonesty and other crimes;[1] 2) the burden of proof for convictions older than 10 years; and 3) the federal distinction between defendant-witnesses and other witnesses.

[1] The Subcommittee was mindful that in 1963, Supreme Court, upon the recommendation of the full committee, had recommended that N.J.R.E. 609 [then N.J. Evid. R. 21] limit impeachment by conviction to crimes involving dishonesty and that the proposed rule was rejected by the Legislature. The Subcommittee reviewed a sampling of the scholarly literature addressing the issue as to whether permitting impeachment of a defendant for crimes unrelated to dishonesty distorted the truth seeking function of trials due to either juror misuse of the evidence or a chilling effect upon the defendant's right to testify. See for example Jeffrey Bellin, Improving the Reliability of Criminal Trials Through Legal Rules That Encourage Defendants to Testify, 76 U. Cin. L. Rev 851 (2008),John H. Blume, The Dilemma of the Criminal Defendant with a Prior Record-Lessons from the Wrongfully Convicted, 5 Journal of Empirical Legal Studies 477 (2008), Alan D. Hornstein, Between Rock and a Hard Place: The Right To Testify and Impeachment By Prior Conviction, 42 Vill. L. Rev. 1 (1997). The Subcommittee was of the view that a more detailed look at the underlying studies would be needed since there are divergent results and opinions**.** The Subcommittee recommended that a future Subcommittee be tasked with evaluating this literature and its implications for New Jersey.

Distinction Between Crimes of Dishonesty and Other Crimes

The consensus of the Subcommittee was not to follow the Fed. R. Evid. 609 in distinguishing within the body of the rule between crimes of dishonesty and other crimes. First, adopting the Federal Rule would take away from the judge's responsibility and discretion in assessing the probative value and prejudicial effect of such convictions in the context of the case. While New Jersey's historical treatment of prior conviction evidence for impeachment recognizes the Federal Rule's motivating principle - that crimes of dishonesty and false statement have more probative value than other crimes in assessing a witnesses credibility - current New Jersey practice acknowledges that principle as part of the remoteness and balancing analysis that a court must do in evaluating the admissibility of a conviction. State v. Sands, supra, 76 N.J. at 144, makes clear that in assessing admissibility, more weight should be given to "[s]erious crimes, including those involving lack of veracity, dishonesty or fraud . . . ."

Second, drafting and applying such a rule becomes challenging with respect to demarcating which crimes are crimes of dishonesty, whether specifically in the rule, or through a determination by the court in a hearing on admissibility.

Thus, rather than incorporate a distinction between crimes of dishonesty and other crimes into the rule itself, the Subcommittee recommended retaining the current practice of leaving it to the judge to give due weight to the nature of the crime for which a conviction is sought to be admitted. Of course, in making such a determination, it is anticipated that convictions for crimes of dishonesty should be viewed as being highly probative as to the credibility of a witness. As such, the proposed rule identifies this as a factor in Section (b)(2).

Admissibility of Convictions Older than 10 Years

The Supreme Court's referral in Harris primarily centered on the question of how to treat convictions that were more than 10 years old, specifically, whether the New Jersey rule should follow the federal rule in shifting the burden onto the proponent of admitting such older convictions. Further, the Harris facts raise the issue of whether convictions for disorderly and petty disorderly persons offense, rather than crimes, could be used to "bridge the gap" so as to admit an otherwise remote conviction.

The Subcommittee concluded that N.J.R.E. 609 should be amended to adopt the Federal Rule's practice of a presumption to admit convictions less than 10 years old and a presumption against admitting convictions more than 10 years old,[2] but with some differences that preserve New Jersey's current principles. The Committee was guided by several factors in this regard. First, although the current New Jersey Rule 609 does not set forth by rule a higher burden for the admissibility of convictions older than 10 years, there was consensus within the Subcommittee that in the actual practice when judges conduct the remoteness analysis under the rule, they in fact impose a higher burden upon the admissibility of such convictions. As such, to a great degree the Federal Rule burden shift is the current informal rule of decision in many cases and, thus, setting forth this burden shift in the rule seems wise. Second, the current New Jersey Rule places New Jersey in a small minority of states that do not place a time

[2] Consideration was given as to what date would govern determination of the 10 year period. The Subcommittee recommends that the 10 year period be calculated from the witness's conviction for a crime or release from confinement for it, whichever is later and the date the trial begins. The date the trial begins, rather than the date the witness testifies, was deemed a better endpoint because the Court, rather than the litigants, has more control over the date of trial than the date a particular witness may testify and thus there would be less opportunity for strategic manipulation by the litigants. This is consistent with prevalent Federal practice. United States v. Thompson, 806 F.2d 1332, 1339 (7th Cir. 1986), United States v. Hans, 738 F.2d 88, 93 (3d Cir. 1984), United States v. Cathey, 591 F.2d 268, 274 n.13 (5th Cir. 1979), United States v. Cobb, 588 F.2d 607, 612 n.5 (8th Cir. 1978), cert. denied, 440

limit on the admissibility of such convictions, either by shifting the burden as in the Federal Rule [25 states][3] or by prohibiting their admission altogether after the time period [9 states][4].

Third, the Subcommittee was of the view that the current trend in the states and among New Jersey judges to shift the burden for convictions older than 10 years provides a fair balance among the competing interests that New Jersey has recognized as it has considered and shaped its jurisprudence in this area: the defendant's interest in testifying, a concern as to the prejudicial effect such convictions may have upon the jury, the truth-seeking function of trials [including both the desire to have the defendant testify and a concern that if such evidence is not admitted the jury may be missing important information to evaluate the defendant's or witness's testimony for truthfulness].

U.S. 947, 99 S. Ct. 1426, 59 L. Ed.2d 636 (1979). The Committee did not address what endpoint applies if a case is remanded for a new trial, and leaves that hypothetical question to resolution in case law.

[3] Twenty five states have adopted the 10 year demarcation, similar to the federal rule. Those states are: **Alabama** [Ala. R. Evid. 609 (2012)]; **Alaska** [Alaska R. Evid. 609]; **Arizona** [Ariz. R. Evid. 609 (2012)]; **Delaware** [De. R. Evid. 609]; **Idaho** [I.R.E. 609]; **Indiana** [Ind. R. Evid. 609]; **Iowa** [Iowa R. Evid. 5.609 (2012)]; **Kentucky** [K.R.E. 609 (2012)]; **Minnesota** [Minn. R. Evid. 609 (2012)]; **Mississippi** [Miss. R. Evid. 609 (2012 as amended 2009)]; **New Hampshire** [N.H. Evid. Rule 609 (2012)]; **New Mexico** [N.M.R. Evid. 11-609 (2012)]; **North Carolina** [N.C. Gen. Stat. § 8C-1, Rule 609 (2012)]; **North Dakota** [N.D.R. Evid. 609 (2012)]; **Ohio** [Ohio. R. Evid. 609 (2012)]; **Oklahoma** [12 Okla. Stat. Ann. §2609]; **Pennsylvania** [Pa. R.E. 609 (2012)]; **Rhode Island;** [RI R. Evid. Art. VI, Rule 609 (2012)]; **South Carolina** [S.C.R. Evid. 609 (R. 609 SCRE)]; **Tennessee** [Tenn. R. Evid. Rule 609 (2012)]; **Texas** [Tx. R. Evid. 609(2012)]; **Utah** Utah R. Evid. 609 (2012); **Washington** [Wash. E.R. 609]; **West Virginia** [W.V.R.E. 609 (2012)]; **Wyoming** [Wyo. R. Evid. 609].

[4] Nine jurisdictions have rules that do not permit the admissibility of convictions for impeachment after a designated period of time. Those states are: **Arkansas** [A.R.E. 609]; **Colorado** [5 year limit for civil actions set forth in C.R.S. 13-90-101 (2012)]; **Louisiana** [10 year limit set forth in La. C.E. Art. 609 (2012)]; **Maine** [15 year limit set forth in Me. R. Evid. 609]; **Maryland** [15 year limit set forth in Md. Rule 5-609]; **Massachusetts** [ALM GL ch. 233, §21 (2012)]; **Michigan** [10 year limit set forth in M.R.E. 609]; **Oregon** [15 year limit set forth in ORS § 40.355 (2011)]; **Vermont** [15 years limit set forth in V.R.E. 609 (2012)].

Further, there was a consensus that the proposed rule should set forth examples of factors a court may consider in assessing the admissibility of older convictions, such as intervening convictions of crimes or offenses that may "bridge the gap," and the distinction between crimes of dishonesty versus other crimes. The setting forth of factors, however, does not alter the requirement that a trial court should continue to assess all relevant factors in making admissibility determinations and should determine the appropriate weight to give to each factor. Nor does setting forth examples of the factors to be considered limit the development of the law or the consideration of factors not specifically enumerated.

The Subcommittee also believed that using disorderly and petty disorderly persons offenses to "bridge the gap" to a conviction older than 10 years was problematic. Rather than flatly prohibit the consideration of convictions for offenses, the Subcommittee reached a consensus that this concern was best addressed by the proposed burden shift. Although under the proposed rule intervening disorderly and petty disorderly persons offenses may still be considered by a court in assessing whether a more than 10-year-old conviction should be admitted, proponents of the older conviction will need now to meet the shifted burden. Of course, a court may find that a pattern of disorderly or petty disorderly persons offenses or multiple convictions for offenses involving dishonesty suffices to meet the burden in a particular context. As such, these factors are set forth in Section (b)(2).

The proposed rule's burden shift is not as onerous as the Federal Rule for convictions older than 10 years. This is because the proposed rule rejects the federal requirement that the probative value "substantially" outweigh the prejudicial effect.

Rather, under the proposed rule, the burden is met if the probative value of the conviction outweighs the prejudicial effect. The Subcommittee believes this is more in keeping with current New Jersey informal practice. Further, by removing that modifier, we avoid creating an asymmetrical rule that might otherwise be required by State v. Garron, 177 N.J. 147, 172 (2003), cert. denied, 540 U.S. 1160, 124 S. Ct. 1169, 157 L. Ed.2d 1204 (2004) (holding that exclusion of defense evidence that is probative and material would be unconstitutional).[5]

Distinction Between Defendant-Witnesses and Other Witnesses

The proposed rule will, in criminal cases, be equally applicable to cooperating witnesses for the State as it will be for the testifying defendant. This feature of the rule makes it easier to apply and is consistent with current New Jersey practice. Although the Federal Rule distinguishes between witnesses and testifying defendants in order to impose a different standard for the admissibility of convictions less than 10 years old to impeach a witness [excluded only if the probative value is substantially outweighed by

[5] There was a consensus among subcommittee members that the formal burden shift should apply in every case in which there was no conviction during the ten year period prior to trial. The subcommittee considered whether to apply a different standard to cases in which the witness also had one or more criminal convictions that were less than ten years old. The Attorney General's representative on the subcommittee was of the view that a formal burden shift is inappropriate in such circumstances and that under current governing case law and practice, such a conviction would not be regarded as "remote" solely because it happened to fall beyond the ten year line and urged that such cases not be the subject of a formal burden shift but instead be evaluated under traditional remoteness analysis under existing case law. Under that member's view, any intervening convictions within ten years undermines the logic to a pre-set ten year date's legal significance in determining remoteness.

The other subcommittee members were of the view that the rule as proposed would provide a better framework to assess such cases; although the burden would shift for any conviction that was more than ten years old, the fact and circumstances of the intervening conviction that was less than ten years old would be one factor that the judge would consider in assessing whether the burden had been met. When the probative value of the earlier conviction in that context outweighed the prejudicial effect, the court would admit the older conviction. As such, the proposed rule expressly sets forth this as a factor in section (b)(2)(i). This created a clear and concise rule and did not exclude the older conviction as remote solely because of its age, since a court could find the older conviction was admissible when the circumstances of the intervening convictions so required.

the danger of unfair prejudice] than a testifying defendant [admitted if probative value outweighs prejudicial effect], the Subcommittee saw no reason to depart from the current practice of applying the same rule to both witnesses and testifying defendants. Finally, the Subcommittee considered addressing the fact that the current New Jersey Rule's language, "Such conviction may be proved by examination, production of the record thereof, or by other competent evidence," has been limited by the holding in State v. Brunson, supra, 132 N.J. at 377, which requires sanitizing the evidence of the prior conviction when it is the same or similar to the crime charged. In order to clarify the rule, the Subcommittee recommends incorporating the Brunson principles into the rule in paragraph (a)(2).

Conclusion

The full Committee carefully considered the Subcommittee's report and voted by a large majority to adopt its conclusions. The Committee, therefore, recommends adoption of the following amendments[6] to N.J.R.E. 609:

[6] In drafting the proposed rule, the Subcommittee endeavored to follow the goals of the restyling project (see Section IIIA of this Report).

N.J.R.E. 609

(a) In General:

(1) For the purpose of affecting the credibility of any witness, the witness's conviction of a crime, subject to Rule 403, must [shall] be admitted unless excluded by the judge pursuant to Section (b) [as remote or for other causes].

(2) Such conviction may be proved by examination, production of the record thereof, or by other competent evidence[.], except in a criminal case, when the defendant is the witness, and

(i) the prior conviction is the same or similar to one of the offenses charged, or

(ii) the court determines that admitting the nature of the offense poses a risk of undue prejudice to a defendant,

the State may only introduce evidence of the defendant's prior convictions limited to the degree of the crimes, the dates of the convictions, and the sentences imposed, excluding any evidence of the specific crimes of which defendant was convicted, unless the defendant waives any objection to the non-sanitized form of the evidence.

(b) Use of Prior Conviction Evidence After 10 Years

(1) If, on the date the trial begins, more than 10 years have passed since the witness's conviction for a crime or release from confinement for it, whichever is later, then evidence of the conviction is admissible only if the court determines that its probative value outweighs its prejudicial effect.

(2) In determining whether the evidence of a conviction is admissible under Section (b)(1), the court may consider:

(i) whether there are intervening convictions for crimes or offenses, and if so, the number, nature, and seriousness of those crimes or offenses,

(ii) whether the conviction involved a crime of dishonesty, lack of veracity or fraud,

(iii) how remote the conviction is in time,

(iv) the seriousness of the offense.

II. RULE AMENDMENTS CONSIDERED AND REJECTED

A. Authentication of Non-English Text Messages, Audio and Video Files

In a letter dated December 20, 2011, Judge Grant wrote to Judge Messano asking the Committee to "review the range of issues relating to the authentication, introduction and use of text messages and electronically recorded sound and/or video files in court proceedings, particularly when those items are in a language other than English, and to make any appropriate recommendations." In response, Judge Messano formed an Article X Subcommittee (Subcommittee), chaired by Judge Harvey Weissbard, to study the issue.

After a thorough analysis of the issues Judge Grant raised, the Subcommittee produced a written report strongly recommending that the Evidence Rules not be changed to address the problem (Subcommittee report attached as Appendix A). The Subcommittee recognized that there is a growing problem in our courts of attorneys and pro se parties seeking to introduce into evidence text messages and other electronic files in foreign languages. The Evidence Rule the Subcommittee thought was most relevant to the inquiry was N.J.R.E. 901, Requirement of Authentication or Identification. That rule provides: "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter is what its proponent claims." The rule, the Subcommittee noted, was written broadly to avoid the "Byzantine practices observed under the old rule such as the required production of custodians of records." The Subcommittee felt that the general language of N.J.R.E. 901 gave trial courts the flexibility they needed to deal with evolving authentication issues, including the issues raised by Judge Grant. Although

the Subcommittee did not support any amendments to the Evidence Rules, it thought that the Supreme Court might want to address the problem by adopting standards to guide interpreters on how to interpret and handle text messages and other electronic files.

The Evidence Committee agreed with the Subcommittee's recommendation that no change to the Evidence Rules was necessary relating to this issue.

III. MATTERS HELD FOR CONSIDERATION

A. Restyling the New Jersey Evidence Rules

In the Fall of 2007, the federal court system undertook a major rewriting of the Federal Rules of Evidence with a goal "to make the [Federal Evidence] Rules simpler, easier to read, and easier to understand without changing their substance."[7] The restyling of the Federal Rules of Evidence was part of a larger effort to revise all the national rules of procedure so that they were all written in plain language with the same clear, consistent style conventions. The last set of federal procedure rules to be restyled were the Evidence Rules. The restyling of the Federal Rules of Evidence was scheduled last, at least in part, because the difficulty of the task was recognized.[8] As a result of this massive, multi-year effort, on December 1, 2011 the restyled Federal Rules of Evidence took effect.

The New Jersey Rules of Evidence were extensively revised in 1991. The 1991 revision was the result of the Supreme Court seeking input from this Committee as to whether New Jersey should adopt the Federal Rules of Evidence. At that time, the Committee recommended against adopting the Federal Rules as a whole, but rather, as it explained, recommended adopting "the substance and language of the federal rules when we considered them equal to or better than our present rules. However, in a number of instances we preferred the prevailing New Jersey law . . . . "[9] Consequently, the 1991 New Jersey Evidence Rules generally are largely patterned after the Federal Rules of Evidence in effect in 1991, but are by no means identical to them.

[7] Davidson M. Douglas et al., The Restyled Federal Rules of Evidence, 53 Wm. & Mary L.Rev. 1435, 1440 (2012).
[8] Id. at 1444.
[9] 1991 Report of the New Jersey Supreme Court Committee on the Rules of Evidence.

Because of the similarities between the current New Jersey Rules of Evidence and the Federal Rules of Evidence that were in effect before restyling, Chief Justice Stuart Rabner, in late 2011, asked this Committee to study the restyled Federal Rules of Evidence to determine whether our Rules of Evidence would benefit from a similar revision. Chief Justice Rabner charged the Committee with recommending stylistic changes to the New Jersey Evidence Rules that would make the rules simpler and easier to understand, but would not change their substantive meaning.

As a result, in January 2012, Judge Messano appointed a Restyling Subcommittee (Subcommittee), led by Judge Phillip Carchman, to embark on an in-depth study of the restyled Federal Evidence Rules. The Subcommittee's membership was carefully chosen to include judges, practitioners and an academic, all with expertise in the evidence rules, and additionally with expertise in varying substantive areas of the law, including civil and criminal practice, appellate practice, personal injury law, family law, and municipal court practice.

The Restyling Subcommittee subsequently undertook a systematic, rule-by-rule, word-by-word review of the New Jersey Rules of Evidence. Consistent with Chief Justice Rabner's charge, the Subcommittee recognized that its recommendations should be limited to making the New Jersey evidence rules clearer, plainer, easier to understand, but without changing their meaning. The Subcommittee decided that initially it would be guided by the style rules and guidelines used by the federal Advisory Committee on Evidence Rules that are set forth as a note after Federal Rule of Evidence 101. These style rules include eliminating ambiguous words, minimizing the use of redundant intensifiers, and preserving "sacred phrases;" that is, phrases that

have become so familiar and have been interpreted so frequently in the case law that to alter them would be disruptive.

In its review, the Subcommittee used a meticulous method of analysis. For each Evidence Rule it considered, it compared the federal rule of evidence before the restyling, the federal rule after restyling, the current New Jersey Rule of Evidence, the notes of the federal Advisory Committee and the notes of the 1991 New Jersey Evidence Committee. The Subcommittee also considered revisions to the federal rules of evidence adopted since 1991.

As a starting point, the Subcommittee decided to restyle Article IV of the New Jersey Rules of Evidence, Relevancy and its Limits. This decision was prompted by its recognition that the Article IV rules were relatively short and succinct. The Subcommittee believed by addressing these rules first, it could refine its method of analysis, before starting work on more complex rules, such as those found in Article VIII, Hearsay.

As of the date of this report, the Subcommittee has restyled the Article IV evidence rules, N.J.R.E 401 – N.J.R.E. 411. The recommendations of the Subcommittee have been adopted by this Committee as a whole.

As in the case of the federal restyling effort, the Subcommittee has found that the restyling process is arduous and time-consuming. Nevertheless, the Subcommittee has established a schedule for completion of the restyling of all of the rules. The Subcommittee is confident that the work performed on the restyling of Article IV will reduce the time necessary to complete the entire restyling project. The Subcommittee will next address Article I, General Provisions. Its goal is to complete the project during

the Committee's 2013-15 term. When the restyling is completed, this Committee will present the entire restyled Evidence Rules to the Supreme Court for its review and approval.

B. **Comprehensive Mental Health Care Provider Privilege**

In its 2009-11 Report, this Committee sought authorization from the Supreme Court to embark on a study of New Jersey's mental health care provider privileges with the goal of determining whether New Jersey should adopt a unified mental health care provider privilege. Currently, the extent of the privilege that applies to a communication between a patient and a mental health care provider largely depends on the license or professional credentials of the provider. For example, the Evidence Rules provide for different and sometimes inconsistent privileges for communications between a patient and a psychologist, N.J.R.E. 505, a physician, N.J.S.A. 506, a marriage counselor, N.J.R.E. 510, a cleric, N.J.R.E. 511, a victim counselor, N.J.R.E. 517, and a social worker, N.J.R.E. 518. The Mental Health Privileges Subcommittee (Subcommittee) of the Evidence Committee concluded that there was "little apparent justification for treating a patient's communications with one mental health professional differently from communications with a different mental health professional." The Supreme Court granted this Committee permission to start an in-depth analysis of this issue, including soliciting the opinions of various stakeholders.

Accordingly, on June 1, 2012, Judge Grant published a Notice to the Bar (attached as Appendix B) requesting the comments from any interested parties on the concept of a unified mental health care provider privilege. The Committee also sent individual letters to over 50 organizations, which might have an interest in mental health care provider privileges, welcoming written comments on the possible adoption of a unified privilege.

As a result, the Evidence Committee received over 20 responses from government agencies, academic institutions, bar associations, professional organizations of mental health providers, and other interest groups. The overwhelming majority of the responses favored adoption of some type of unified privilege. Many respondents, however, reserved their final opinion until seeing the proposed draft of the unified privilege. Many comments were similar to this one from the National Association of Social Workers:

> Neither the interests of consumers of mental health services in New Jersey nor the providers of such services benefit from the uncertainty that surrounds the confidentiality of their discussions.
>
> A unified evidential privilege that extends to all mental health services providers in New Jersey has the potential to provide that certainty. Whether this potential is realized depends upon the provisions of such unified privilege. For the goals of certainty and predictability to be achieved, the unified privilege must be based upon the highest common denominator among the evidential privileges in question.

In the remaining time available during this term, the Subcommittee will draft the text of a unified privilege. The Committee will then circulate the proposed unified privilege to the various interest groups through a Notice to the Bar and individual letters. After considering the comments, the Evidence Committee plans to propose a final version of the unified privilege in its 2013-15 Report to the Supreme Court.

C. N.J.R.E. 1001 -1003—Admission of Fax or Electronic Copies

In April 2011, a private attorney who represents companies providing telepsychiatry services wrote to Judge Jack Sabatino, Chair of the Civil Practice Committee, requesting that that Committee consider an amendment to R. 4:74-7(b)(1), to allow electronic or facsimile copies of clinical certificates to be accepted into evidence at civil commitment hearings. A copy of the letter was sent to Judge Messano asking, in the alternative, that N.J.R.E. 1001 be amended to "specifically permit fax or electronic copies to be deemed originals under appropriate conditions . . . ." Judge Messano formed a Subcommittee, chaired by Judge Weissbard, to consider this issue.

In analyzing the issue, the Subcommittee considered whether the definition of "original" in N.J.R.E. 1001(c) should be expanded to include "electronically transmitted images." See the Subcommittee's report in Appendix A. The full Committee was unsure whether such an expansion of the definition of "original" was advisable, so it sent the issue back to the Subcommittee for further study. The Committee will take up this issue again during its 2013-15 term.

In the meantime, the Civil Practice Committee, in response to the April 2011 letter, recommended a change to R. 4:74-7(b)(1) that would permit a court to accept "a facsimile of the original screening certificate in lieu of the original." The Supreme Court adopted this recommended rule change on July 10, 2012.

IV. REQUEST FOR SUPREME COURT GUIDANCE

A. Proposed Amendments to N.J.R.E. 104 and 702 — Admission of Expert Testimony

In a letter dated October 16, 2012, the New Jersey Lawsuit Reform Alliance (Alliance) wrote to the Evidence Committee asking it to recommend changes to New Jersey Evidence Rules 104 and 702, "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." (letter attached as Appendix C). Specifically, the Alliance proposed an amendment to N.J.R.E. 104 that would require, upon the motion of a party, a court in a civil matter to hold a pretrial hearing on the qualifications of an expert witness. The Alliance also proposed an amendment to N.J.R.E. 702 that would add three factors that a trial court is to consider before admitting expert testimony. The Alliance's proposed amendment is largely meant to bring N.J.R.E. 702 in line with the United States Supreme Court's landmark decision in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed.2d 469 (1993), and the subsequent changes to Fed. R. Evid. 702 enacted in response to Daubert. (Alliance letter, pp. 5-6.)

Shortly after receiving Alliance's letter, the Evidence Committee received a number of letters supporting Alliance's position and urging changes to N.J.R.E. 104 and 702. These organizations include: Commerce and Industry Association of New Jersey; HealthCare Institute of New Jersey; Medical Society of New Jersey; New Jersey Business and Industry Association; New Jersey Defense Association; New Jersey Hospital Association; and New Jersey State Chamber of Commerce.

The Committee is seeking the Supreme Court's guidance on whether it should again undertake a study of this complex area, in light of the fact that it has twice before considered the same subject matter. The Committee first discussed this issue during its 2000-02 term. This discussion was prompted by the change to Fed. R. Evid. 702 resulting from Daubert. At that time the Committee decided not to recommend an amendment to N.J.R.E. 702 because it believed that "New Jersey's current jurisprudence on the admission of expert testimony works well and should not be altered." The Committee also observed that the federal standard under Fed. R. Evid. 702 had not yet been well-defined.

The Committee returned to this issue during its 2007-09 term. At that time, the Committee's chair formed a subcommittee "to study whether N.J.R.E. 702 . . . should be amended to express a clear standard for the admission of expert testimony." The subcommittee, chaired by Judge Jamie Happas, embarked on an intensive study of N.J.R.E. 702 and the other evidence rules contained in Article VII, Opinions and Expert Testimony. The subcommittee produced a comprehensive 19 page report that recommended changes to N.J.R.E. 702.

As a result of the subcommittee's work, the full Committee recommended to the Supreme Court that N.J.R.E. 702 be amended to incorporate a reliability standard, evolving from New Jersey's case law, while still 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. Particularly, the Evidence Committee recommended adding the following language to the end of N.J.R.E. 702: "provided that the basis for the testimony is generally accepted

or otherwise shown to be reliable." (see excerpt from the 2007-09 Evidence Committee report attached as Appendix D).

During the 2009 comment period, the Alliance and many of the organizations now supporting the Alliance's position submitted comments opposing the Evidence Committee's recommendation. As Alliance said in its 2012 letter, these groups objected to the Committee's recommendation for the following reason: "While the [Evidence] 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."

The Court declined to enact the Evidence Committee's 2009 recommended change to N.J.R.E. 702, leaving the rule unchanged and essentially identical to the pre-2000 version of Fed. R. Evid. 702.

In short, before it embarks on another in-depth analysis of Fed. R. Evid. 702, Daubert and its progeny, and how they relate to New Jersey's jurisprudence on admission of expert testimony, the Evidence Committee seeks the guidance of the Supreme Court. If the Court believes that such an endeavor is worthwhile, then the Committee will be happy to undertake it in its next term.

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,

Hon. Carmen Messano, J.A.D., Chair
Hon. Jamie D. Happas, P.J.S.C., Vice-Chair
Akinyemi T. Akiwowo, Esq.
Matthew Astore, Deputy Public Defender
Hon. Philip S. Carchman, J.A.D. (ret.)
John C. Connell, Esq.
William F. Cook, Esq.
Norma R. Evans, D.A.G..
Hon. Michele M. Fox, J.S.C.
Benjamin Goldstein, Esq.
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Hon. James J. Hely, J.S.C.
Hon. Douglas H. Hurd, P.J.S.C.
Hon. Sherry Hutchins Henderson, J.S.C.
Hon. Robert Kirsch, J.S.C.
Hon. Lawrence M. Lawson, A.J.S.C.
Michael P. Madden, Esq.
James McClain, Acting Prosecutor
Hon. Roy F. McGeady, P.J.M.C.
Professor Denis F. McLaughlin
Hon. Mitchel E. Ostrer, J.A.D.
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Joseph J. Rodgers, Esq.
Hon. Patricia B. Roe, P.J.S.C.
John D. Rosero, Esq.
Dean Andrew Rossner
Hon. Garry S. Rothstadt, J.S.C.
Hon. Jack M. Sabatino, J.A.D.
Hon. James P. Savio, J.S.C.
Christopher F. Struben, Esq.
Hon. Mark A. Sullivan, Jr., J.S.C. (ret.)
Hon. Harvey Weissbard, J.A.D. (ret.)
Alan L. Zegas, Esq..
Carol Ann Welsch, Esq., Evidence Committee Staff

APPENDIX A

REPORT OF THE SUBMCOMMITTEE ON POSSIBLE AMENDMENT TO EVIDENCE RULES 1001 and 1003
2011-2013 EVIDENCE COMMITTEE

This subcommittee was formed following the Evidence Committee meeting of January 26, 2012. Its purpose was to review and report on two issues: 1) An amendment to N.J.R.E. 1001 (c) to include electronic images within the definition of "original," and 2) An amendment to N.J.R.E. 901 to establish standards for the authentication of foreign language recordings.

The first issue has its genesis in letters of February 19, 2009 and April 7, 0211 on behalf of a company engaged in providing telepsychiatry services in connection with civil commitments addressed primarily to the Civil Practice Committee concerning the qualification for filing of electronic or facsimile copies of clinical certificates in such civil commitment proceedings. Although that particular issue has now resolved by the Civil Practice Committee, that fact that it arose at all suggested that N.J.R.E. 1001 (c) might be amended to broaden the definition of "original" accordingly. Following our review, this subcommittee is recommending that N.J.R.E. 1001 (c) be amended to read as follows:

> (c) **Original.** An "original" of a writing is the writing itself, any electronically transmitted image thereof or any counterpart intended by the person or persons executing or issuing it to have the same effect. An "original" of a photograph includes the negative or any print therefrom. If data are stored by means of a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately. Is an "original." (Underlined portion added).

While it could be argued that fax and electronic copies are "originals" as defined in 1001 (c), we have been advised that judges in various counties have interpreted the Rule in different ways in the context of the civil commitment proceedings referenced above. Accordingly, we believe that no harm is done, and much good advanced, by providing complete clarity and, thereby, uniformity. Thus, electronic or facsimile copies are not to be deemed duplicates under Rule 1001(d) and 1003.

The second issue was raised in a letter dated December 20, 2011 from Judge Grant which notes that there has been a reported increase in the number of instances where attorneys or pro se parties offer cell phone, audio or video files or text messages as evidence in court. The letter goes on to note that this raises numerous threshold issues relating to authentication including the identity of the speaker, chain of custody and the use of interpreters when the message is in a foreign language. With respect thereto we are not there dealing with the Best Evidence Rules, but rather with the Authenticity Rule, N.J.R.E. 901.

While the subcommittee recognizes the legitimacy of these concerns, it feels strongly that tinkering with Rule 901 would be a mistake, as the present form of the Rule was carefully crafted to read only as follows:

> "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter is what its proponent claims."

This was done specifically to avoid all of the Byzantine practices observed under the old rule such as the required production of custodians of records. It is no longer necessary to call the tax collector as a witness to authenticate a tax bill to prove the ownership of real property. Both the Evidence Committee and the Supreme Court at the time felt that the general language set forth above left trial courts with the flexibility needed to deal with evolving authentication issues, as is well exemplified by the development of case law in this area. Although Rule 902 does list various modes of self-authentication, the subcommittee does not feel that the Administrative Director is suggesting that type of approach.

What the AOC actually seems to be concerned with is the introduction into evidence of interpretations of foreign language recordings or data supported by no testimony other than that of the interpreters. This raises several issues:

1) Can the recording by authenticated?
2) Even if it is authentic, is it otherwise admissible under all the other rules of evidence including relevance, hearsay, privilege and the like?
3) Is the recording audible?
4) Is the translation accurate?

These questions cannot be resolved simply by amending the Authentication Rules or the Best Evidence Rules. Addressing the questions in reverse order, Items 3 and 4 are no different in this context than what they are in a normal interpretation situation. If anything, such problems are easier to rectify where there is a preexisting, and presumably still existing, recording. Normal evidence objections (item 2) are also no different here than they are with any other out-of-court statement; trial judges rule on these all the time. Item number 1 may be the real concern Judge Grant addressed, but the subcommittee does not see how changing the Evidence Rule will make it any better. Obviously, the interpreter cannot act as an expert witness on electronic authenticity. He or she may, however, act as an interpreter in a Rule 104 hearing so as to assist the court in determining if the electronic recording or data is admissible. One can translate the content in a Rule 104 hearing independently of whether it thereby becomes admissible. This is specifically provided for in Rule 104(a). "In making that determination the judge shall not apply the rules of evidence except for Rule 403 or a valid claim of privilege." Depending on the complexity of the recording or data offered, there may or may not be need of an expert witness. Most cell phone recordings are simple enough that, absent a bona fide claim of tampering, expert testimony would not be necessary. On the other end of the spectrum, text that has been deleted from a computer and then recovered might require extensive expert testimony. The methodology for this is within the professional expertise of the witnesses and would not

normally be delineated in the Evidence Rules any more than would be the technique for a radiologist to authenticate an X-ray.

While the subcommittee does not support any Evidence Rule amendment in this regard, it is not suggesting that the Court should not adopt standards for interpreters as to what hardware or software they may or may not handle as suggested in the November 30, 2011 attachment to Judge Grant's letter. That suggestion, however goes to the Court's power to regulate its own interpreters and not to the Rules of Evidence.

Respectfully submitted,
Harvey Weissbard, J.A.D. (ret.)
James Savio, J.S.C.
Mark Sullivan, J.S.C. (ret.)
Joseph Rodgers, Esq.
Christopher Struben, Esq.
Fernando Pinguelo. Esq.

APPENDIX B

NOTICE TO THE BAR

SUPREME COURT COMMITTEE ON THE RULES OF EVIDENCE
REQUEST FOR COMMENTS ON POSSIBLE UNIFIED MENTAL HEALTH CARE PROVIDER EVIDENTIARY PRIVILEGE

In 2011, the Supreme Court authorized its Committee on the Rules of Evidence ("Committee"), chaired by Appellate Division Presiding Judge Carmen Messano, to undertake a comprehensive study of the various mental health care provider evidentiary privileges with the goal of determining whether to recommend that New Jersey replace these many privileges with one unified privilege for all mental health care providers. Judge Messano appointed a subcommittee to study the issue, chaired by Appellate Division Judge Mitchel Ostrer.

A unified privilege for mental health care providers would possibly modify or replace the current privileges found in:

N.J.R.E. 505 (N.J.S.A. 45:14B-28), the Psychologist-Patient Privilege
N.J.R.E. 506 (N.J.S.A. 2A:84A-22.1 to -22.7), the Patient and Physician Privilege
N.J.R.E. 510 (N.J.S.A. 45:8B-29), the Marriage Counselor Privilege
N.J.R.E. 511 (N.J.S.A. 2A:84A-23), the Cleric-Penitent Privilege
N.J.R.E. 517 (N.J.S.A. 2A:84A-22.13 to -22.16), the Victim Counselor Privilege
N.J.R.E. 518 (N.J.S.A. 45:15BB-13), the Social Worker Privilege
N.J.S.A. 45:8B-49, the Licensed Professional Counselor Privilege

The Committee published a preliminary analysis of this issue in its 2009-2011 report to the Supreme Court, see page 9 and appendix C to that report. The report was published by Notice to the Bar dated February 3, 2011, and may be viewed online at njcourts.com/reports2011/evidence.pdf.

The Committee is now studying the possible recommendation of a unified privilege for all mental health care providers. As part of that study, the Committee would like to hear from groups and individuals with an interest in the subject. Accordingly, please send any comments on a unified mental health care provider privilege in writing by September 14, 2012 to: 2

Carol A. Welsch, Esq., Committee Staff, Committee on the Rules of Evidence

Hughes Justice Complex; P.O. Box 986

Trenton, New Jersey 08625

Comments may also be submitted via Internet e-mail to the following address: Comments.Mailbox@judiciary.state.nj.us.

The Committee will not consider comments submitted anonymously. Thus, those submitting comments by mail should include their name and address and those submitting comments by e-mail should include their name and e-mail address. Comments submitted in response to this notice will be subject to public disclosure.

The Committee on the Rules of Evidence expects to make its recommendation to the Supreme Court on a unified mental health care provider evidentiary privilege in January 2013. Public comments on the Committee's recommendation will also be solicited at that time.

/s/ Glenn A. Grant

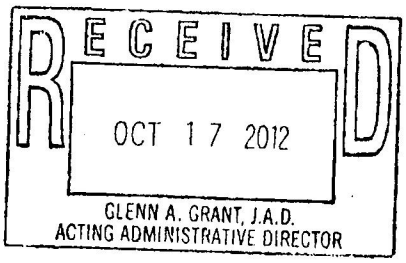
_____

Glenn A. Grant, J.A.D. Acting Administrative Director of the Courts

Dated: June 11, 2012

APPENDIX C

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

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[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

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[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

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[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

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[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.

Exhibit A

Proposed Amendments 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.

Exhibit B

Proposed Amendments 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.**

APPENDIX D

Excerpt from 2007-2009 Evidence Committee Report

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.

[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.