2013 - 2015 REPORT OF THE

SUPREME COURT COMMITTEE ON

THE RULES OF EVIDENCE

Part II

January 15, 2015

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N.J.R.E. 702 SUBCOMMITTEE REPORT

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The N.J.R.E. 702 subcommittee was formed to address the Supreme Court's directive to provide the Court with a report to determine if (1) "N.J.R.E. 702 and related case law are so unclear that New Jersey's trial courts are applying inconsistent standards in admitting expert testimony" and, (2) "whether current law is creating other problems, such as attracting a disproportionate number of negligence cases to the State, especially mass tort cases, that might otherwise be filed in other jurisdictions."

In furtherance of the subcommittee's charge, we gathered an abundance of information including (1) court statistics depicting the number of filings for the past ten years in case types most likely to necessitate expert testimony, (2) analyses of reported and unreported cases involving N.J.R.E. 702, (3) a comparison of how other states determine admissibility of expert testimony, (4) research analyzing the history and application of the three-part test for admissibility set forth in State v. Kelly, 97 N.J. 178 (1984) and repeatedly applied by the Supreme Court and in other published cases, (5) memos and e-mails from various groups setting forth their arguments as to why we should/should not amend N.J.R.E. 702 and (6) journal and research articles focusing on the present criteria of Fed. R. Evid. 702, as amended in 2000, and the adoption of same or similar standards by state courts.

This is not the first time the Supreme Court Committee on the Rules of Evidence ("Committee") has been directed to study N.J.R.E. 702. On November 16, 2000, the Committee discussed whether New Jersey should adopt the federal Daubert standard for the admission of expert testimony. Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d. 469 (1993). The Committee reached a consensus that it should take no action on the issue based on the belief that federal case law interpreting Daubert was then still unsettled and New Jersey's jurisprudence regarding the admission of expert testimony remained sound law. The

Committee's 2000-2002 report stressed that "it would be a mistake to change our rule to conform with the federal standard before the standard is well-defined." 2000-2002 Report of the Supreme Court Committee on the Rules of Evidence (Feb. 8, 2002).

The Committee addressed the issue again in 2008. It recommended in the 2007-2009 report to the Supreme Court that, without specifically endorsing and adopting the federal Daubert standard, the reliability aspect of the standard evolving from our State's case law should be expressly incorporated into the Rules of Evidence. The Committee noted that the New Jersey courts would retain more flexibility in clarifying and refining its own reliability test under state law, rather than importing wholesale the federal criteria and federal case law under Daubert. Specifically, the Committee recommended N.J.R.E. 702 should 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.

The New Jersey Supreme Court did not accept this recommendation, although the Court's substantive objections to that particular proposal are not known.

Since some of our current members were not on the Committee when we last considered N.J.R.E. 702, this report will briefly set forth the standards in the federal courts and New Jersey for determining the admissibility of expert testimony.

BACKGROUND OF FEDERAL LAW

The federal standard for determining the admissibility of expert testimony is guided by Fed. R. Evid. 702, as well as case interpretations of the rule. Prior to the 1975 enactment of the Federal Rules of Evidence, Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923), established

that the admissibility of expert testimony was held to the "general acceptance" test. The District of Columbia Appellate Court famously stated, "[w]hile courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs." Ibid.

Frye remained the dominant standard even after the initial adoption of the Federal Rules of Evidence in 1973. Twenty years later, the United States Supreme Court held that Fed. R. Evid. 702 superseded Frye. Daubert, supra, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d. 469. The Court noted that the drafting history did not mention Frye, and that a strict interpretation of the "'general acceptance' requirement would be at odds with the 'liberal thrust' of the Federal Rules." Id. at 588, 113 S. Ct. at 2794, 125 L. Ed. 2d at 479. In sum, Daubert confirmed the trial court's role in screening expert testimony at a preliminary hearing and recognized that it would be unreasonable to know the subject matter of testimony to an absolute degree of certainty. Id. at 590, 113 S. Ct. at 2795, 125 L. Ed. 2d at 481.

The Daubert test provides non-exclusive guidelines for a trial court to assess, including (1) whether the scientific knowledge can be or has been tested, (2) whether the methodology relied on has been subject to peer review or publication, (3) whether there is a known or potential rate of error, and (4) whether the theory or technique enjoys general acceptance in the scientific community. Id. at 593-94, 113 S. Ct. at 2796-2798, 125 L. Ed. 2d at 482-485. Though "general acceptance" was maintained as a consideration, it is no longer "a necessary precondition to the admissibility of scientific evidence." Id. at 597, 113 S. Ct. at 2799, 125 L. Ed. 2d at 485. In sum, the Court declared that "the Rules of Evidence – especially Rule 702 – do assign to the trial judge

the task of ensuring that an expert's testimony both rests on a *reliable* foundation and is *relevant* to the task at hand." Ibid. (emphasis added).

After Daubert, the United States Supreme Court elaborated on the new standard in General Electric Co. v. Joiner, 522 U.S. 136, 118 S. Ct. 512, 139 L. Ed. 2d 508 (1997). Joiner held that abuse of discretion was the proper standard of review for determinations as to admissibility, but that a trial court could nevertheless exclude testimony that used reliable methodology. Id. at 146, 118 S. Ct. at 519, 139 L. Ed. 2d at 519. ("A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered."). In the third decision of what has been referred to as "the Daubert trilogy," the Supreme Court held that Daubert applies to all experts and not just scientific experts. See Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999) (holding that the federal standard for expert testimony applies to engineers and other experts who are not scientists).

Fed. R. Evid. 702 was amended in 2000 to encompass the aforementioned developments. Prior to the 2000 amendment, Fed. R. Evid. 702 stated:

> 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 expect by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

After the 2000 amendment Fed. R. Evid. 702 stated:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
> (b) the testimony is based on sufficient facts or data;
> (c) the testimony is the product of reliable principles and methods; and

> (d) the expert has reliably applied the principles and methods to the facts of the case.

In the advisory committee notes, an explanation of the Daubert trilogy was provided. Fed. R. Evid. 702 advisory committee's note ("The standards set forth in the amendment are broad enough to require consideration of any or all of the specific Daubert factors where appropriate."). However, the notes stated that the amendment was not an attempt to codify specific factors, as Daubert indicated that none of the proffered considerations are dispositive. Id.

DEVELOPMENT OF NEW JERSEY LAW

In New Jersey, cases that require courts to determine admissible expert testimony all use the same guidelines that have been established in Kelly, supra, 97 N.J. at 208. These guidelines, which are not explicitly stated in the text of N.J.R.E. 702, are found in the first comment following N.J.R.E. 702. Current N.J. Rules of Evidence, comment on N.J.R.E. 702. This three-part test, that was established through New Jersey case law and is used in all expert testimony cases, reads as follows:

> (1) [T]he intended testimony must concern a subject matter that is beyond the ken of the average juror; (2) the field testified to must be at a state of the art such that an expert's testimony could be sufficiently reliable; and (3) the witness must have sufficient expertise to offer the intended testimony.

Id. at 208. The history of the Kelly test can be found in Document 3.

Since the Kelly test was developed it has been cited in practically all New Jersey cases that involve the admission of expert testimony. The case itself is cited directly by over 430 cases and many other cases cite to the three-part test without mention of Kelly. The most notable cases that cite to the three-part Kelly test are Rubanick, Landrigan, and Kemp. Rubanick v. Witco Chemical Corp., 125 N.J. 421, 431-432 (1991), Landrigan v. Celotex Corp., 127 N.J. 404, 414-15 (1992), and Kemp v. State, 174 N.J. 412, 424 (2002).

Two years before the Daubert opinion, the New Jersey Supreme Court in Rubanick, supra, 125 N.J. 421, relaxed the "general acceptance" standard for the admissibility of expert testimony in toxic-tort litigation. Noting that the Third Circuit was more flexible with the reliability of emerging scientific theories in toxic-tort litigation, the Court held that a new scientific theory in that particular subject matter can be reliable "if it is based on sound methodology that draws on scientific studies reasonably relied on in the scientific community, and has actually been used and applied by responsible experts or practitioners in the particular field." Id. at 447. Notably, the Court in Rubanick also quoted from and applied features of the general admissibility test it had previously announced in Kelly, including whether the field of science involved "must be at a state of the art such that an expert's testimony could be sufficiently reliable." Id. at 431-32 (quoting Kelly, supra, 97 N.J. at 210).

Unlike the federal approach, which required a separate determination for the reliability of the data used *and* the methodology used to interpret the data, Rubanick distinguished the corresponding State rule as employing a single determination of reliability. Id. at 228. Rubanick also provided a distinct explanation of qualifications for the proffered expert, such as sufficient education in their field, an ability to assess data and apply scientific methodology, and an explanation of the conclusion reached. Id. at 449. Moreover, future trial courts were directed to consider whether "comparable experts accept the soundness of the methodology" and actually rely on that information. Id. at 451-52.

One year later, the Court in Landrigan, 127 N.J. 404, provided additional substance to the new toxic-tort law requirements for the admission of expert testimony. The Court reaffirmed the Kelly test, quoting all three Kelly factors and identifying them as "basic requirements" of the evidence rule. Id. at 413. In addition, the opinion announced that the proffered expert should be

able to "identify factual bases for their conclusions, explain their methodology, and demonstrate that both . . . are scientifically reliable." Id. at 417. For guidance, an expert may draw support from professional journals, texts, conferences, symposia, or judicial opinions accepting the methodology. Id. at 417. In other words, the court should examine each step in the witness' reasoning. Id. at 421. Significantly, the Court reaffirmed in Landrigan the Kelly test, this time quoting all three Kelly factors and identifying them as "basic requirements" of the evidence rule. Id. at 413.

In 1992, the Court adopted N.J.R.E. 702 to replace Evid. R. 56(2) and tracked the language of the then-existing version of Fed. R. Evid. 702. The current rule reads as follows:

> 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.

N.J.R.E. 702 official comment states that:

> Rule 702 follows Fed. R. Evid. 702 verbatim and makes only minor language changes in the first sentence of Evid R. 56(2). The foundation requirement set forth in Evid. R. 19 has been omitted as necessarily implied by the use in this rule of the generic word "witness" rather than the more limited word "expert" used in the 1967 New Jersey analogue. Note further for that reason, the applicability of the general conditional acceptance provision of Rule 104(b) to the proffered testimony of an expert witness. Consequently the similar provision of N.J.R.E. 19 is redundant.
>
> This rule intends to incorporate New Jersey case law establishing the general criteria for admissibility of expert testimony articulated by State v. Kelly, 97 N.J. 178, 208 (1984). As restated by Landrigan v. The Celotex Corporation, 127 N.J. 404, 413 (1992), these criteria include the requirements that "(1) the intended testimony must concern a subject matter that is beyond the ken of the average juror; (2) the field testified to must be at a state of the act such that an expert's testimony could be sufficiently reliable; and (3) the witness must have sufficient expertise to offer the intended testimony."

Current N.J. Rules of Evidence, comment on N.J.R.E. 702 (2014) (alteration to original).

These narrow developments relating to toxic-tort cases were expanded in Kemp, supra, 174 N.J. 412, where New Jersey further clarified the standard for the admission of expert testimony under the language of N.J.RE. 702, which has displaced former Evid. R. 56(2). In explaining the rule, Kemp first confirmed that N.J.R.E. 702 tracks the 1973 version of the federal rule despite ensuing developments in the federal case law. Id. at 423-24. Specifically the court stated that "[w]e do not intend by this opinion to incorporate the Daubert factors into N.J.R.E. 702." Kemp, supra, 174 N.J. at 424 n.3.

Next, Kemp stated that the Kelly criteria requires "(1) the intended testimony must concern a subject matter that is beyond the ken of the average juror; (2) the field testified to must be at a state of the art such that an expert's testimony could be sufficiently reliable; and (3) the witness must have sufficient expertise to offer the intended testimony." Id. at 424 (citing Landrigan, supra, 127 N.J. at 413 (quoting Kelly, supra, 97 N.J. at 208)). After evaluating the many burdens of the "general acceptance" test on other tort claims, the Court held that the exception carved out in Rubanick should be extended beyond toxic-tort litigation. Id. at 430.

In reaching this decision, the Court in Kemp explained how "[s]everal other varieties of tort litigation exist in which a medical cause-effect relationship has not been confirmed . . . but compelling evidence nevertheless suggests that such a relationship exists." Ibid. The proffered witness was a professor at a medical school and published writer, who had relied on the plaintiff's medical reports which were written by different doctors and specialists at different time periods. Id. at 418. The witness drew conclusions from the reports, explained his process of reasoning, and argued for and against competing medical studies. Id. at 431. The only problem with the proffered testimony was the witness' failure to demonstrate that his methodology was consistent with other

qualified experts in the field. Id. at 431-32. However, the trial court merely evaluated a deposition, allowing the defense to more easily attack the reliability of the opinion. Id. at 432.

Kemp analyzed then existing federal precedent for determining reliability of expert testimony at an in limine hearing. Id. at 428 (citing Padillas v. Stork-Gamco, Inc., 186 F.3d 412, 417 (1999)). At the federal level, the Third Circuit emphasized how the party seeking to admit evidence should have a fair opportunity to justify their submissions. Ibid. (citing Padillas, 186 F.3d at 417). Even where a party did not request an in limine hearing, federal case law had indicated that the trial court "has an independent responsibility for the proper management of complex litigation." Id. at 429 (citing Padillas, 186 F.3d at 417). Kemp agreed with this approach, holding that "in cases in which the scientific reliability of an expert's opinion is challenged and the court's ruling on admissibility may be dispositive of the merits, the sounder practice is to afford the proponent of the expert's opinion an opportunity to prove its admissibility at a Rule 104 hearing." Id. at 432-33.

Subsequently, 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, 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 a 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).

Notably, the Court's opinions in Hisenaj, supra, 194 N.J. at 15-16 (describing N.J.R.E. 702 as having "three well-known prerequisites," citing the factors derived from Kelly) and State v. Jenewicz, supra, 193 N.J. at 454 (repeating the three requirements of Kelly and noting that they are "construed liberally in light of Rule 702's tilt in favor of the admissibility of expert testimony") continued to endorse and apply the three-part criteria for admissibility first expressed in Kelly. These standards continue to be applied by the Court in ensuing civil and criminal opinions. See State v. Rosales, 202 N.J. 549 (2010); Agha v. Feiner, 198 N.J. 50, 62 (2009); State v. Reed, 197 N.J. 280 (2009); Polzo v. County of Essex, 196 N.J. 569, 582 (2008); State v. Joseph, 426 N.J. Super. 204, 219 (App. Div. 2012); State v. Locascio, 425 N.J. Super. 474, 489 (App. Div. 2012). So, the holdings in Kelly, Rubanick, and Kemp would appear to apply not only to determining causation in toxic tort and medical malpractice cases, but also every civil and criminal case in which expert testimony is offered.

ANALYSIS

The impetus for the Court's directive appears to be the renewed requests from various civil litigation defense and business groups who urge an amendment of N.J.R.E. 702 to incorporate a

three-factor reliability standard similar to the 2000 version of Fed. R. Evid. 702. However, the Court did not phrase its inquiry to the Committee this way. The Committee is not being asked whether the 2000 version of Fed. R. Evid. 702 should be adopted, either verbatim or in some variation. Nor is the Committee being asked, as it had been in prior rules cycles, to consider generally whether the federal Daubert standard should be adopted as part of our expert witness admissibility jurisprudence. As we understand the Court's present charge, the Committee is only being asked whether current N.J.R.E. 702 and related case law are "so unclear" that "inconsistent standards" are being applied by trial judges and whether our current law is creating other problems, such as being so lax as to render New Jersey a magnet for foreign-based tort litigation.

In order to answer the questions posed to us, we had four interns conduct research on various topics. Our recommendation is based in part on the five documents attached to this report. The first document addresses the current admission of expert testimony approaches of each state to admission of expert testimony. The second document analyzes all reported and unreported cases dealing with N.J.R.E. 702. The third document sets forth the history of the Kelly three-part test. The fourth document is a chart of civil filings for the past ten years in the areas of law most effected by expert testimony and the fifth document is a 2008 study of the mass tort cases filed by non-New Jersey residents.

Based on the data the Committee has collected to date, it cannot be said that either the current version of N.J.R.E. 702 or the Court's development of the jurisprudence on the issue is unclear. Quite the contrary, the Court has been very clear in its cases, particularly Kelly, Rubanick, Landrigan, Kemp, and Hisenaj, in defining the standards for determining the admissibility of expert testimony. See Hisenaj, supra, 194 N.J. 6; Kelly, supra, 97 N.J. 178; Kemp, supra, 174 N.J. 412; Landrigan, supra, 127 N.J. 404; Rubanick, supra, 125 N.J. 421.

Although the Court's jurisprudence to date has not expressly adopted the Daubert standard, as some states have done, the Court's current case-law standards as pronounced in Rubanick, Landrigan, Kemp, and Hisenaj are clear. Id. In fact, the Court in Hisenaj clearly defined and summarized the three accepted methods for establishing scientific reliability under New Jersey law. Hisenaj, supra, 194 N.J. at 17. If, as posited by the groups advocating a rule change, trial courts were applying inconsistent standards in admitting expert testimony, then this is not because the Court has been unclear in its case law articulating the requirements for expert testimony admissibility.

The general consensus of the subcommittee is that the language of the current N.J.R.E. 702 is not unclear or otherwise preventing the development of the law in this area. It is important to emphasize that the 2000 amendment of Fed. R. Evid. 702 did not establish the federal standard for expert witness admissibility. The 2000 amendment was essentially a housekeeping measure to more closely conform the language of Fed. R. Evid. 702 to the United States Supreme Court's already issued decisions in Daubert, Joiner and Kumho Tire. See Daubert, supra, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d. 469; Joiner, supra, 522 U.S. 136, 118 S. Ct. 512, 139 L. Ed. 2d 508; Kumho Tire, supra, 526 U.S. 137, 119 S. Ct. 1167, 143 L. Ed. 2d 238. As the Fed. R. Evid. 702 advisory committee's note states: "Rule 702 has been amended in response to Daubert v. Merrell Dow Pharmaceuticals, Inc, 509 U.S. 579 (1993), and to the many cases applying Daubert, including Kumho Tire Co. v. Carmichael, 199 S.Ct. 1167 (1999)."

Significantly, the so-called Daubert trilogy (Daubert, supra, 509 U.S. 57, 113 S. Ct. 2786, 125 L. Ed. 2d. 469; Joiner, supra, 522 U.S. 136, 118 S. Ct. 512, 139 L. Ed. 2d 508; Kumho Tire, supra, 526 U.S. 137, 119 S. Ct. 1167, 143 L. Ed. 2d 238) were all decided under the original version of Fed. R. Evid. 702, which is identical to the language of N.J.R.E. 702. Thus, nothing in

the language of current N.J.R.E. 702 prevents the New Jersey Supreme Court from adopting a reliability standard identical to or similar to Daubert. In fact, a number of state courts, as reflected in Document 1, have adopted the Daubert standard while still maintaining the original version of Fed. R. Evid. 702 and without adopting the 2000 version of Fed. R. Evid. 702. See, e.g., Document 1 14, 19, 25, 26, 29, 32, 33. Importantly, this is a step that the New Jersey Supreme Court to date has declined to take. In fact, the Supreme Court in Kemp was careful to point out that "[w]e do not intend by this opinion to incorporate the Daubert factors into N.J.R.E. 702." Kemp, supra, 174 N.J. at 424 n.3.

New Jersey falls into a specific group of states when looking at the impact that the Daubert decision has had on the admissibility of expert testimony. New Jersey is one of eight states that had its own test established prior to the Daubert decision and the subsequent change to Fed. R. Evid. 702. The states that did not have their own test previously followed the guidelines of the Federal Rule, and most amended their test to parallel the Daubert standard. Only two of the eight states that already had their own test for handling admissible expert testimony chose to adopt the Daubert standard (Oregon and Louisiana). Both of these states adopted the test because they felt as though their current guidelines were virtually the same as those set out in Daubert. The other states have expressed that because their rule is effective and well established through case law there is no reason to transition to the federal guidelines. A few of these states have mentioned why they have chosen not to follow Daubert. North Carolina contends that the Daubert test is too stringent, while Minnesota states that the test takes the authority to determine what is scientific away from scientists and gives the power to judges. Document 1 17, 23.

As noted above, the 2000 amendment of Fed. R. Evid. 702 merely conformed to the already existing case law established by the United States Supreme Court. In contrast, an amendment of

N.J.R.E. 702 to track, either in verbatim or similar form, the language of Fed. R. Evid. 702 would work the opposite result. It would impose the broader federal standard by rule amendment when the New Jersey Supreme Court in its opinions has declined to do so.

The tradition in New Jersey has been for the law in this area to develop through case law, as reflected in the Court's decisions in, among others, Rubanick, Landrigan, Kemp, and Hesinaj. Nothing in the current language of N.J.R.E. 702 prevents the New Jersey Supreme Court from adopting the Daubert standard in full or in modified form. More importantly, however, there is nothing unclear about the current pronouncement of the law as defined by the New Jersey Supreme Court or as expressed in the language of N.J.R.E. 702.

We also considered several studies on the impact of Daubert and the various approaches to its adoption or modification in the state courts. These studies suggest that the differences in the standards may not be as significant as thought. As one 2012 article published in the Supreme Court Economic Review concluded:

> The *Daubert* trilogy creates a new standard for determining the admissibility of expert evidence in federal court. Because of its focus on methodological rigor, many tort reformers trumpet the *Daubert* standards as a way to get rid of junk science in the courtroom. Conventional wisdom holds that *Daubert* led to a stronger scrutiny of expert evidence in the federal courts, seemingly supporting the tort reformers' view. This has led to a related effort to encourage state courts to adopt the *Daubert* standard. Despite all of these efforts, as well as the efforts of those opposing adoption on the grounds that *Daubert* is overly restrictive, there is virtually no systematic evidence supporting the view that adoption of *Daubert* makes any difference at all.
>
> … While we cannot determine exactly why *Daubert* seems to have no systematic effect, our results are consistent with other empirical studies on this topic. While none of these studies is perfect, their imperfections are largely orthogonal to each other, making it unlikely that design flaws or data limitations are driving this non-effect. While courts may be scrutinizing expert evidence more

> carefully, as suggested by the RAND research at the federal level, it seems unlikely that this has anything to do with *Daubert* per se.

Eric Helland and Jonathan Klick, "Does Anyone Get Stopped at the Gate? An Empirical Assessment of the Daubert Trilogy in the States," 20 S. Ct. Econ. Rev 1 (2012).

Lastly, the statistics we received from the AOC reveal that there is a statewide decrease in new filings, but it does not indicate the filing of mass tort cases by non-New Jersey residents. Document 4. During our consideration of the issues, the New Jersey Civil Justice Institute submitted a 2008 study prepared by the law firm of McCarter & English listing the number of certain mass tort cases filed by non-New Jersey residents. According to the McCarter & English study 27,718 (or 93%) of the 29,703 mass tort cases involving ten specific products were filed by non-New Jersey residents in our state courts. Document 5. However, we have no data, for comparative purposes, of the percentages of out-of-state plaintiffs who file mass tort cases in other states, particularly in instances where those states are the home states of defendant manufacturers or companies. Even if, for the sake of discussion, New Jersey courts happen to draw a comparatively higher percentage of foreign plaintiffs than other states, the Committee has no empirical basis to ascertain whether our standards of expert opinion admissibility under N.J.R.E. 702 are responsible for that phenomenon, or whether other factors (such as substantive New Jersey products liability law, summary judgment standards, or juror demographics) play a more significant role in venue selection by potential plaintiffs.

CONCLUSION

The Supreme Court gave us a very pointed fact-finding task rather than a directive to propose a rule change. Historically, when the Supreme Court wanted us to consider a new rule, they expressly said so (prior 702 directives, forfeiture by wrongdoing hearsay exception, and 609 impeachment changes).

We have concluded that the trial courts are not applying inconsistent standards in admitting expert testimony, and there is no definite or conclusive evidence that the current law is creating other problems, such as attracting a disproportionate number of negligence cases or other civil litigation matters to be venued in this state. Nevertheless, some members of the subcommittee perceive that there might be some benefit to trial judges and practicing lawyers if the Court, in its discretion, were to choose to enhance the clarity of the rule by making the present case-law criteria more explicit within the text of the rule itself.

If in the future the Court were to request for the Committee to consider the possibility of a rule change, then the three-part Kelly test would be the best candidate for rule codification given its frequent reference in almost all New Jersey cases that involve the admissibility of expert testimony.

On the other hand, the Subcommittee is mindful of the Court's institutional interests in maintaining flexibility in the ability of future case law to refine and modify the admissibility standards without "locking in" a more detailed codified test in the text of the rule.

Document 1

MEMORANDUM

To: The Honorable Jamie D. Happas, P.J.S.C.

From: Ashley Abraham Williams, Esq.

Date: February 28, 2014

RE: Evidence Rule 702 Project: Current State Approaches to Admission of Expert Testimony (Excluding NJ)

The following memorandum addresses the current approaches of each state, except New Jersey, to admission of expert testimony. For the most part, each section includes a brief description of the current state statute or rule regarding expert testimony, as well as information about whether the state follows the Frye "general acceptance" standard,[1] the Daubert trilogy reliability analysis standard,[2] or neither approach.

Appendix 1 is a chart detailing each state's rule as well as a checked box indicating whether the state follows Frye, Daubert, or neither. In total, seven states follow Frye, thirty-nine states follow Daubert, and ten states follow neither approach. Appendix 2 is a color-coded map of the United States.

1. Alabama

Effective January 1, 2012, the Alabama Legislature amended Rule 702 of the Alabama Rules of Evidence to adopt the Daubert-based standard for scientific expert testimony.[3] The rule as codified is split into two sections, where section (b) lays out the Daubert standard and limits its

[1] See Frye v. United States, 293 F. 1013 (D.C. 1923).
[2] See Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993); see also Gen. Elec. Co. v. Joiner, 522 U.S. 136 (1997); see also Kumho Tire v. Carmichael, 526 U.S. 137 (1999).
[3] See Ala. R. Evid. 702 advisory committee's notes to amendment to Rule 702 eff. Jan. 1, 2012.

application to scientific evidence only, including testimony regarding DNA analysis.[4] However, the Daubert standard does not apply in domestic relations cases, child-support cases, juvenile cases, probate cases, and certain criminal cases.[5]

2. Alaska

While the Supreme Court of Alaska adopted the Daubert standard as it applies to scientific expert testimony in 1999,[6] the state has still not yet decided whether to expand its application to other types of expert testimony by adopting the rule of Kumho Tire.[7] The Alaska Supreme Court rejected the Kumho Tire expansion in 2005, and limited the Daubert analysis "to expert testimony based on scientific theory, as opposed to testimony based upon the expert's personal experience."[8] This approach, however, may lead to abuse by allowing parties to have their experts "avoid serious scrutiny by classifying the experts' testimonies as experience-based rather than scientific."[9]

3. Arizona

Effective January 1, 2012, Arizona Rule of Evidence 702 was amended to conform to the Federal Rule of Evidence 702, as restyled. The Comment to the 2012 Amendment was derived in part from the Committee Notes on Rules—2000 Amendment to Federal Rule of Evidence 702.[10] The Senate Bill sponsor touted the change to the Daubert standard as a mechanism to make Arizona

[4] Ala. R. Evid. Rule 702 court comment to amendment to Rule 702 eff. Jan. 1, 2012.
[5] Id.
[6] State v. Coon, 974 P.2d 386, 395 (Alaska 1999).
[7] Ratlif v. State, 110 P.3d 982, 985 (Alaska Ct. App. 2005).
[8] Marron v. Stromstad ,123 P.3d 992, 1004 (Alaska 2005).
[9] Gregory R. Henrikson, Dimond, Not Daubert: Reviving the Discretionary Standard of Expert Admission in Alaska, 25 Alaska L. Rev. 213 (2008).
[10] Order Amending the Arizona Rules of Evidence and Rule 17.4(F), Arizona Rules of Criminal Procedure, Filed Sept. 7, 2011.

a "competitive business location," while others in the legal community said it was made in order to follow the federal system and improve judicial efficiency.[11] Arizona courts will now consider as persuasive authority all federal cases discussing the Daubert/Rule 702 standard.

4. Arkansas

Currently Arkansas Rule of Evidence 702 follows the 1973 version of Fed. R. Evid. 702. However, without much explanation, the Arkansas Supreme Court adopted the Daubert standard in 2000 in Farm Bureau Mut. Ins. Co. v. Foote.[12] Prior to the change, Arkansas used the three-pronged Prater test of reliability, special balancing, and fit.[13] While the Foote court called the Prater test a "strikingly similar approach,"[14] the Daubert test is seemingly more liberal than the Prater test.[15] Nevertheless, in a limited analysis, two out of the three cases most notable Arkansas cases on expert testimony after Daubert would probably have been decided the same under the Prater test.[16] Thus, it is unclear whether the switch to the Daubert standard really made a difference in Arkansas jurisprudence.

5. California

[11] Emily Ward, Arizona Supreme Court Adopts Daubert Standard for Expert Witness Testimony After Constitutional Dustup, Ariz. L. Rev. Syl. (2011), *available at* http://www.arizonalawreview.org/2011/syllabus/az-supreme-court-adopts-daubert-standard-for-expert.
[12] See Farm Bureau Mut. Ins. Co. of Ark. v. Foote, 341 Ark. 105, 115, (2000).
[13] Chin Kuay, Ten Years After Arkansas Adopted Daubert: Anything New Under the Sun?, 65 Ark. L. Rev. 409, 425 (2012).
[14] Foote, 341 Ark. at 116.
[15] Kuay, 65 Ark. L. Rev. at 432.
[16] Id. at 431.

For decades California held strong to the Kelly/Frye standard, refusing to adopt a Daubert-style analysis to expert testimony. Some appellate decisions narrowed the application of Kelly/Frye stating that that Evidence Code Section 801 requires trial courts to analyze whether the foundation for an expert's opinion, on its face, supports the particular opinion offered.[17] However, in 2012, the California Supreme Court unanimously adopted a gatekeeper role for trial courts. In Sargon Enterprises, Inc., v. University of Southern California,[18] the California Supreme Court cited the authority and approval of Daubert, Joiner and Kumho Tire in requiring trial courts to conduct a substantive review of the foundation, methods and reasoning underlying ordinary expert opinions, i.e., expert opinions not based upon novel scientific techniques.[19] Sargon warns, though, that "[t]he trial court's gatekeeping role does not involve choosing between competing expert opinions."

Kirk A. Wilkinson and Garrett L. Jansma, attorneys at Latham & Watkins, suggest,

> While Sargon never goes go so far as to say that Daubert applies to ordinary expert opinion testimony in California, by relying so heavily on the do's and don'ts of Daubert, the court suggests that California's trial courts should look to their federal counterparts to see how to execute their gatekeeping responsibility. And by doing so, practitioners now have a basis for relying on the extensive federal case law applying Daubert to challenge the admissibility of all expert opinions.[20]

6. Colorado

[17] In Re Lockheed Litigation Cases 115 Cal. App. 4th 558 (Cal. Ct. App. 2004)). See also Roberti v. Andy's Termite and Pest Control, Inc., 113 Cal. App. 4th 893(Cal. Ct. App. 2003) (holding that the Kelly-Frye rule had no application to expert medical testimony).
[18] Sargon Enterprises, Inc., v. University of Southern California, 55 Cal. 4th 747 (Cal. 2012).
[19] In footnote 6, the court clarifies that this case does not disturb the ''general acceptance'' test for admissibility of expert testimony based on new scientific techniques; Sargon, 55 Cal. 4th at 772, n.6.).
[20] Kirk A. Wilkinson and Garrett L. Jansma, Sargon Augments Trial Judge's Gatekeeping Role in California Courts, Expert Evidence Report, 13 EXER 211, 04/22/2013.

In 2001, the Colorado Supreme Court concluded that the Frye "general acceptance" test was inappropriate as the sole dispositive standard for determining the admissibility of scientific evidence because it was too rigid.[21] Instead, the court found that the trial court's inquiry should focus on Rule 702's "overarching mandate of reliability and relevance" by considering the totality of the circumstances, rather than any specific factors. The Daubert factors may or may not be pertinent, and thus, are not necessary to evaluate in each case. Note that the Colorado Rule of Evidence 702 still reads as the 1973 version of Federal Rule of Evidence 702 verbatim.

7. Connecticut

In 1997, the Connecticut Supreme Court afforded trial court judges a gatekeeping role in relation to scientific evidence.[22] The court decided to follow the Daubert approach,[23] and ordered trial judges to inquire whether "sufficient indicia of legitimacy exist to support the conclusion that evidence derived from the principle may be profitably considered by a fact finder at trial."[24] Furthermore, the court listed a non-exclusive list of factors to consider in deciding whether scientific evidence is reliable.[25] The Commentary to the Connecticut Code of Evidence asserts that the Code does not take a position on whether or not to follow Kumho Tire and apply Daubert to all expert testimony.[26] Although the Connecticut Supreme Court has not yet decided the issue, the

[21] People v. Shreck, 22 P.3d 68, 77 (Colo. 2001).
[22] State v. Porter, 241 Conn. 57, 73 (Conn. 1997).
[23] Id. at 68.
[24] Id. at 91.
[25] Id. at 84-86.
[26] Official 2000 Connecticut Code of Evidence (2009 Edition), *available at* http://www.jud.state.ct.us/Publications/code2000.pdf

Appellate Court of Connecticut seemed to follow the Kumho Tire approach by affirming the trial court's decision to not limit the Daubert rationale to scientific testimony.[27]

8. Delaware

Effective December 31, 2000, the Delaware Uniform Rule of Evidence 702 was changed to adopt the Daubert and Kumho Tires decisions by adding a clause that directed that expert testimony be based on sufficient facts or data and upon reliable principles and methods that were reliably applied to the facts at issue.[28] The official commentary states that the Delaware rule was changed to be consistent with the federal rule, and that Kumho Tire and Daubert correctly interpret the Delaware rule.[29]

According to researchers from the National Center for State Courts who studied a small sample of Delaware products liability cases, the Daubert trilogy had no effect on the likelihood of a motion to exclude an expert witness and the likelihood of summary judgment.[30]

9. Florida

For decades Florida strictly adhered to the Frye standard until very recently when the state legislature adopted the federal Daubert trilogy standard.[31] On June 4, 2013, Florida Governor Rick Scott signed into law the amended evidentiary rule, which expressly cites the legislature's intent

[27] Poulin v. Yasner, 64 Conn. App. 730, 740-42 (Conn. App. Ct. 2001).
[28] Thomas J. Reed, The Re-Birth of the Delaware Rules of Evidence: A Summary of the 2002 Changes in the Delaware Uniform Rules of Evidence, 5 Del. L. Rev. 155, 197-98 (2002).
[29] Id. at n.97.
[30] Eric Helland and Jonathan Klick, Does Anyone Get Stopped at the Gate? An Empirical Assessment of the Daubert Trilogy in the States, 20 S. Ct. Econ. Rev. 1, 9 (2012) (the sample included only 57 cases).
[31] See Fla. Stat. § 90.702 (2013) amendment notes (Florida Legislature intends to adopt standards provided in Daubert, Joiner, and Kumho Tire).

to pattern the rule after FRE 702.[32] Governor Scott explained his approval stating, "Florida was the only stated in the South that did not use this common sense method for determining who is an expert. By signing [the statute] into law, we will create a fairer system for Florida families."[33]

10. Georgia

In 2005, the Georgia General Assembly enacted the Tort Reform Act of 2005, which, among other things, amended the standard for admissibility of expert testimony.[34] The statute specifically mentions the legislature's intent to follow Daubert and its progeny in all civil cases.[35] Furthermore, the statute directs courts to draw from federal case law in applying the Daubert standard.[36]

11. Hawaii

Hawaii Rule of Evidence 702 tracks the 1973 version of FRE 702, except that it added the following sentence: "In determining the issue of assistance to the trier of fact, the court may consider the trustworthiness and validity of the scientific technique or mode of analysis employed by the proffered expert."[37] This sentence was added to clarify that the rule necessarily incorporates a reliability factor, and that although the Frye "general acceptance" test is highly probative of

[32] Fla. Stat. § 90.702 (2013).
[33] Anaysa Gallardo, Florida Expert Evidence 2.0 - The Frye to Daubert Upgrade, *available at* http://www.cozen.com/news-resources/publications/2013/florida-expert-evidence-2-0---the-frye-to-daubert-upgrade.
[34] Mason v. Home Depot U.S.A., Inc., 658 S.E.2d 603, 605–06 (Ga. 2008).
[35] O.C.G.A. 24-7-702(f) (2013).
[36] Id.
[37] Haw. Rev. Stat. Ann. § 702 (2013).

reliability, the Frye test "should not be used as an exclusive threshold for admissibility determinations."[38]

The Hawaii Supreme Court has not expressly adopted nor rejected the Daubert test.[39] However, the court found the Federal Rules of Evidence and federal case law, including Daubert, to be instructive in interpreting the Hawaii Rules of Evidence.[40]

12. Idaho

Idaho Rule of Evidence 702 is identical to FRE 702 prior to its 2000 amendment.[41] In 1986, the Idaho Supreme Court explained that Idaho adopted the Federal Rules of Evidence almost exactly is in order to promote uniformity between the state and federal courts.[42] However, the Idaho Supreme Court has been reluctant to follow either Frye or Daubert, stating only that I.R.E. 702 controls without any explanation as to how it differed from either test.[43] Even as recently as February 14, 2014, the Idaho Supreme Court reaffirmed that it has never adopted the Daubert test.[44] Matthew Gordon, an Idaho-based attorney, argues that this refusal to adopt Daubert is based on a misunderstanding of Daubert's treatment of "general acceptance" as a permissive factor rather than a requirement. Nevertheless, the Idaho Supreme Court has looked to Daubert for "guidance" when applying I.R.E. 702, but only in criminal cases.[45]

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[38] HRE chap 626, HRS Rule 702, 1992 Supplemental Commentary to Rule 702.
[39] State v. Vliet, 19 P.3d 42, 53 (Haw. 2001).
[40] Id.
[41] See Idaho Rule of Evidence 702 (2013).
[42] Chacon v. Sperry Corp., 723 P.2d 814, 819 (Idaho 1986).
[43] Matthew Gordon, Dancing Around Daubert: The Idaho Supreme Court's Puzzling Approach to Expert Testimony, 47 Idaho L. Rev. 523, 525 (2011).
[44] Nield v. Pocatello Health Servs., 2014 Ida. LEXIS 50, at *51 (Feb. 14, 2014) (W. Jones, J., Concurring).
[45] Martin S. Kaufman, Status of Daubert in State Courts, Atlantic Legal Foundation (2006).

13. Illinois

Illinois strictly adheres to the Frye test of admissibility,[46] and applies it only to new or novel scientific methodologies.[47] The Illinois Supreme Court clarified that a trial court does not need to look at the reliability of an expert's methodology because that inquiry is subsumed by the inquiry into the methodology's general acceptance.[48] In other words, "a principle or technique is not generally accepted in the scientific community if it is by nature unreliable."[49] Thus, the court emphatically rejected any "Frye-plus-reliability" tests.[50]

14. Indiana

Indiana recently amended its Rule 702, which became effective on January 1, 2014. Although the text has changed, the Rule merely clarifies existing Indiana law, which makes "reliability" the standard for admitting scientific evidence rather than the Frye "general acceptance" standard.[51] In particular, subsection (b) of Ind. R. Evid. 702 now reads: "Expert scientific testimony is admissible only if the court is satisfied that the expert testimony rests upon reliable scientific principles."

The Indiana Supreme Court stated that the concerns driving Daubert coincide with the reliability requirement of Ind. R. Evid. 702, and therefore courts can consider the Daubert factors in determining reliability.[52] However, the court noted that while Daubert is helpful, it is not

[46] People v. Robinson, 2013 Ill. App. LEXIS 832, *44 (Ill. App. Ct. 2013).
[47] People v. Simmons, 821 N.E.2d 1184, 1189 (Ill. 2004).
[48] Donaldson v. Cent. Ill. Pub. Serv. Co., 767 N.E.2d 314, 326 (Ill. 2002).
[49] Id.
[50] Id.
[51] Ind. R. Evid. 702 committee commentary (2013).
[52] Malinski v. State, 794 N.E.2d 1071, 1084 (Ind. 2003)

controlling.[53] Furthermore, the court declined to follow Kumho Tire, and instead limited the reliability analysis to scientific expert testimony only.[54]

15. Iowa

The Iowa expert testimony statute is identical to the 1973 version of Fed. R. Evid. 702.[55] Generally, Iowa has been "committed to a liberal view on the admissibility of expert testimony."[56] The Supreme Court of Iowa rejected the Frye test, and instead endorsed an ad hoc approach to assessing reliability.[57] For particularly novel or complex scientific evidence, as opposed to technical or other nonscientific evidence, the court suggests considering the Daubert factors.[58] For example, Daubert would be inapplicable to "general medical issues," but would be applicable to toxic-tort cases involving complex medical issues.[59] Furthermore, the judicial gatekeeping role should be more expansive in difficult scientific cases.

16. Kansas

Kansas continues to use the Frye test for admissibility of scientific opinion, and as of January 2013 the Supreme Court of Kansas has shown no intention of adopting Daubert.[60] Kansas case law has not given much explanation for its rejection of Daubert other than the fact that Daubert was a federal case and is only binding on federal jurisprudence.[61]

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[53] Id.
[54] Turner v. State, 953 N.E.2d 1039, 1050 (Ind. 2011).
[55] Iowa R. Evid. 5.702 (2013).
[56] Ranes v. Adams Labs., Inc., 778 N.W.2d 677, 685 (Iowa 2010).
[57] Id. at 685-86 (citing State v. Hall, 297 N.W.2d 80, 85 (Iowa 1980)).
[58] Id. at 686.
[59] Id.
[60] In re Girard, 294 P.3d 236, 239, 241 (Kan. 2013).
[61] Armstrong v. City of Wichita, 907 P.2d 923, 929 (Kan. Ct. App. 1995).

17. Kentucky

Kentucky Rule of Evidence 702 was amended in 2007 to precisely echo the 2000 version of Fed. R. Evid. 702.[62] In 1995, the Supreme Court of Kentucky expressly adopted the Daubert analysis and the abuse of discretion standard of review.[63] The court then abated oral arguments in a pending case until the Supreme Court of the United States rendered the Kumho Tire decision in 1999.[64] Thereafter, the Supreme Court of Kentucky expressly adopted Kumho Tire and its reasoning in 2000, and expanded Daubert's applicability to also now include "technical" and "other specialized" knowledge in addition to "scientific" knowledge.[65]

18. Louisiana

Louisiana Rule of Evidence 702 is identical to the 1973 version of Fed. R. Evid. 702.[66] Long before the Daubert decision, the Louisiana Supreme Court rejected Frye's "general acceptance" standard in favor of a "discretion of the trial judge" test, in which the trial judge would exercise his gatekeeping function by "balancing the probative value of the evidence against its prejudicial effect."[67] Citing the similarities between the federal and Louisiana rules, in addition to the similarities between Daubert and Louisiana case law, the Louisiana Supreme Court decided to adopt the Daubert standard.[68]

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[62] See Ky. R. Evid. 702 (2014).
[63] Mitchell v. Commonwealth, 908 S.W.2d 100, 102 (Ky. 1995).
[64] Goodyear Tire and Rubber Co. v. Thompson, 11 S.W.3d 575, 577 (Ky. 2000).
[65] Id.
[66] See La. C.E. art. 702.
[67] State v. Foret, 628 So.2d 1116, 1123 (La. 1993) (citing State v. Catanese, 368 So.2d 975, 978-79, 983 (La. 1979)).
[68] Id. at 1123.

19. Maine

Maine Rule of Evidence 702 tracks the 1973 version of Fed. R. Evid. 702.[69] In 1978, the Supreme Court of Maine established the Williams test, which rejected the rigid Frye test of general acceptance.[70] Like Daubert, the Williams test examines whether the testimony is relevant and reliable.[71] Although the court declined to explicitly adopt Daubert,[72] lower courts in Maine have found "very little -- if any -- daylight between the analyses in Williams and Daubert."[73]

20. Maryland

In 1978, the Maryland Court of Appeals expressly adopted the Frye standard.[74] In 1994, Maryland adopted its current Rule 5-702, and the committee notes explained that the rule does not overrule the Frye-Reed standard.[75] Furthermore, the Court of Appeals flatly declined to adopt the Daubert approach.[76]

21. Massachusetts

Massachusetts recently codified its rule regarding expert witness testimony. According to rule, the trial judge, as the gatekeeper, must ensure the reliability of expert testimony by either the Frye test or the Daubert-Lanigan analysis.[77] The notes appended to the rule explain,

[69] See Me. R. Evid. 702 (2014).
[70] State v. Williams, 388 A. 2d 500, 504 (Me. 1978).
[71] Id.
[72] See Searles v. Fleetwood Homes of Pennsylvania, Inc., 878 A.2d 509, n.2 (Me., 2005).
[73] Hall v. Kurz Enterprises, 2006 Me. Super. LEXIS 94, at *9 (Me. Super 2006).
[74] Reed v. State, 283 Md. 374, 389 (Md. 1978).
[75] Md. R. 5-702 committee notes (2013).
[76] Clemens v. State, 392 Md. 339, 352 n.7 (Md. 2006).
[77] ALM G. Evid. § 702 note.

"Massachusetts law makes general acceptance the default position and a Daubert analysis an alternative method of establishing reliability."[78] General acceptance is sufficient to establish reliability, regardless of the other Daubert factors.[79]

22. Michigan

Effective January 1, 2004, Michigan Rule of Evidence 702 was amended to read almost exactly like Fed. R. Evid. 702.[80] According to the Staff Comment, the Rule was amended in order to conform to the federal rule and the Daubert trilogy.[81] The Michigan Supreme Court further clarified that "the trial court's obligation under MRE 702 is even stronger than that contemplated by FRE 702 because Michigan's rule specifically provides that the court's determination is a precondition to admissibility."[82]

23. Minnesota

Minnesota Rule of Evidence 702 was amended effective September 1, 2006 to codify existing Minnesota case law.[83] Minnesota applies the Frye-Mack standard, which states that novel scientific theory evidence may be admitted if it is generally accepted in the relevant scientific community, and also has foundational reliability.[84] By requiring general acceptance, the Supreme Court of Minnesota believes it "avoids the problem that many commentators see as inherent in Daubert, namely, that such an approach 'takes from scientists and confers upon judges . . . the

[78] Id.
[79] Commonwealth v. Patterson, 840 N.E.2d 12, 23 (Mass. 2005)
[80] See Mich. R. Evid. 702 (2014).
[81] Mich. R. Evid. 702 staff comment (2014).
[82] Gilbert v. DaimlerChrysler Corp., 685 N.W.2d 391, 408 n.46 (Mich. 2004).
[83] Minn. R. Evid. 702 committee comment (2006).
[84] State v. MacLennan, 702 N.W.2d 219, 230 (Minn. 2005)

authority to determine what is scientific.'"[85] Minnesota also allows for more rigorous appellate review whereas the Daubert approach only allows an abuse of discretion review.[86]

24. Mississippi

Mississippi Rule of Evidence 702 was amended effective May 29, 2003 with the express purpose of clarifying the court's gatekeeping responsibilities.[87] The Mississippi Supreme Court also specifically recognized the adoption of Daubert and repudiation of the longstanding Frye standard.[88] The court further noted, "there is universal agreement that the Daubert test has effectively tightened, not loosened, the allowance of expert testimony."[89]

25. Missouri

Although Missouri long followed the Frye standard, the Supreme Court of Missouri stated that only Section 490.065 of the Missouri Revised Statutes applies to expert witness testimony in civil cases in Missouri. In 2004, the court further clarified that neither Frye nor Daubert governs the admission of expert testimony in Missouri civil cases.[90] According to Section 490.065, it is within trial court's discretion to decide whether the statute's requirements have been met by

[85] State v. Traylor, 656 N.W.2d 885, 891 (Minn. 2003) (citing Goeb v. Tharaldson, 615 N.W.2d 800, 812 (Minn. 2000)).
[86] Traylor, 656 N.W.2d 885, 891.
[87] Miss R. Evid. 702 (2013).
[88] Miss. Transp. Comm'n v. McLemore, 863 So.2d 31, 35 (Miss. 2003).
[89] Id. at 38.
[90] McGuire v. Seltsam, 138 S.W.3d 718, 720, n.3 (Mo. 2004).

considering "whether experts in the field reasonably rely on the type of facts and data used by the expert or if the methodology is otherwise reasonably reliable."[91]

26. Montana

Montana Rule of Evidence 702 is identical to the 1973 version of Fed. R. Evid 702.[92] In 1983, the Montana Supreme Court rejected the Frye general acceptance standard, noting that it was not in conformity with the spirit of Montana's rules of evidence.[93] The court then expressly adopted Daubert in 1994 in State v. Moore, but limited its applicability to novel scientific evidence.[94] Although in his concurrence in State v. Clifford, Justice Nelson, the author of Moore, urged the court to expand the applicability of the Daubert standard to all expert testimony, the Montana Supreme Court has not yet done so.[95]

27. Nebraska

Nebraska Rule of Evidence 702 echoes the 1973 version of Fed. R. Evid. 702 verbatim.[96] Until 2001, Nebraska courts applied the Frye test. The Supreme Court of Nebraska cited two reasons for its continued adherence to Frye: "(1) that the Daubert standards were relatively undeveloped and uncertain and (2) that Daubert might fail to exclude unreliable 'junk science.'"[97] However, in Schafersman v. Agland Coop., the court acknowledged that the nature and

[91] Id. at 721.
[92] See Mont. Code Ann. § 26-10-702 (2013).
[93] Barmeyer v. Mont. Power Co., 657 P.2d 594, 598 (Mont. 1983).
[94] State v. Moore, 885 P.2d 457, 471 (Mont. 1994).
[95] State v. Clark, 198 P.3d 809, 819 (Mont. 2008).
[96] See Neb. Rev. Stat. § 27-702 (2013).
[97] Schafersman v. Agland Coop., 631 N.W.2d 862, 873 (Neb. 2001).

implications of Daubert have become well known since it has become the majority rule.[98] The Schafersman court further noted that the concern about "junk science" was also unfounded because Daubert has proven to be "a more effective means of excluding unreliable expert testimony than is the Frye test."[99] The court went on to say that Daubert was more flexible than Frye, and that Frye allowed judges to "piggyback their decisions onto someone else's judgment of whether the proffered evidence was sufficiently valid to be admitted."[100] For these aforementioned and other reasons, the court held that Nebraska courts should now apply the standards of the Daubert trilogy.[101]

28. Nevada

Nevada's rule on expert testimony is similar to the 1973 version of Fed. R. Evid. 703.[102] While Nevada has never adopted Frye, the state has not adopted Daubert either. The Supreme Court of Nevada explained that while the court did not take issue with the Daubert standard itself, the court was rejecting Daubert because of the rigid manner in which lower courts have applied the test.[103] The court opined that Daubert and federal case law may be persuasive, it would not limit the factors to consider when evaluating expert testimony admissibility.[104] The Nevada rule instead gives trial judges discretion in deciding on a case-by-case basis which factors to consider.[105]

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[98] Id. at 873.
[99] Id.
[100] Id. at 875.
[101] Id. at 876.
[102] See Nev. Rev. Stat. Ann. § 50.275 (2013).
[103] Higgs v. State, 222 P.3d 648, 657–58 (Nev. 2010).
[104] Id. at 658.
[105] Id. at 659.

29. New Hampshire

New Hampshire Rule of Evidence 702 is identical to the 1973 version of Fed. R. Evid. 702.[106] The New Hampshire Supreme Court adopted Daubert in 2002, and specified that the proper inquiry should not focus on the "reliability of the expert's conclusion" but rather on "the reliability of the underlying technique used to reach that conclusion."[107]

However, in 2003, State v. Whittey, the court used the Frye standard in evaluating the validity of a particular method of DNA testing because the parties stipulated to its use.[108] Later that year, the court also affirmed a lower court's denial of a motion to conduct a pretrial Daubert hearing on the reliability of that same method of DNA testing.[109]

30. New Mexico

The language of Rule 11-702 was amended in 2012 for stylistic reasons only in order to be consistent with the restyling of the federal rules.[110] The committee commentary to the Rule, however, clarifies that New Mexico has not adopted the changes to the Federal Rule that incorporate Daubert because New Mexico does not apply Daubert to nonscientific testimony. Although the Supreme Court of New Mexico adopted Daubert in 1993,[111] the court rejected Kumho Tire in 1999 by refusing to apply Daubert where the expert testimony is based only on experience or training.[112]

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[106] See N.H. Evid. R. 702 (2013).
[107] Baker Valley Lumber v. Ingersoll-Rand Co., 813 A.2d 409, 416 (N.H. 2002).
[108] State v. Whittey, 821 A.2d 1086, 1092 (N.H. 2003).
[109] State v. Thompson, 825 A.2d 490, 491, 493 (N.H. 2003).
[110] N.M. R. Evid. 11-702 committee commentary (2013).
[111] State v. Alberico, 861 P.2d 192, 203 (N.M. 1993).
[112] State v. Torres, 976 P.2d 20, 34 (N.M. 1999).

31. New York

The New York rule on expert witness testimony reads as follows:

> Unless the court orders otherwise, questions calling for the opinion of an expert witness need not be hypothetical in form, and the witness may state his opinion and reasons without first specifying the data upon which it is based. Upon cross- examination, he may be required to specify the data and other criteria supporting the opinion.[113]

New York has continued to adhere to the Frye test for the admissibility of new or novel scientific evidence. As recently as 2006 in Parker v. Mobile Oil Corp., the New York Court of Appeals reaffirmed that Frye is the current standard in New York.[114] However, the court acknowledged that some cases from other jurisdictions that used a Daubert analysis were "instructive to the extent that they address the reliability of an expert's methodology."[115]

32. North Carolina

North Carolina Rule of Evidence 702 is consistent with the 2000 version of Fed. R. Evid. 702. However, North Carolina has not adopted the Daubert standard, but instead uses a three-step inquiry as discussed in State v. Goode.[116] In order to be admissible, 1) the expert's method must be sufficiently reliable, 2) the expert must be qualified in the area and 3) the testimony must be relevant. To assess reliability, the court can look to precedent; but if the court is faced with novel theories or techniques, then the court should consider the following nonexclusive factors: "the expert's use of established techniques, the expert's professional background in the field, the use of

[113] N.Y. C.P.L.R 4515 (Consol. 2013).
[114] Parker v. Mobil Oil Corp., 857 N.E.2d 1114, 1120 n.3 (N.Y. 2006).
[115] Id. at 1121 n.4.
[116] State v. Goode, 461 S.E.2d 631 , 639–41 (N.C. 1995).

visual aids before the jury so that the jury is not asked to sacrifice its independence by accepting the scientific hypotheses on faith, and independent research conducted by the expert."[117] The court acknowledged the similarities with Daubert, but found that the North Carolina approach was "decidedly less mechanistic and rigorous than the 'exacting standards of reliability' demanded by the federal approach."[118]

33. North Dakota

North Dakota Rule of Evidence 702 is identical to the 1973 version of Fed. R. Evid. 702.[119] The North Dakota Supreme Court has never explicitly adopted Daubert.[120] In State v. Hernandez, the court declined to adopt Daubert by judicial decision, citing the state's formal processes for adopting procedural rules.[121] Instead, the court pointed to its Rule 702, which gives broad discretion to the trial court "to determine whether the witness is qualified as an expert and whether the evidence will assist the trier of fact."[122]

34. Ohio

Ohio Rule of Evidence 702 was amended in 1994 to clarify existing Ohio law.[123] Even before Daubert was decided, the Ohio Supreme Court rejected Frye by "refus[ing] to engage in scientific nose-counting for the purpose of deciding whether evidence based on newly ascertained

[117] Howerton v. Arai Helmet, Ltd., 597 S.E.2d 674, 687 (N.C. 2004).
[118] Id. at 690.
[119] See N.D. R. Evid. 702 (2013).
[120] State v. Hernandez, 707 N.W.2d 449, 453 (N.D. 2005).
[121] Id.
[122] Id.
[123] See Ohio Evid. R. 702 staff note (2014).

or applied scientific principles is admissible."[124] Ohio courts have extensively cited Daubert and similar federal cases in assessing reliability.[125]

35. Oklahoma

Oklahoma Rule of Evidence 702 echoes the 2000 version of Fed. R. Evid. 702.[126] Having already adopted Daubert for criminal proceedings, the Oklahoma Supreme Court explicitly adopted Daubert and Kumho Tire in 2003 for civil cases as well.[127] The court held that Daubert and Kumho Tire were in line with the state's evidence code and jurisprudence.[128]

36. Oregon

Oregon's rule on expert witnesses is identical to the 1973 version of Fed. R. Evid. 702.[129] The Oregon Supreme Court rejected Frye in 1984, and instead instructed courts to look at seven primary factors set out in State v. Brown.[130] These factors are:

> (1) the technique's general acceptance in the field; (2) the expert's qualifications and stature; (3) the use the expert made of the technique; (4) the potential rate of error; (5) the existence of specialized literature; (6) the novelty of the invention; and (7) the extent to which the technique relies on the subjective interpretation of the expert.[131]

In 1995, the Oregon Supreme Court found Daubert consistent with Brown and stated that Oregon trial courts should find Daubert instructive.[132]

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[124] State v. Williams, 446 N.E.2d 444, 448 (Ohio 1983).
[125] See, e.g., Terry v. Caputo, 875 N.E.2d 72, 77-78 (Ohio 2007); Miller v. Bike Ath. Co., 687 N.E.2d 735, 740 (Ohio 1998).
[126] See 12 Okla. Stat. § 2702 (2013).
[127] Christian v. Gray, 65 P.3d 591, 600 (Okla. 2003).
[128] Id.
[129] See Or. Rev. Stat. § 40.410 (2012).
[130] State v. Brown, 687 P.2d 751, 759 (Or. 1984).
[131] Id.
[132] State v. O'Key, 899 P.2d 663, 680 (Or. 1995).

37. Pennsylvania

Pennsylvania has long adhered to the Frye standard, and even as recently as 2013 the Pennsylvania Supreme Court has reaffirmed its stance.[133] In fact, Pennsylvania Rule of Evidence 702 includes general acceptance of the expert's methodology as one of its three requirements.[134] The official comment to the rule also notes that Pennsylvania has rejected Daubert and adopted Frye.[135]

38. Rhode Island

Rhode Island Rule of Evidence 702 is similar to the 1973 version of Fed. R. Evid. 702 differing only by replacing the federal rule phrase "in the form of an opinion or otherwise" with "in the form of fact or opinion."[136] The Advisory Committee's Note comments that its adoption of Fed. R. Evid. 702 would not change current Rhode Island law or practice.[137]

As recently as 2013, the Rhode Island Supreme Court reaffirmed its use of the Daubert standard.[138] The court further explained that when the expert testimony involves novel or technically complex theories or procedures, the trial court must look to see whether one or more of the Daubert factors are satisfied to admit the evidence.[139] However, when the evidence is neither novel nor highly technical, then it is not necessary to satisfy one or more of the Daubert factors.[140]

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[133] See Commonwealth v. Ballard, 80 A.3d 380, 395 n.16 (Pa. 2013).
[134] Pa. R. Evid. 702 (2013).
[135] Pa. R. Evid. 702 cmt. (2013).
[136] See R.I. R. Evid. Art. VII, Rule 702 (2013).
[137] R.I. R. Evid. 702 advisory committee's note (2013).
[138] See Morabit v. Hoag, 80 A.3d 1, 12 (R.I. 2013).
[139] Morabit, 80 A.3d 1, 12 (R.I. 2013).
[140] Id.

39. South Carolina

South Carolina Rule of Evidence 702 was adopted effective September 3, 1995, and is identical to the 1973 version of Fed. R. Evid. 702. The South Carolina Supreme Court has declined to adopt either Frye or Daubert.[141] Instead the court has formed its own test, which take into consideration the following factors: "(1) the publications and peer reviews of the technique; (2) prior application of the method to the type of evidence involved in the case; (3) the quality control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures."[142]

40. South Dakota

South Dakota Rule of Evidence 702 is identical to the 2000 version of Fed. R. Evid. 702. South Dakota adopted the Daubert test in 1994, and as recently as 2013 the Supreme Court of South Dakota has reaffirmed this rule.[143] In 2001, the court accepted the Kumho Tire extension of Daubert, pointing out that "The standards set forth in Daubert are not limited to what has traditionally been perceived as scientific evidence. These standards must be satisfied whenever scientific, technical, or other specialized knowledge is offered."[144]

41. Tennessee

[141] State v. Jones, 681 S.E.2d 580, 554 (S.C. 2009).
[142] Id. at 556.
[143] State v. Yuel, 840 N.W.2d 680, 683 (S.D. 2013).
[144] State v. Guthrie, 627 N.W.2d 401, 416 (S.D. 2001).

Tennessee Rule of Evidence 702 is very similar to the 1973 version of Fed. R. Evid. 702.[145] The 2001 Advisory Commission Comments explain that Frye no longer applies in Tennessee, and that a standard similar to Daubert now applies.[146] The Tennessee Supreme Court explained that trial courts may consider the following five nonexclusive factors:

> (1) whether scientific evidence has been tested and the methodology with which it has been tested; (2) whether the evidence has been subjected to peer review or publication; (3) whether a potential rate of error is know [sic]; (4) whether, as formerly required by Frye, the evidence is generally accepted in the scientific community; and (5) whether the expert's research in the field has been conducted independent of litigation.[147]

42. Texas

Texas Rule of Evidence 702 is identical to the 1973 version of Fed. R. Evid. 702.[148] In 1992, before the Daubert decision, the Texas Court of Criminal Appeals ruled that Frye was no longer applicable.[149] Instead, trial courts should assess reliability of expert evidence by considering several nonexclusive factors.[150] The Texas Supreme Court adopted this rule as well as Daubert in 1995.[151] Texas also adopted the Kumho Tire extension of Daubert.[152]

43. Utah

Utah Rule of Evidence 702 was amended in 2007 to clarify existing Utah law and the differences between the federal approach and Utah approaches.[153] Like the federal law, the Utah

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[145] See Tenn. R. Evid. 702 (2014).
[146] Tenn. R. Evid. 702 advisory commission comments [2001] (2014).
[147] Id.
[148] See Tex. R. Evid. 702 (2014)
[149] Kelly v. State, 824 S.W.2d 568, 572 (Tex. Crim. App. 1992).
[150] Id.
[151] E.I. du Pont de Nemours and Co. v. Robinson, 923 S.W.2d 549, 556 (Tex. 1995).
[152] Mack Trucks. v. Tamez, 206 S.W.3d 572, 579 (Tex. 2006).
[153] Utah R. Evid. 702 advisory committee note (2013).

rule applies to all expert testimony and gives trial judges a gatekeeper role.[154] However, unlike its federal counterpart, the Utah rule allows generally accepted principles and methods to be admitted based on judicial notice.[155] If general acceptance is not shown, then the proponent of the expert testimony must make a "threshold showing" of reliability.[156]

44. Vermont

Vermont Rule of Evidence 702 was amended effective July 1, 2004 to correspond verbatim with the 2000 version of Fed. R. Evid. 702.[157] Since the rules are essentially identical to the federal rules, Vermont has adopted federal principles, including Daubert and Kumho Tire, for evaluating admission of expert testimony.[158] The Vermont Supreme Court has stated that it adopted the Daubert standard "specifically to promote more liberal admission of expert evidence."[159]

45. Virginia

The text of Virginia's rule on expert testimony is not very similar to the federal rule, but the Virginia Supreme Court explains that rule does not have a broader scope than the parent federal rules.[160] Virginia has rejected Frye, and instead has directed the court to make a threshold reliability finding for scientific evidence,

> unless it is of a kind so familiar and accepted as to require no foundation to establish the fundamental reliability of the system, such as fingerprint analysis; or unless it is so unreliable that the considerations requiring its

[154] Id.
[155] Id.
[156] Id.
[157] See Vt. R. Evid. 702 (2014).
[158] State v. Brooks, 643 A.2d 226, 229 (Vt. 1995); see USGen New Eng., Inc. v. Town of Rockingham, 862 A.2d 269, 276 (Vt. 2004).
[159] State v. Scott, 2013 Vt. LEXIS 96, at *8 (Vt. Oct. 18, 2013).
[160] See Va. Code Ann. § 8.01-401.1 (2014); McMunn v. Tatum, 379 S.E.2d 908, 912 (Va. 1989).

> exclusion have ripened into rules of law, such as 'lie-detector' tests; or unless its admission is regulated by statute, such as blood-alcohol test results.[161]

Even as recently as 2012, Virginia lower courts have reiterated that the state has adopted neither Frye nor Daubert.[162] However, the Virginia Supreme Court did cite one of the Daubert factors in 2008, without ever explicitly adopting its holding,[163] which suggests that Virginia may find Daubert persuasive.

46. Washington

Washington Rule of Evidence 702 is identical to the 1973 version of Fed. R. Evid. 702.[164] Washington has long adhered to the Frye standard for criminal cases, but has neither explicitly adopted Frye nor explicitly rejected Daubert for civil cases.[165] Nevertheless, in 2011, for the limited purpose of the case before it, the Washington Supreme Court assumed without deciding that Frye applied in civil cases as well.[166]

47. West Virginia

West Virginia Rule of Evidence 702 is identical to the 1973 version of Fed. R. Evid. 702. West Virginia used to follow the Frye test, but then shortly after the Daubert decision, the Supreme Court of Appeals of West Virginia adopted the Daubert analysis.[167] However, West Virginia has

[161] Spencer v. Commonwealth, 393 S.E.2d 609, 621 (Va. 1990) (internal citations omitted).
[162] Commonwealth v. Cupp, 2012 Va. Cir. LEXIS 182, at *2 (Va. Cir. Ct. July 16, 2012); see also Newman v. Commonwealth, 2009 Va. App. LEXIS 360, at *13 n.5 (Va. Ct. App. Aug. 11, 2009).
[163] Odaris v. Morton G. Thalhimer, Inc., 2008 Va. LEXIS 148, at *4 (Va. Sept. 12, 2008).
[164] See Wash. E.R. 702 (2014).
[165] Anderson v. Akzo Nobel Coatings, Inc., 260 P.3d 857, 861–62 (Wash. 2011).
[166] Id. at 862.
[167] Wilt v. Buracker, 443 S.E.2d 196, 200, 203 (W. Va. 1993).

not yet adopted the Kumho Tire extension of Daubert and limits its application to scientific evidence only.[168]

48. Wisconsin

Although Wisconsin had previously rejected Frye,[169] the Court of Appeal of Wisconsin in 2005 confirmed that "Wisconsin is not a Daubert state."[170] Opposers of Daubert cited concerns over taking fact-finding functions away from juries and added costs of Daubert hearings as reasons to reject Daubert.[171] However, in an apparent attempt to protect Wisconsin businesses,[172] the legislature amended Wisconsin's rule on expert testimony in 2011 to include the Daubert reliability standard.[173]

49. Wyoming

Wyoming Rule of Evidence 702 is identical to the 1973 version of Fed. R. Evid. 702.[174] Prior to the Daubert decision, Wyoming rejected Frye.[175] In 1999, Wyoming expressly adopted Daubert and its progeny as "guidance" for admissibility of all expert testimony, and reiterated that Daubert was consistent with Wyoming's original approach.[176]

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[168] State v. Leep, 569 S.E.2d 133, 143 (W. Va. 2002).
[169] See State v. Peters, 534 N.W.2d 867, 872 (Wis. Ct. App. 1995)
[170] City of West Bend v. Wilkens, 693 N.W.2d 324, 329 (Wis. Ct. App. 2005).
[171] Kristen Irgens, Wisconsin is Open for Business or Business Just As Usual? The Practical Effects and Implications of 2011 Wisconsin Act 2, 2012 Wis. L. Rev. 1245, 1266 (2012).
[172] Id. at 1248 n.12.
[173] See Wis. Stat. § 907.02(1) (2013).
[174] See Wy. R. Evid. 702 (2014).
[175] Rivera v. State, 840 P.2d 933, 942 (Wyo. 1992).
[176] Bunting v. Jamieson, 984 P.2d 467, 471 (Wyo. 1999).

Appendix 1

STATE	STATUTE	FRYE	DAUBERT	NEITHER FRYE NOR DAUBERT
Alabama	**Ala. R. Evid. 702** (a) 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. (b) In addition to the requirements in section (a), expert testimony based on a scientific theory, principle, methodology, or procedure is admissible only if: (1) The testimony is based on sufficient facts or data; (2) The testimony is the product of reliable principles and methods; and (3) The witness has applied the principles and methods reliably to the facts of the case.		X (scientific only)	
Alaska	**Alaska R. Evid. 702(a)** (a) 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.		X (scientific only)	
Arizona	**Ariz. R. Evid. 702** A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.		X	
Arkansas	**Ark. R. Evid. 702** If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence		X	

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	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.			
Califor-nia	**Cal. Evid. Code § 720** (a) A person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates. Against the objection of a party, such special knowledge, skill, experience, training, or education must be shown before the witness may testify as an expert. (b) A witness' special knowledge, skill, experience, training, or education may be shown by any otherwise admissible evidence, including his own testimony.		X	
Colorado	**Colo. R. Evid. 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.			X
Connec-ticut	**Conn. Code. Evid. 7-2** A witness qualified as an expert by knowledge, skill, experience, training, education or otherwise may testify in the form of an opinion or otherwise concerning scientific, technical or other specialized knowledge, if the testimony will assist the trier of fact in understand the evidence or in determining a fact in issue.		X (scien-tific only)	
Delaware	**Del. R. Evid. 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 testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the		X	

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	principles and methods reliably to the facts of the case.			
Florida	**Fla. Stat. § 90.702** 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 testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.		X	
Georgia	**O.C.G.A. 24-7-702(b)** 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 testimony is based upon sufficient facts or data; (2) The testimony is the product of reliable principles and methods; and (3) The witness has applied the principles and methods reliably to the facts of the case which have been or will be admitted into evidence before the trier of fact.		X	
Hawaii	**Haw. R. Evid. 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. In determining the issue of assistance to the trier of fact, the court may consider the trustworthiness and validity of the scientific technique or mode of analysis employed by the proffered expert.		X	
Idaho	**Idaho R. Evid. 702**			X

STATE	STATUTE	FRYE	DAUBERT	NEITHER FRYE NOR DAUBERT
	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.			
Illinois	No substantial equivalent to Fed. R. Evid. 702	X		
Indiana	**Ind. R. Evid. 702** **(a)** A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue. **(b)** Expert scientific testimony is admissible only if the court is satisfied that the expert testimony rests upon reliable scientific principles.		X (scientific only)	
Iowa	**Iowa R. Evid. 5.702** 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.		X (scientific only)	
Kansas	**K.S.A. 60-456** (no equivalent of Fed. R. Evid. 702) (b) If the witness is testifying as an expert, testimony of the witness in the form of opinions or inferences is limited to such opinions as the judge finds are (1) based on facts or data perceived by or personally known or made known to the witness at the hearing and (2) within the scope of the special knowledge, skill, experience or training possessed by the witness.	X		
Kentucky	**Ky. R. Evid. 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 testimony is based upon sufficient facts or data;		X	

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	(2) The testimony is the product of reliable principles and methods; and (3) The witness has applied the principles and methods reliably to the facts of the case.			
Louis-iana	**La. CE 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.		X	
Maine	**Me. R. Evid. 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 there to in the form of an opinion or otherwise		X	
Maryland	**Md. Rule 5-702** Expert testimony may be admitted, in the form of an opinion or otherwise, if the court determines that the testimony will assist the trier of fact to understand the evidence or to determine a fact in issue. In making that determination, the court shall determine (1) whether the witness is qualified as an expert by knowledge, skill, experience, training, or education, (2) the appropriateness of the expert testimony on the particular subject, and (3) whether a sufficient factual basis exists to support the expert testimony.	X		
Massa-chusetts	**ALM G. Evid. § 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 (a) the testimony is based upon sufficient facts or data, (b) the testimony is the product of reliable principles and methods, and (c) the witness has applied the principles and methods reliably to the facts of the case.			X

STATE	STATUTE	FRYE	DAUBERT	NEITHER FRYE NOR DAUBERT
Michigan	**Mich. R. Evid. 702** If the court determines that 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 testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.		X	
Minne-sota	**Minn. R. Evid. 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. The opinion must have foundational reliability. In addition, if the opinion or evidence involves novel scientific theory, the proponent must establish that the underlying scientific evidence is generally accepted in the relevant scientific community.	X		
Missis-sippi	**Miss. R. Evid. 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 testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.		X	
Missouri	**Mo. Rev. Stat. § 490.065(1)** In any civil action, 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.			X

STATE	STATUTE	FRYE	DAUBERT	NEITHER FRYE NOR DAUBERT
Montana	**Title 26, Ch. 10, Rule 702, Mont. Code Ann.** 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.		X (novel scien-tific only)	
Nebraska	**Neb. Rev. Stat. § 27-702** 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.		X	
Nevada	**Nev. Rev. Stat. Ann. § 50.275** 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 special knowledge, skill, experience, training or education may testify to matters within the scope of such knowledge.			X
New Hamp-shire	N.H. Evid. Rule 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.		X	
New Mexico	**N.M. R. Evid. 11-702** A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.		X (scien-tific only)	
New York	**N.Y. C.P.L.R. 4515** Unless the court orders otherwise, questions calling for the opinion of an expert witness need not be hypothetical in form, and the witness may state his opinion and reasons without first specifying the data upon which it is based. Upon cross- examination, he	X		

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	may be required to specify the data and other criteria supporting the opinion.			
North Carolina	**N.C. Gen. Stat. § 8C-1, Rule 702(a)** 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 all of the following apply: (1) The testimony is based upon sufficient facts or data. (2) The testimony is the product of reliable principles and methods. (3) The witness has applied the principles and methods reliably to the facts of the case.			X
North Dakota	**N.D. R. Evid. 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.			X
Ohio	**Ohio R. Evid. 702** A witness may testify as an expert if all of the following apply: (A) The witness' testimony either relates to matters beyond the knowledge or experience possessed by lay persons or dispels a misconception common among lay persons; (B) The witness is qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony; (C) The witness' testimony is based on reliable scientific, technical, or other specialized information. To the extent that the testimony reports the result of a procedure, test, or experiment, the testimony is reliable only if all of the following apply: (1) The theory upon which the procedure, test, or experiment is based is objectively verifiable or is		X	

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	validly derived from widely accepted knowledge, facts, or principles; (2) The design of the procedure, test, or experiment reliably implements the theory; (3) The particular procedure, test, or experiment was conducted in a way that will yield an accurate result.			
Oklahoma	**12 Okla. Stat. § 2702** 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 testimony is based upon sufficient facts or data; (2) The testimony is the product of reliable principles and methods; and (3) The witness has applied the principles and methods reliably to the facts of the case.		X	
Oregon	**Or. Rev. Stat. § 40.410** 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.		X	
Pennsyl-vania	**Pa. R. Evid. 702** A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert's scientific, technical, or other specialized knowledge is beyond that possessed by the average layperson; (b) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; and (c) the expert's methodology is generally accepted in the relevant field.	X		
Rhode Island	**R.I. R. Evid. Art. VII, Rule 702**		X	

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	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 fact or opinion.			
South Carolina	**S.C. R. Evid. 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.			X
South Dakota	**S.D. Codified Laws § 19-15-2** 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 n expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion or otherwise, if: (1) The testimony is based upon sufficient facts or data, (2) The testimony is the product of reliable principles and methods, and (3) The witness has applied the principles and methods reliably to the facts of the case.		X	
Tennes-see	**Tenn. R. Evid. 702** If scientific, technical or other specialized knowledge will substantially 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 in the form of an opinion or otherwise.		X	
Texas	**Tex. Evid. R. 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.		X	
Utah	**Utah R. Evid. 702** (a) Subject to the limitations in paragraph (b), a witness who is qualified as an expert by knowledge,			X

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	skill, experience, training, or education may testify in the form of an opinion or otherwise if the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue. (b) Scientific, technical, or other specialized knowledge may serve as the basis for expert testimony only if there is a threshold showing that the principles or methods that are underlying in the testimony (1) are reliable, (2) are based upon sufficient facts or data, and (3) have been reliably applied to the facts. (c) The threshold showing required by paragraph (b) is satisfied if the underlying principles or methods, including the sufficiency of facts or data and the manner of their application to the facts of the case, are generally accepted by the relevant expert community.			
Vermont	**Vt. R. Evid. 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 testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.		X	
Virginia	**Va. Code Ann. § 8.01-401.1** In any civil action any expert witness may give testimony and render an opinion or draw inferences from facts, circumstances or data made known to or called upon to testify. The facts, circumstances or data relied upon by such witness in forming an opinion or drawing inferences, if of a type normally relied upon by others in the particular field of expertise in forming opinions and drawing inferences, need not be admissible in evidence. *(The rest of the rule is omitted)*			X
Washington	**Wash. E.R. 702** If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence	X		

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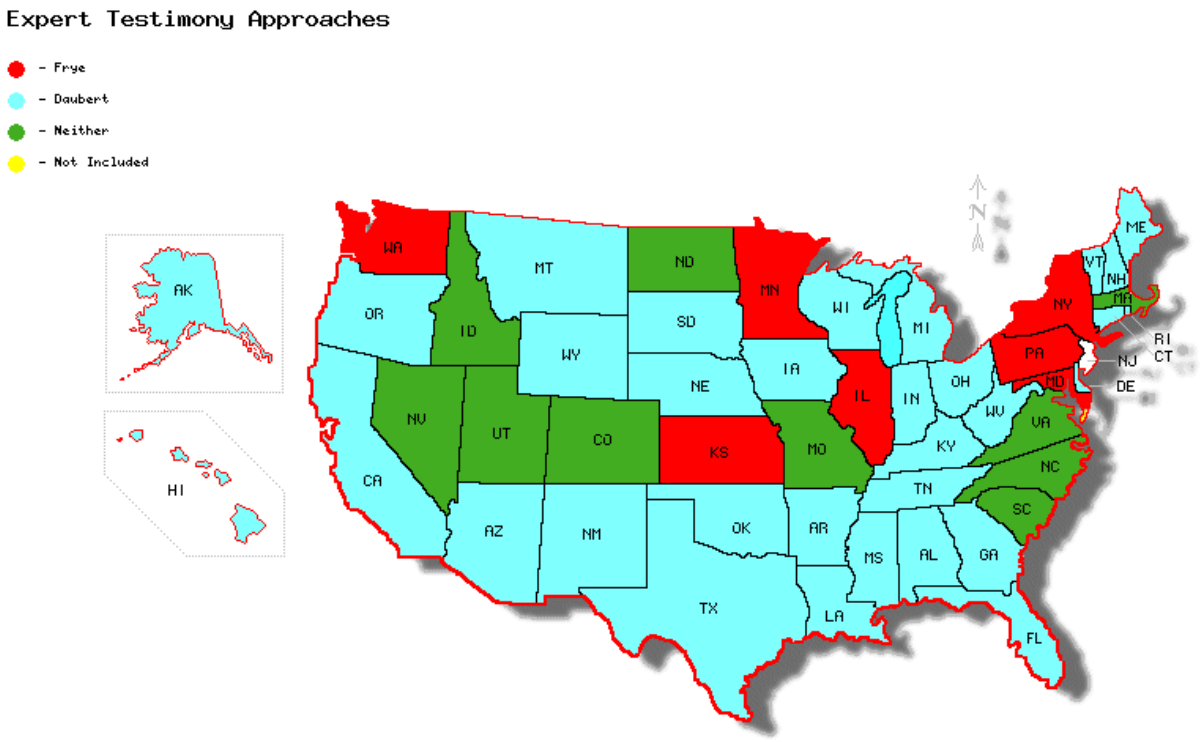
	or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.			
West Virginia	**W. Va. R. Evid. 702** If scientific, technical, or other specialized knowledge will assist the trier 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.		X (scien-tific only)	
Wiscon-sin	**Wis. Stat. § 907.02(1)** 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 the testimony is based upon sufficient facts or data, the testimony is the product of reliable principles and methods, and the witness has applied the principles and methods reliably to the facts of the case.		X	
Wyoming	**Wyo. R. Evid. 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.		X	
TOTALS		7	32	10

Appendix 2


Expert Testimony Approaches
- Frye
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Document 2

To: The Honorable Jamie D. Happas, P.J.S.C.
From: Valerie Werse
RE: Rule 702 in Published Appellate Court Decisions
Date: January 22, 2014

Detailed below are published cases appearing before the New Jersey Appellate Division that claim an error occurred at trial in the interpretation of N.J.R.E. 702. The cases were obtained through Rutgers School of Law – Newark's Law Library's Courts Search Page.[177] Search dates were limited to October 2005, to correspond to the unpublished cases, to November 2013, the commencement of the project. Rule 702 was used as the search term. This produced 484 results from the database. Results were further narrowed to published appellate decisions that contained an assertion of error in the interpretation of N.J.R.E. 702 and subsequent discussion. This produced 10 relevant cases over the roughly eight year search period.

The remaining 10 cases are organized in a chart with information including: date, name of case, the issue on appeal, what originally happened in the case, the disposition, and the reasoning for the Appellate Court's decision. Included in an appendix at the end of the document is information about the percentage of cases that were admissible or inadmissible, whether a verdict was affirmed or reversed, and whether the verdict generally favored the plaintiff or the defendant. For purposes of the appendix cases marked other are those that were remanded on other issues or dealt with multiple admissibility claims.

The published cases conform to the general consensus found with the unpublished cases. New Jersey's tendency toward admissibility is reflected in the fact that 60% of the published appellate cases examined found the expert's testimony admissible. Additionally verdicts in favor of plaintiffs amounted to 60% of the published appellate cases. Unlike the unpublished cases,

[177] New Jersey Courts Search Page, Rutgers School of Law – Newark, http://njlaw.rutgers.edu/collections/courts/search.php.

the published defendants fared worse with only 10% of defendants having a favorable outcome. Of the 10 published appellate cases, 50% of the decisions of the trial court were affirmed. Although there were fewer decisions affirmed in the published opinions than the unpublished opinions there was a larger percentage of cases that had several admissibility issues and were therefore affirmed in part and reversed in part or remanded on other issues.

The statistical data of the published cases roughly mirrors the data from the unpublished cases.

Date	Case/Citation	Issue	What Happened Originally	Disposition	Reasoning
08/18/2006	State v. King	Δ wants to introduce testimony of expert on his personality disorders that affected the reliability of his confession without restriction. Π wants the entirety barred. Claims expert is unqualified.	After a 104 hearing Δ's forensic psychiatry expert was allowed to testify that Δ was diagnosed with certain personality disorders and that these disorders can be associated with false confessions. The expert could not testify, however, to any of the circumstances surrounding this Δ's confession.	Verdict for Δ affirmed (admissible). Verdict barring statements in interview reversed (admissible).	Expert was sufficiently qualified in psychiatry and forensic psychiatry to be considered an expert. Any lack of experience he had in false confessions was a matter of weight for the jury not a lack of qualification. Psychiatric diagnosis and analysis is beyond the ken of the average juror. Expert used his training and experience to evaluate Δ and diagnosed him with a disorder from DSM-IV. The DSM is generally accepted in the psychiatric community. Even though he produced no extra studies, that did not matter because it was not about causation but about diagnosis. The court was too broad in disallowing expert to testify to what was said in his clinical interviews with Δ. He may testify to those things that were said that he relied on in forming his opinion on Δ.
03/16/2011	State V. McGuire	Δ challenge's expert's testimony because he did not use a control batch of garbage bags.	State had an expert testify on the process of garbage bag manufacturing and how to identify if a garbage bag came from a particular lot. He concluded that the manufacture batch of the garbage bags in Δ's home and the ones that were found with the body were a match.	Verdict for Π affirmed (admissible).	No error was committed in allowing the testimony. The methodology would have affected the credibility and weight but not the admissibility.
06/22/2010	State v. Calleia	Δ claims court erred in allowing expert witness to testify to Y-STR DNA evidence because it does not satisfy Frye standards. He claims it has not reached an appropriate level of development	At trial state presented an expert who claimed based on Y-STR DNA found under the victim's fingernails that the Δ could not be ruled out as the person whose DNA it was.	Reversed and remanded on other grounds. Court considered this argument for next trial. (Admissible).	The record that is before the court indicates that this type of DNA testing is generally accepted in the scientific community. It is widely accepted by forensic scientists. Δ has presented no counter evidence that it is not acceptable or reliable.

		and acceptability.			
08/11/2009	Quinlan v. Curtiss-Wright Corp.	Δ challenges the testimony of Π's expert witness on payment/employability issues.	Π's expert testified to the issue of front pay for employment discrimination case. The expert, an economist, testified to the lost income based on Π's anticipated retirement date.	Remanded on the issue of front pay and punitive damages.	Π's expert's testimony was proper as it did not cross into employability. He did not support his premise of his testimony with any direct evidence however. The jury instructions were not correct in explaining which party bore the burden of showing future financial loss. This can be fixed at the third trial.
06/04/2012	State v. Joseph	Δ claims photo retrieval device did not have a proper foundation laid and is not scientifically reliable. Also, the operator of the device was not qualified.	Officers testified at trial how the photo retrieval system operated, the characteristics the victims reported, and how they entered that into the machine.	Verdict for Π affirmed (admissible).	This system is not new or novel, untested or unscrutinized. It is regularly accepted by courts. Because the system is similar to a mug shot book it is not beyond the ken of the average juror and does not require any expert testimony to establish reliability.
08/03/2006	Hisenaj v. Kuehner	Π appeals the inclusion of the testimony of a biomechanical engineer asserting that a low-impact rear-end collision will not cause a herniated disc. (*i.e.* as seen barred in Suanez v. Egeland)	Δ presented the testimony of an expert at trial who claimed that Π's injuries could not have come from a low-impact collision. The judge allowed the testimony after a 104 hearing despite Suanez because while the expert in Suanez did not rely on any of their own medical studies, this expert did. The expert here also based his opinion on 17 scientific studies.	Verdict for Δ reversed (inadmissible). Remanded for new trial.	The record from the 104 hearing does not show any evidence that the studies the expert relied on were generally accepted and relied upon. After appellate review the studies undermine their reliability. The studies do not have participants like the Π and are not reflective of the type of injuries she would get. His opinion as to the Π's injuries was not supported by the literature or even his own studies.
04/04/2008	State v. Almonte	Δ claims trial court erred in allowing expert testimony about gangs from officer who was not qualified.	State's expert testified to gang organizational characteristics after a 104 hearing found him to be qualified.	Verdict for Π affirmed (admissible).	Expert's qualifications were adequate. He had been a police officer for a decade and had completed several hours of formal training by the State Police about gangs. He had additional experience working personally with gang members as part of his job. He also authored a report for the State Police on the gang in question in the testimony.
11/18/2008	State v. Murdock	Δ claims state's witness was presented as an expert without first properly	State had narcotics expert testify. Defense counsel stated in summation that Δ was the	Verdict for Π affirmed. (expert admissible; Δ inadmissible)	State's witness was properly qualified to be a narcotics expert and Δ was given an opportunity to challenge his training during cross-examination. His testimony was to

		having his qualifications on the record. Δ claims she should have been allowed to testify as expert on LSD and mushrooms because of extensive recreational use.	real expert in LSD and mushrooms. During direct testimony Δ gave statements about use and packaging of drugs.		specific experiences. Δ was never actually offered as an expert. It was just alluded to in summation. Her direct testimony statements already challenged what the state's expert had stated.
08/20/2010	Anderson v. A.J. Friedman Supply Co., Inc.	Δ argues that it was error to limit their expert's testimony. They claim the expert is qualified to testify in the area he is excluded from.	At trial Δ introduced an expert in internal medicine who considered himself an expert in cancer causation. Expert wished to testify to the heightened possibility of ovarian cancer of Π because she had been on hormones and how ovarian cancer and mesothelioma diagnosis overlap. Judge allowed him as an expert but did not allow him to talk about hormone therapy or ovarian cancer. Her reasoning was that it would be net opinion, Π's could not cross examine him on unnamed studies, and he had no expertise in medical diagnosis.	Verdict for Π affirmed (inadmissible).	The expert did not have sufficient expertise to give the intended testimony. He had no experience in gynecology or diagnosis of ovarian cancer. Because Π's did not know what documents he relied on they could not have cross examined him. The opinion would be net because he did not review her medical history or examine her.
10/21/2008	Midoneck v. Redd	Π's claim their expert's opinion was not net opinion.	Π's expert claimed that the tire that came loose from a bus was due to underinflation which resulted from improper maintenance. During summary judgment motion the judge found the Π's expert had merely speculated on the cause of the failure and no additional evidence was provided to prove otherwise.	Affirmed for summary judgment for one Δ. Reversed as to summary judgment to other Δ (admissible).	The expert used the testimony of others who talked about the tire maintenance and care. Expert stated that he was certain to a reasonable degree that this was the cause of the tire coming loose. That is all that is necessary to support his opinion. Just because he could not inspect the tire himself does not negate his opinion. That would go to the weight of his opinion.

Appendix 1
Statistical Information

	Total	% of Total
Admissible	6	60%
Inadmissible	2	20%
Other	2	20%

	Total	% of Total
Affirmed	5	50%
Reversed	1	10%
Other	4	40%

Verdict Favors	Total	% of Total
Plaintiff	6	60%
Defendant	1	10%
Other	3	30%

Total Cases	10

To: The Honorable Jamie D. Happas, P.J.S.C.
From: Valerie Werse
RE: Rule 702 in Unpublished Appellate Court Decisions
Date: January 20, 2014

Detailed below are unpublished cases appearing before the New Jersey Appellate Division that claim an error occurred at trial in the interpretation of N.J.R.E. 702. The cases were obtained through Rutgers School of Law – Newark's Law Library's Courts Search Page.[178] Search dates were limited to October 2005, the first year available in the database, to November 2013, the commencement of the project. Rule 702 was used as the search term. This produced 484 results from the database. These results included New Jersey Supreme Court cases and published appellate opinions. Results were further narrowed to unpublished appellate decisions that contained an assertion of error in the interpretation of N.J.R.E. 702 and subsequent discussion. This produced 141 relevant cases over the roughly eight year search period.

The remaining 141 cases are organized in a chart with information including: date, name of case, the issue on appeal, what originally happened in the case, the disposition, and the reasoning for the Appellate Court's decision. Included in an appendix at the end of the document is information about the percentage of cases that were admissible or inadmissible, whether a verdict was affirmed or reversed, and whether the verdict generally favored the plaintiff or the defendant. For purposes of the appendix cases marked other are those where the outcome is either unclear because it has been remanded for a 104 hearing or the case was reversed on other grounds than the alleged N.J.R.E. 702 violation.

New Jersey's tendency toward admissibility is mentioned in many of the cases listed and is reflected in the fact that 57.45% of the unpublished appellate cases examined found the

[178] New Jersey Courts Search Page, Rutgers School of Law – Newark, http://njlaw.rutgers.edu/collections/courts/search.php.

expert's testimony admissible. Additionally verdicts in favor of plaintiffs amounted to 58.16% of the unpublished appellate cases. While these totals may be slightly heightened in favor of admissibility and the plaintiffs,[179] it does not appear to be egregiously so. It is keeping in line with New Jersey's standard of acceptance for new types of methodology used by experts.

It seems clear that trial judges have an understanding of admissibility under N.J.R.E. 702. Of the 141 unpublished appellate cases, 75.18% of the decisions of the trial court were affirmed.

Though admissibility and plaintiffs may be slightly favored under N.J.R.E. 702 it does not seem to be significantly disproportionate. In fact, the percentage of cases where the Appellate Court affirmed trial court decisions reflects that the trial courts understand N.J.R.E. 702 and are applying it properly.

[179] The percentage of verdicts favoring plaintiffs may be bolstered by several criminal cases listed where defendants challenged testimony from the state regarding expert testimony in drug cases. When State v. McLean was decided in 2011, it seems to have inspired several appeals regarding officer testimony in drug cases.

Date	Case	Issue	What Happened Originally	Disposition	Reasoning
10/12/2005	Soprano v. Gulli	Δ claims that court erred in not limiting testimony of Π's expert.	Π's expert testified at trial about combustion engines.	Verdict for Π reversed (inadmissible). Remanded.	Judge allowed expert to testify to issues that went well beyond what would be expert testimony based on his experience with combustion engines. His testimony amounted to giving credibility to certain witnesses over others.
10/14/2005	Martin v. Lithotripsy Treatment Group	Π claims error in disallowing her expert witness.	Π wanted to introduce evidence from a nursing expert that Δ breached the standard of care used in nursing which in turn caused Π's fall. Trial judge determined the testimony was not above the ken of the average juror.	Verdict for Δ reversed (admissible).	There is a liberal view in admitting expert testimony. It goes to determining whether or not Δ was negligent and failed to use the proper nursing standard of care.
10/19/2005	Snell v. Bostrom Products Co.	Π claims error in excluding their expert witness's testimony.	Π wanted expert to testify to in a product's liability case. Judge determined that the expert did not have sufficient experience.	Verdict for Δ affirmed (inadmissible).	Expert had education and training but did not have experience with the type of product in the case. Additionally his report amounted net opinion.
11/10/2005	State v. Hearns	Δ claims expert testimony was to bolster and not assist the jury.	State's expert testified at trial as to why a drug distributer would discard their product.	Verdict for Π affirmed (admissible).	Why a drug distributer would discard valuable product would be beyond the ken of the average juror and would assist the trier of fact.
12/08/2005	Adriansen v. Wayne Dodge, Inc.	Π asserts that court erred in not allowing their expert's opinion and calling it net opinion.	Π had expert auto mechanic testify. The judge determined that expert could be qualified in the field of auto mechanics but not in worn engines.	Verdict for Δ reversed (admissible).	The expert's extensive auto mechanic experience would be adequate qualification as an expert in worn engines as well. It was not a net opinion and was based in factual evidence.
12/29/2005	Scheck v. Dalcorso	Π challenges exclusion of expert in hedonic damages.	Π had expert give testimony of economist on loss of household services and hedonic damages because of her injury. Trial judge allowed testimony to household service but not hedonic damages.	Verdict for Δ reversed. 104 hearing ordered.	The expert is a well-known economist who "literally wrote the book on the use of expert testimony in hedonic damages." A 104 hearing was never held and the court was not properly informed about expert opinions in hedonic damages by Π's counsel. The judge therefore did not have

					the proper information to rule on whether the expert could testify.
02/06/2006	State v. Tirado	State's response to a Δ's appeal that Δ's expert should not have been able to testify because his testimony was not reliable and was misleading.	Δ's expert testified at trial as to Δ's level of intoxication and ability to perceive his actions. Judge allowed testimony.	Verdict for Π affirmed (admissible).	Even though expert's testimony did not talk about all the legal criteria for intoxication it was still helpful under 702. The probative value has high.
02/07/2006	Prasa v. Trezoglou	Π claims error in the exclusion of his expert's testimony as net opinion	Π had forensic accountant testify to lost wages from his business as a result of the accident. The court struck the testimony as net opinion.	Verdict for Δ affirmed (inadmissible).	While accountant had evidence of loss he did not make any casual connection to the Π's accident as the reason for the loss and was therefore giving net opinion.
04/24/2006	Poplawski v. Joseph Appezzato Building Contractors, Inc.	Π appeals decision to keep expert testimony out of trial.	Π's expert's opinion on what caused a propane heater to burn Π was ruled a net opinion as he listed several possible causes.	Verdict for Δ affirmed (inadmissible).	Expert could not give a particular cause of the heater fire and therefore was giving a net opinion when he offered several different potential causes.
05/12/2006	State v. Walker	Δ claims that state's expert testimony was improperly admitted as no expert was required.	State's expert testified to drugs being possessed for distribution purposes and that the area was fortified. Judge allowed.	Verdict for Π affirmed (admissible).	Practices of drug dealers is considered specialized knowledge and may have an expert testify.
06/26/2006	Gnecco v. Abbate	Π claims that Δ's testimony was net opinion.	Δ's expert testified to the maintenance and safety issues of a piece of property.	Verdict for Δ affirmed (admissible).	Expert's testimony was not net opinion because it was based on his own factual gathering and observation.
07/17/2006	Sample v. City of Trenton	Δ claims that expert made a net opinion.	Π's expert had not been able to take measurements at the actual site of a fall as it had been repaved. Trial judge ruled that despite that it was not net opinion as it was based off photographs and testimony.	Verdict for Π affirmed (admissible).	There was enough evidence in the record to account for a factual basis of the opinion of the expert.
08/16/2006	Thornton v. Camden County Prosecutor' s Office	Π claims expert's testimony was improperly excluded.	Π wanted to introduce testimony of expert in labor relations. Judge concluded that there was no factual basis for the opinions and therefore it was net opinion.	Verdict for Δ affirmed (inadmissible).	Expert's opinion was based on unfounded facts.
08/30/2006	State v. Skouras	Δ asserts error in omitting his	Δ wanted to offer an expert who would explain that Δ had involuntarily	Verdict for Π reversed (admissible).	Δ should be permitted to give evidence from expert that would help show the credibility of his

		expert's testimony	waived Miranda rights because he was under the influence and not fully aware of the consequences. Judge denied the testimony.		statements to the jury. Expert's statements were relevant to the Δ's mental state.
11/27/2006	Patel v. Decortes, et. al	Π asserts court erred in allowing a police officer to testify as an expert without being qualified.	Police officer opined that Π crossed yellow line in the road and was therefore negligently driving.	Verdict for Δ reversed (inadmissible). Remanded.	Officer was not identified as an expert yet gave expert opinion anyway. None of his opinion was done with his own observations, only through hearsay.
12/29/2006	Marino v. Sears, Roebuck & co.	Π claims that Δ's experts gave net opinions.	Δ presented two experts. One detailed the design and engineering of saws and the second a doctor who opined that the injury did not happen in the way Π claimed based on the placement of his injuries.	Verdict for Δ affirmed (admissible).	They were not net opinions because they were based on facts and not unfounded speculation.
01/29/2007	6400 Corp. v. Chevron U.S.A. Inc.	Δ asserts Π's expert was not qualified, gave a net opinion and their methodology was not scientifically reliable.	Δ had an environmental engineer as an expert witness. He claimed Π's expert's methodology was not scientifically accepted and advocated a different methodology.	Verdict for Π affirmed (admissible).	Π was suitably qualified to be an expert. The methods he used were generally accepted within the field. It was not the most common or accepted theory, but it was still one that was generally accepted in the field. Expert's opinion was based on facts and data and therefore was not net opinion.
02/08/2007	Division of Youth and Family Serv v. M.W.	Δ claims state's expert does not have the proper qualifications to be considered an expert.	Psychologist examined Δ and determined that they were not able to properly care for a child.	Verdict for Π affirmed (admissible).	Expert's training and education qualified her to be an expert.
03/13/2007	State v. Taffaro	Δ claims that detective's expert testimony exceeds his expertise in computer forensics.	Prosecution had detective testify that Δ was behind a Craiglist posting by tracing the IP address.	Verdict for Π affirmed (admissible).	The testimony did not exceed the detective's expertise.
03/14/2007	State v. Akins	Δ claims state's expert's testimony was improper.	State's witness testified to drug dealers' operations and how sometimes innocent appearing conduct can be deceiving.	Verdict for Π affirmed (admissible).	Witness's opinion was proper. He did not give net opinion and it was information that was beyond the ken of the average juror.
03/14/2007	State v. Berry	*See Atkins*	*See Atkins*	Verdict for Π affirmed (admissible).	*See Atkins*

04/05/2007	Bull v. Zeidman	Π asserts that just because expert was not in the Δ's area of practice does not mean that he is unqualified.	Π wanted expert to testify to the standard of care that any physician would use. Expert was a neurologist. No Δ's were neurologists.	Verdict for Δ reversed (admissible).	The doctor is qualified to testify as an expert based on his education and work with doctors in other specialties.
04/18/2007	Tamburella v. Caterpillar, Inc.	Π appeals order barring his expert's testimony	Π obtained an expert in heavy equipment for a personal injury suit. The expert pointed out several safety flaws in the equipment that Π was using. Judge found the opinion to be net opinion because it was unsupported by factual evidence.	Verdict for Δ reversed (admissible).	Expert established a causal connection between the inadequacies in the equipment and the Π's injuries.
06/01/2007	State v. Irizzary	Δ asserts court allowed state's witness to testify as expert without being qualified.	State was not able to have expert testify so at trial they had arresting officer testify to possession with intent to distribute. Δ counsel objected. Court overruled claiming that based on his experience as a police officer it is lay testimony.	Verdict for Π reversed (inadmissible). Case remanded.	This type of testimony exceeded lay testimony. It required specialized knowledge based on the officer's training and experience, one that a lay person does not have.
06/05/2007	Don Corson Constructio n Co, Inc. v. Hrebek	Δ claims Π's expert opinion is not reasonably relying on fact.	Π's expert prepared a report on the costs of construction using court documents and a cost consultant.	Verdict for Π affirmed (admissible).	They cost consultant's report was not simply restated by the expert but used to form new conclusions.
06/11/2007	State v. Maqbool	Δ argues that state's medical expert should not have been able to testify.	State's expert had relinquished medical license in MA and was on probation in NH which was found out right before trial. This information was revealed in voire dire. Defense counsel submitted anyway.	Verdict for Π affirmed (admissible).	Expert was qualified. He possessed the minimum education and employment still having his license in NJ.
07/03/2007	State v. Randolph	Δ claims state's expert opined on his guilt.	Expert was given a hypothetical question about drug distribution.	Verdict for Π affirmed (admissible).	Hypotheticals are allowed to be posted to expert witnesses in drug cases.
07/27/2007	Suarez v. Lee Industries	Π claims expert's opinion isn't net and shouldn't be excluded.	Π obtained a liability expert who opined that a tank was defective because it lacked safety devices to protect workers. Trial judged found this to be net opinion.	Verdict for Δ reversed (admissible).	The opinion was not net because it was based on facts and data that were known when he formed his opinion.

07/30/2007	Schorpp-Replogle v. N.J. Manufacturers Insurance Co.	Δ claims testimony was net opinion.	Π presented expert testimony from an ENT specialist who examined her hearing in a workman's compensation claim. He claimed that her hearing loss was likely due to exposure at her workplace. Judge found the expert's testimony convincing.	Verdict for Π affirmed (admissible).	Although elaboration would have been appreciated the doctor's opinions are not net and are supported by science.
08/03/2007	Otero v. Schindler Elevator Corp.	Δ says Π's expert was improperly qualified and gave net opinion.	Π's expert was a mechanical engineer testifying in a product's liability case involving elevators. He claimed to have experience in elevator maintenance and repair but not about elevator design. Δ objected to his qualifications. The judge allowed it.	Verdict for Π affirmed (admissible).	Expert's expertise was sufficient for the questions being asked.
08/14/2007	Albarracin v. Crown Equipment Corp.	Δ appeals expert's ability to talk of OSHA standards	Π's expert told jury of OSHA standards about safe work environment. Judge informed jury that they could consider it if the facts supported it.	Verdict for Π affirmed (admissible).	No abuse of discretion that would cause the trial court to be overruled.
10/19/2007	State v. Varner	Δ argues that state's expert's testimony exceeded his qualifications and did not rely on generally accepted methods.	Expert testified at trial to the extent and origin of victim's injuries.	Verdict for Π affirmed (admissible).	Expert has been in his field for some time, previously testified as an expert, and works in a relatively young field. He was fully qualified.
01/08/2008	Cardinale v. Losman, et. al	Π claims error in excluding their pharmacology expert for lack of qualification.	Π wanted to introduce testimony of a pharmacological expert to testify to the negligence of deceased doctors. During cross examination admitted he had never written a prescription, had a medical degree, or worked in an ICU. Trial judge determined he was not qualified to render an opinion on the doctor's responsibility.	Verdict for Δ affirmed (inadmissible).	Court ruled correctly; the expert, while adept in pharmacology, was not qualified to talk about the doctor's malpractice in not overseeing the patient's medication.
03/12/2008	Onyx Acceptance Corp. v.	Δ claims court erred in not allowing its	Δ wanted to introduce the expert testimony of a hotel executive to explain	Verdict for Π affirmed (inadmissible).	Expert was going to testify beyond the general standards and include whether or not Δ had

	Trump Hotel & Casino Resorts, Inc.	expert's testimony.	that Δ had followed the standard of care of the hotel industry. Trial court acknowledged his qualifications but barred testimony because he did not read all relevant material that would be necessary for him to form an expert opinion.	Reversed and remanded in part on other grounds.	followed such standards. Trial court did not abuse discretion in saying he did not have enough information to form such an opinion.
03/13/2008	GK Reality Services, LLC v. Stopar	Π claims that court erred in excluding their expert witness.	Π wished to call an expert to testify that a break in several months in a negotiation was not substantial. The judge ruled that it was not esoteric enough that the jury could not understand on their own.	Verdict for Δ affirmed (inadmissible).	Not outside what would be common knowledge to a jury and it would have been net opinion anyway.
04/10/2008	State v. Green	Δ claims that the expert's testimony impermissibly invaded the province of the jury.	State used an expert witness to testify to the mechanics of drug transactions.	Verdict for Π affirmed (admissible).	This type of information is above the ken of the average juror. The expert's opinion did not contain any opinion on Δ's guilt.
05/28/2008	Porras, et. al v. Porras	Δ argues that Π's expert's opinion was net because it failed to establish her injuries were caused by the electrical shock she received.	Π's expert testified to the tremors she experienced after receiving an electrical shock. He examined her and determined that she was suffering from carpal tunnel due to her electrical shock.	Verdict for Π affirmed (admissible).	Expert's opinion causally connected the tremor and the shock and was not net opinion.
07/25/2008	Estate of Madeline F. Burnett v. Water's Edge Convalescent Center	Π claims that expert's testimony about injury demonstrates an issue of material fact.	Π had expert testify to Water's Edge not conforming to the standard of care when it came to deceased patient's health issues. Trial judge omitted for speculation.	Verdict for Δ affirmed (inadmissible).	Testimony of the doctor was too speculative and did not rely on any concrete evidence regarding the deceased injuries. It amounted to bare suspicion.
10/20/2008	Hernandez v. Orange Medical Primary Care	Δ claims error in excluding their expert testimony.	Δ attempted to present testimony of an expert on billing practices but the trial judge ruled it inadmissible as net opinion.	Verdict for Π affirmed (inadmissible).	There are no facts on the record that show how the expert got any information to draw any conclusions. This amounts to net opinion. l
11/05/2008	Spectraserv, Inc. Kearny Municipal Utilities Authority	Π claims Δ's expert witness was not qualified.	Δ introduced an expert who Π attempted to disqualify in trial. Judge determined that the objection was too technical and that the	Verdict for Δ affirmed (admissible).	Witness was sufficiently qualified to be considered and expert in that area.

			witness was competent in his engineering knowledge.		
12/01/2008	McCarrell v. Hoffman-La Roche, Inc.	Δ claims court erred in allowing testimony from Π's expert because his methodology was unreliable and improper under N.J.R.E. 702 (2nd prong).	Pre-trial the judge considered the Π's expert report, expert's deposition, briefs, and oral argument from parties. Judge determined that data used by expert was generally followed by other experts in his field and the scientific methodology was proper	Verdict for Π affirmed (admissible)	N.J. Sup. Ct. had relaxed the Frye "general acceptance" specifically in tort cases with novel theories or causation. The relaxation was in order to help Π's who had a high burden. N.J.'s case law has trended toward admissibility. The opposing party has the chance to cross examine in order to show the weakness.
12/17/2008	State v. Daley	Δ asserts error in letting state present expert witness without qualifying or providing reports prior to trial.	Police officer testified to the type of drugs he saw in the Δ's car.	Verdict for Π affirmed (admissible).	The experience of the officers was satisfactory to qualify them and though no pre-trial report was proffered the Δ had a copy of transcripts from the suppression hearing.
01/05/2009	State v. Glover	Δ says court improperly admitted detective's expert opinion as it did not help the jury and improperly bolstered fact based testimony	Detective testified to methods of drug distribution.	Verdict for Π affirmed (admissible).	Witness was qualified in the field of narcotics, use, distribution, and packaging.
03/02/2009	State v. Dellisanti	Δ claims state's expert witness was not qualified as such when giving his opinion.	Witness for state testified as to why the insurance card offered by Δ to the police was false.	Verdict for Π affirmed (admissible).	Witness was not an expert witness, he was a fact witness. His job at the insurance company gave him familiarity with the types of insurance cards they produced.
03/12/2009	Fox Rothschild LLP v. Alanwood Trust	Δ claims court improperly excluded its expert's opinion as net opinion.	Δ submitted an expert report claiming that Π committed malpractice. Judge dismissed this as net opinion. Π had expert submit a report for a malpractice case stating conduct was a reasonable methodology in the field.	Verdict for Π affirmed (inadmissible).	Δ expert did not review the trial tape buy rather relied only on what the Δ told him. His conclusions where therefore unsupported by factual evidence. Expert cites no consensus among the legal field.
04/28/2009	In Re Joan Ivan	Π claims her expert should have been admitted.	Π attempted to introduce a firearms training expert. Judge determined that the testimony was irrelevant because it required no special expertise and therefore barred it.	Verdict for Δ affirmed (inadmissible).	In reviewing the report the appellate court finds no information that would aid or require any special expertise.

06/12/2009	State v. Gibson	Δ claims state's expert was not qualified.	State's expert gave testimony on the analysis of ethyl alcohol.	Verdict for Π affirmed (admissible).	Expert was qualified. He was certified and had done hundreds of similar tests during his career.
06/19/2009	State v. Rosales	Δ claims court erred in not allowing expert testimony about false confessions	Δ wished to produce an expert who would speak to the factors that cause a false confession. Trial court likened this testimony to State v. Free and said it was not expert testimony.	Verdict for Π affirmed (inadmissible).	If the expert witness had been offered to show what the mental condition of the Δ was at the time of the confession (i.e. he had a mental illness that would inform this behavior) then it would have been different. In this case however there was nothing to suggest that the testimony was based on scientifically reliable authority or beyond the knowledge of the average juror.
06/24/2009	Rokos v. Marina Assoc.	Π claims error in not allowing her expert witness to testify to a security code.	Π wanted expert to be able to testimony relating to an administrative code on security regulants. Judge denied indicating that he could not testify to his "interpretation" of an administrative code.	Verdict for Δ affirmed (inadmissible).	The expert's expertise was not in law and interpretation but security and so the trial court properly excluded his interpretation of the code.
07/31/2009	Sarkozy v. A.P. Green Industries, Inc.	Δ claims Π's expert should not have been allowed to testify because he had no experience at the particular plant that Δ worked at or product Δ worked with and that that his methods were not readily known.	Π had expert testify that asbestos fibers that were released in the process of paper making would be inhaled by workers in the vicinity of the felts.	Verdict for Π affirmed (admissible).	Expert's testimony was not used to prove negligence, but to show that asbestos would be inhaled by workers working with such a product. His testimony was only about the general process and did not talk about Δ's conduct. It was based on personal experience and was not net opinion.
08/17/2009	State v. McMullen	Δ asserts error in not allowing his expert to testify.	Δ wanted to introduce an expert to show there was no connection between exposing himself and filming young girls.	Verdict for Π affirmed (inadmissible).	This was not the point the state was trying to make and therefore the evidence was irrelevant.
08/21/2009	Kilhullen v. ABM Industries	Π's expert's was not allowed to testify to fire code regulations.	Π's expert was used in a slip and fall case. He was allowed to testify to experiments he performed to determine the cause of the fall (floor surface) but was not allowed to testify to fire code violations.	Verdict for Δ affirmed (inadmissible).	The trial court properly determined that the fire code violation was not relevant to the Π's slip and fall. His expert testimony was limited to relevant knowledge.

11/05/2009	State v. Guaman	Δ argues that state's expert's opinions were not beyond the ken of the jurors and therefore bolstered victim's credibility.	State's expert provided details in a sexual assault case as to how extensive the victim's injuries were and how they may have been produced.	Verdict for Π affirmed (admissible).	Expert's testimony was beyond the ken of the average juror.
12/04/2009	N.J. Div. of Youth and Family Services v. G.R.	Δ claims state's witness improperly testified beyond her scope as a psychologist.	State's psychologist testified to the prospects of Δ remaining drug free and stable.	Verdict for Π affirmed (admissible).	State's witness was properly qualified, and even had similar qualifications to Δ's witness.
12/22/2009	State v. K.E.	Δ claims court erred when It allowed a cultural expert to testify and when it allowed a nurse to offer expert opinion without qualifying her as such.	Nurse who dealt with victim testified that the woman appeared to be a broken woman and gave testimony about a test/condition she was not qualified to talk about.	Verdict for Π reversed (inadmissible). Remanded.	Nurse's testimony was expert testimony when she was not properly qualified to give it. She even opined on when the victim's abuse started. Witness improperly bolstered credibility of victim. It was capable of producing error and needed to be reversed.
12/23/2009	State v. Tatum	Δ appeals decision to exclude his expert's testimony.	Δ sought to introduce an expert on drug addiction. Judge excluded because expert relied on what Δ said about his drug usage and because it did not address state's witness's testimony.	Verdict for Π reversed (admissible). Remanded.	Expert's testimony was beyond the ken of the average juror and could assist them in their decision it was proper. Additionally relying on hearsay is what happens in expert's profession.
12/24/2009	State v. Salter	Δ claims a fact witness was treated as an expert	Medical examiner was asked about his knowledge of penetration without trauma.	Case reversed and remanded on other grounds	Because it was the defense that initiated that line of questioning it was fair for prosecution to talk about it in their redirect
01/05/2010	State v. Proctor	Δ claims expert's testimony was improper because it was not beyond the ken of an average juror, it improperly bolstered testimony, and the hypothetical asked tainted the jury.	State had narcotics expert testify at trial.	Court reversed because of accumulation of errors.	Expert's testimony on packaging, value, and quantity of drugs for distribution was within the range of expert testimony. However, some of the other testimony provided by expert was unsupported.
01/05/2010	Zavala v. Novak	Π claims Δ's accident reconstruction	Δ used an accident reconstructionist to show that she could not see Π's	Verdict for Δ affirmed (admissible).	The accident reconstruction helped jurors understand what happened. Expert was sufficiently

		expert that the methodology was not reliable and unscientific	bicycle before she hit him.		qualified and his methods were reliable.
01/14/2010	State v. Miller	Δ claims detective's testimony was improperly admitted since he was not qualified as an expert.	Detective had taken a photo of Δ's hand as part of the investigation. 104 hearing was held and judge ruled that detective could not testify they were bite marks on Δ's hand because he was not an expert in bite marks. He could testify that victim had said he had bitten Δ in an interview however.	Verdict for Π affirmed (admissible).	Testimony did not exceed lay opinion. Never needed to be qualified as an expert.
03/04/2010	State v. J.I.F.	Δ claims error stemming from state's expert's on battered women's syndrome.	State's expert on battered women's syndrome was allowed to testify on BWS and typical conduct but not whether or not victim was suffering from it or was battered.	Reversed and remanded on other grounds.	State's expert's testimony was merely a recitation of BWS and did not relate that this victim was a battered spouse. It was therefore irrelevant to whether THIS victim recanted her statement because of suffering from BWS. Harmless error.
03/09/2010	State v. Franklin	Δ claims that there was impermissible expert testimony given by a lay witness.	Police officer who was a fact witness claimed that the amount of drugs found on Δ indicated it was for distribution. He had not been qualified as an expert witness.	Harmless error	Opining on the distribution purposes was expert testimony.
03/11/2010	State v. K.S.	Δ asserts that expert's testimony was improperly admitted and not outside the ken of the average juror.	Expert testified in sexual assault case about anatomy and evidence of abuse.	Verdict for Π affirmed (admissible).	The medical facts and explanations presented by the expert were beyond the ken of the average juror.
03/15/2010	Antoinetti v. N.J. Turnpike Authority Garden State Parkway Division	Π appeals decision of trial judge to deny her expert witness to testify.	Π attempted to offer a polymer chemist as an expert in biomechanics. Trial judged denied because his experience and education did not render him so. He was only considered an expert in surfaces but not human motion.	Verdict for Δ affirmed (inadmissible).	Expert witness in how Π was walking was not necessary anyway because it is not beyond the ken of the average juror. The court erred in allowing the expert to testify even in surfaces and walking conditions but the error was favorable to Π and was therefore harmless.
04/05/2010	Buttitta v. Allied Signal, Inc.	Δ claims that Π's expert's opinions were "novel and unsupported"	Π's expert testified to the possibility that decedent's limited exposure to asbestos during his work	Verdict for Π affirmed (admissible).	Even if it is novel it may be reliable if founded on information reasonably relied about by experts in that scientific field. Trial judge was provided with enough

		and whether they were sufficiently reliable.	would be enough to cause mesothelioma		information to make a determination on whether or not the experts' methodology was scientifically sound.
04/14/2010	Kendall v. Hoffman-La Roche, Inc.	Π claims Δ's expert's methodology was unscientific and unsounds because it relied on animal studies	*See* McCarroll v. Hoffman-LaRoche. Same expert, same situation	Verdict for Π affirmed (admissible).	No abuse of discretion or any manifest denial of justice.
07/07/2010	Perina v. Catbagan	Π claims error in excluding his expert.	Π tried to introduce an accident reconstruction expert. Judge determined he only relied on part of the puzzle and did not have the whole picture. The prejudice exceeded the probative value.	Verdict for Δ affirmed (inadmissible).	The opinions did not bolster any other witnesses, but they were not all based on facts.
07/08/2010	Grisham v. Prospect Woman's Medical Center P.A.	Δ claims that Π's expert did not prove a deviation of standard care for all the incidents Π asserts.	Π's expert witness stated that Δ deviated from standard of care of OBGYN when she failed to diagnose Π's breast cancer on two separate visits.	Verdict for Π reversed (admissible).	Π's expert only related the standard of care for one of the physician's visits and not both. In a medical malpractice case it must be done for every instance of deviation from standard of care.
07/19/2010	Rab v. Doner	Π claims error in finding that expert's report was net opinion.	Π presented reports by two experts (oral surgeon and internal medicine) who stated that Δ had not followed acceptable standards for the profession but neither states the deviation from the standard of care. Trial court found the reports inadequate and bared them.	Verdict for Δ reversed (admissible). Motion survives summary judgment.	Although the oral surgeon is undoubtedly qualified to testify, his report does not give the applicable standard of care. The internist comments on the infection that occurred for the Π and does talk about the standard of care. His opinion can be used if he can lay a foundation that Δ is familiar with the infection issue.
07/30/2010	Rhamstine v. Scott	Δ claims Π's expert testimony should have been barred because expert did not have the requisite qualifications.	Π presented an expert who was a prosthodontist who claimed Δ, an orthodontist, deviated from the standard of care necessary to prevent Π's injury. Δ objected saying expert was not an orthodontic specialist. Trial judge denied this because both parties had stipulated to the expert pretrial.	Verdict for Π affirmed (admissible).	Expert was sufficiently qualified and the argument does not merit discussion in a written opinion. Both parties stipulated to the expert.

08/13/2010	Maynard v. Pelican Leisure Sports, Inc.	Π appeals decision that expert's testimony was net opinion.	Π presented an expert in ski binding and testified to the proper torque for release of skis. Π asked if the problem could be a manufacturing error and expert said that he could only attest to the release.	Verdict for Δ affirmed (inadmissible)	Expert could not give the "why and wherefore" as to why there was an issue with the skis. He made an assumption that it was the manufacturer, but it was just an assumption.
08/17/2010	Pazos v. Borough of Sayreville	Π appeals from summary judgment.	Π's expert produced a report about conditions of playing field where Π's fell asserting it was unsafe, but did not have any evidence of its original condition.	Verdict for Δ affirmed (inadmissible).	Expert's first site visit was 2 years after the incident not providing an accurate picture of the topography. The pictures that expert worked off of were not how the area looked at the time of the accident, and do not show what the Π fell on. This makes the expert's opinion net opinion because it is sheer speculation.
08/18/2010	Afriyie-Addo v. Ford	Δ claims error because expert gave net opinion as it did not explain the causal connection between an accident and back pain.	Π presented expert doctor in pain management to show the extent of his back injuries from a car accident. Trial judge called the testimony weak but stated it rose above net opinion.	Verdict for Π affirmed (admissible).	Judge did not abuse discretion. Expert's testimony about the car accident being the cause of the pain is factually based.
08/30/2010	Carino v. Muenzen	Π appeals the exclusion of his expert's testimony.	Π attempted to introduce an expert to prove malpractice of physician. Judge determined he did not have the requisite qualifications because he was opining on neuroscience without being a neuroscientist and during voire dire he was not able to answer several important questions with his own opinion.	Verdict for Δ affirmed (inadmissible).	Because the objection occurred after expert started to talk about the neurological treatment process after admitting to not being a neurosurgeon he was not qualified to talk about such things.
09/08/2010	State v. Coleman	Δ claims expert summarized information in a way that suggested Δ was guilty.	Expert describes what happened in the wiretap conversations of Δ	Verdict for Π affirmed (admissible).	There was no opining on guilt, but merely description.
09/23/2010	State v. Vargez	Δ claims that witness gave expert testimony without being qualified as such.	Δ claim's detective's testimony that he noticed damage to a car that was "indicative of auto theft" constituted expert opinion but he was not qualified as such and also was an opinion that Δ was guilty.	Verdict for Π affirmed (admissible).	Police are able to testify to certain things based on their experience as an officer. It was still lay opinion because it was within the witness's own personal experiences and observations.

10/06/2010	Lewis v. Airco, Inc.	Δ wishes to have general causation testimony by independent scientists admitted.	Π had an expert epidemiologist testify to the level of exposure to toxin that deceased experienced in his work place. Expert relied on literature and studies from the field to determine causation. Trial court ruled it inadmissible.	Verdict for Π reversed. (admissible).	Court conducted its own review of the expert's studies instead of looking to see if it was generally relied upon in the field.
10/26/2010	State v. Notte	Δ claims error in not allowing his expert to testify.	Δ wanted expert to testify about optics and physics to prove that he could not have stood up in the van and exposed himself to girls.	Verdict for Π affirmed (inadmissible).	Judge properly concluded that there was no need for an expert as it was not above the ken of the average juror.
11/08/2010	Mincey v. Parsippany Inn	Π claims exclusion for net opinion was incorrect and there was an issue of material fact.	Π had an expert proffer a report of the slip resistance of surfaces in a slip and fall case. Because no number could be pinpointed as an unsafe number the judge determined it was a net opinion because no standard could be established.	Verdict for Δ affirmed (inadmissible).	Expert could not give a point of certainty of when the floor surface became unsafe.
11/23/2010	Sims v. Deltec Power Systems, Inc.	Π claims judged erred in not finding that Π's expert had the necessary experience to be qualified as an expert	Π had an expert testify that a manufacturing defect would be one possible cause of release of acid fumes. Expert did not examine any of the actual batteries that would have had the defect. At a hearing Π's expert conceded he did not have knowledge of battery technology or chemical reactions in batteries. He had 1 year of practical battery manufacturing experience. Trial judge concluded he did not have requisite experience to qualify as an expert and his opinion was net opinion.	Verdict for Δ affirmed. (inadmissible).	Opinion was net opinion. Court therefore did not need to address the lack of expertise.
11/30/2010	Grembowie c v. Geisler	Δ's claim that trial judge's refusal to bar Π's expert's testimony on	Π's expert testified at trial about the cause of an accident and whether or not the driver was negligent.	Verdict for Π affirmed (admissible).	Expert was both qualified and not giving a net opinion. His accident reconstruction was based on statements by the Δ; what weight

		accident reconstruction was erroneous and was a net opinion.			was given to his reconstruction was to be determined by the jury.
02/16/2011	State v. Kovacs	Δ claims that witness gave expert testimony without being qualified as such.	Sergeant who arrested Δ testified about drug distribution techniques and why that made Δ suspicious.	Verdict for Π reversed (inadmissible). Remanded.	Sergeant testified beyond his observations.
04/11/2011	Spandet v. Bucknam	Π claims court erred in excluding her expert witness testimony.	Π wanted to have an expert testify to the possibility that a drug had been placed in her alcoholic drink. Trial judge excluded after finding that it was not based on any scientific studies or accepted studies and he lacked clinical experience.	Verdict for Π affirmed (inadmissible).	Opinion was net opinion and not supported by any facts or scientific data. This expert had no clinical experience in treating patients who had been drugged.
04/13/2011	In re RJ Dept of Corrections	Appeal by Department of corrections over whether an expert's testimony was qualified.	Corrections officer was dismissed for testing positive for cocaine in a drug test. He was on several other medications because of diagnosis of HIV. He introduced an expert to opine that the other drugs he was taking for the disease may be skewing the results of the test.	Verdict reversed (inadmissible).	There is no scientific evidence that the medications that the officer was taking would have affected the results to make a false positive for cocaine. The expert did not have the right knowledge to testify (he specialized in opiates which cocaine is not) and his opinion was speculative and net.
06/03/2011	Ludwiczak v. Showbaot Atlantic City Operating Company, LLC	Π claims that expert's opinion was not net opinion.	Π produced a security expert who created a report that that stated Π would not have been attacked if Δ had proper security protocols in place. Trial judge determined he could not testify because he did not have any data or statistics particular to the location of the incident and was basing his opinion off his experience as a police officer in a particular town.	Verdict for Δ affirmed (inadmissible).	Expert based his opinion solely on his time as a police officer. He did not point to any generally accepted standard, nor did he use any statistical data about the particular location of the incident.
06/16/2011	State v. Ariste	Δ claim's detective's opinion was an expert opinion	At trial a detective asserted that the Δ fired a gun while going southbound down the	Verdict for Π affirmed (admissible).	Police officers are allowed to testify to personal observations so long as they are based on their experience and career. In this case the detective's observation

		and not properly qualified.	road basing that on the placement of bullet cases.		of how the shells fell was within his experience as an officer.
07/28/2011	K.M. v. S.M.	Whether it was improper to deny Π's expert psychological testimony (104 hearing held)	104 hearing was conducted to determine if Π's psychological expert could testify. Both Π's and Δ's experts testified on the issue of admissibility. Judge found reliability was flawed because Π's expert admitted that she did not follow proper procedure with her interviewing methods. The judge also found Π's expert unreliable because she chose not to video tape the interview.	Verdict for Δ affirmed (inadmissible)	Court analyzed the expert under the proper N.J.R.E. 702 standard and found that the Π's expert did not adhere to the generally accepted practices of the scientific community.
08/26/2011	Lopresti v. Saglimbene	Π claims that expert should not have been precluded without a 104 hearing.	Π's expert's testimony had been excluded because the expert had retired from dentistry over 20 years earlier than when he would be giving testimony and had not performed the procedure in question since his retirement.	Verdict for Δ reversed. Case remanded. 104 hearing necessary.	It was an abuse of discretion to dismiss the Π's expert without a 104 hearing. This would determine how much the field of oral surgery had changed since the expert retired and what his current understanding of it may be. Additionally the court cited case law that advocated the use of cross examination to show weakness in expert testimony rather than preclusion from testifying.
09/14/2011	Lawyer v. Gastrich	Π appeals evidentiary rulings.	Π retained expert to determine whether or not decedent experienced fear before car struck her (judge granted motion to dismiss this testimony on urging that it was not known if decedent saw the car before it hit her and it was therefore conjecture). Π obtained expert to opine on traffic configuration. Δ's witness testified as to why the crosswalk was in its particular place (Π objected to this as expert opinion. Judge overruled).	Verdict for Δ affirmed (admissible).	No abuse of discretion.
09/27/2011	State v. Stevenson	Δ claims it was error to allow witness to testify that it	Expert testified for prosecution that the rarity of the DNA profile found at the scene made it	Verdict for Π affirmed (admissible).	Expert did not attest to the guilt of the Δ, simply the rarity of the DNA type and that it likely belonged to Δ.

		was his DNA at the crime scene.	extremely likely to be Δ's.		
09/30/2011	State v. Coley	Δ claims that state's fact witness acted as an expert witness.	Police officer testified that drugs in possession of Δ were likely for distribution and not personal use.	Verdict for Π reversed (inadmissible).	The distribution was s central issue of the case and the officer lacked the education and experience to qualify as an expert. He was a probationary officer and had limited job exposure to narcotics.
10/06/2011	State v. Randall	Δ claims state's expert rendered an opinion on the ultimate issues before the jury.	State used a hypothetical situation during expert's testimony about whether distribution intent could be drawn from quantity and packaging of drugs.	Verdict for Π affirmed (admissible).	Experts may not attest to the guilt of the Δ but may answer a factual hypothetical. At trial the hypothetical was properly phrased and answered.
11/10/2011	Knitowski v. Gundy	Δ argues that Π's expert's education does not qualify him as an expert in the specific field he is testifying in and gave net opinion.	Π's expert testified to matters relating to economics and statistics but Δ claims that his background only involved vocational counseling and a small amount of economics.	Verdict for Π affirmed (admissible).	Courts have a liberal standard in whether or not they want to allow an expert witness. Credibility and weight are best left to the jury. Additionally Π's expert's education and experience were sufficient to say that the judge did not abuse his discretion. Expert has previously qualified as such in similar cases.
12/21/2011	Egg Harbor Township Bd of Educ v. Schaeffer Nassar	Δ claims that Π's expert provided only net opinion with no factual basis.	Π had expert give opinion on why there was a failure of a water basin.	Verdict for Π affirmed (admissible).	There was sufficient support and data to prevent the opinion being net opinion.
12/21/2011	Egg Harbor Township Board of Ed v. Nassar	Δ claims expert's testimony was net opinion	Π had an engineer testify as an expert as to storm water basin drainage failure.	Verdict for Π affirmed (admissible).	The opinion was admissible and based in factual support and was therefore not net opinion. It was an issue of weight for the jury.
01/09/2012	State v. Diaz	Δ claims state's witness gave expert testimony without being qualified as such.	State's witness was not offered as an expert but gave information about the frequency for recovery of fingerprints. At a sidebar prosecutor acknowledged they did not mean to call him as an expert and did not have a C.V. for him. Judge determined that it did not necessarily require an expert to give such testimony.	Verdict for Π affirmed (admissible).	Most of what state's witness said was expert opinion and not lay opinion. Determining usable fingerprints is beyond the ken of the average juror. However, Δ never objected to the substance of the testimony and if offered as an expert state's witness would undoubtedly have qualified.
01/12/2012	Tietjen v. Mazawey	Π's appeal the decision to omit expert's opinion because it was net opinion.	Expert prepared a report stating that Δ deviated from standards of legal counsel.	Verdict for Δ affirmed (inadmissible).	Expert's report does find a proximate cause connection between negligence and damages. It is therefore net opinion. It is bare conclusion.

01/27/2012	State v. Zarate	Δ asserts that DNA expert testimony should be excluded for failure to testify with degree of medical certainty.	Two forensic scientists testified at Δ's trial that the victim's blood was found over several items in the Δ's home. One scientist did the actual testing and testified to a degree of certainty. The second did no testing and simply relied on the first scientist's report and gave no degree of certainty.	Verdict for Π affirmed (admissible).	Even if second scientist did not give a degree of certainty in his opinion it does not matter; there is no authority claiming it must be so. And the first scientist gave opinion with degree of certainty so any error was harmless.
02/14/2012	N.J. Manufacturers Insurance Company v. Cujdik	Π's expert's testimony was considered to be net opinion.	Π attempted to introduce an expert to show how the fire started in Δ's home. Trial judge ruled expert's opinion on what caused the fire was a net opinion and he could only testify as to the area of origin.	Verdict for Δ affirmed (inadmissible).	An opinion that states the cause of a fire must be framed in probability or reasonable degree of certainty. Here the expert could only pinpoint the origin of the fire, everything else was speculation.
02/23/2012	State v. Martinez	Δ challenges testimony of state's expert, particularly hypothetical question.	Expert testified at trial that Δ possessed drugs with the intent to distribute them.	Verdict for Π affirmed (admissible).	Hypothetical questions posed to experts in drug cases are allowed.
02/23/2012	State v. Perez	Δ claims state erred by allowing improper expert testimony.	State's witness answered a hypothetical set of facts mirroring Δ's case on the methods of packaging and distribution of drugs.	Verdict for Π affirmed (admissible).	The hypothetical posed to the witness was within bounds and was admissible.
02/24/2012	State v. Anderson	Δ claims state's expert testimony bolstered other testimony and he should not have been allowed to answer a hypothetical.	State's expert testified about packaging of crack cocaine and possession circumstances. He answered a hypothetical question about discarding drugs.	Verdict for Π affirmed (admissible).	Expert had the qualifications and experience to be qualified and it is permissible to ask a hypothetical.
02/27/2012	Gonzalez v. Smith	Δ claims that Π's expert should not be able to review MRIs.	Π testified to the link between Π's car accident and subsequent back pain.	Verdict for Π affirmed (admissible).	The doctor reads and interprets MRIs on a daily basis and therefore is qualified to do so in this case.
03/20/2012	Witman v. Kennedy Health System	Π claims that there was error in allowing the opinion of the county medical examiner and that opinion was net opinion.	Medical examiner testified to what he considered the cause of death of woman by using the reports from the other medical examiner.	Verdict for Π affirmed (admissible).	Medical examiner's opinion was based on sufficient facts to distinguish it from net opinion.

03/30/2012	State v. Sorrentino	Δ claims evidence of intoxication in dwi case should be excluded for lack acceptance in the scientific community.	Police officer was a certified drug recognition expert and observed Δ after suspicion of driving while intoxicated.	Verdict for Π affirmed (admissible).	This claim is not supported by the record or any other authority and the state has authorized officers to qualify as experts in drug intoxication.
04/10/2012	State v. Rosario	*See Vega*	*See Vega*	Verdict for Π affirmed (admissible).	*See Vega*
04/10/2012	State v. Vega	Δ claim expert evidence was improperly admitted.	Prosecution introduced an organized crime expert who testified as to the structure and organization of gangs.	Verdict for Π affirmed (admissible).	The subject matter was beyond the ken of the average juror.
04/19/2012	Malice v. Laro Systems Inc.	Π appeals decision that expert's testimony was net opinion	Expert's qualifications not questioned but whether the testimony was net opinion. Testified as to why a door malfunction occurred.	Verdict for Δ reversed. 104 hearing ordered	Trial court originally excluded his opinion on why the door was not working because it lacked evidential support. Appellate court finds that there was evidential support for expert to base such a conclusion on. Because it is a close call on whether there will be evidence to support his opinion there should be a 104 hearing.
04/26/2012	Kowaleski v. George Wolff Morris-Union Jointure Comm.	Π claim error in ruling expert's opinion net.	Π attempted to introduce testimony that Π had post-traumatic stress disorder through an expert.	Verdict for Δ affirmed (inadmissible).	Opinion was net because it did not discuss the basis for the diagnosis nor differentiate between this condition and Π's previous condition.
04/26/2012	Musse v. Port Authority of NY and NJ	Π appeals from expert's disqualification as he was qualified and did not give net opinion.	Π offered expert to show negligence of engineer hitting Π with train. Judge found the expert unqualified and the testimony net opinion.	Verdict of Δ affirmed (inadmissible).	Disagree with trial judge and believe the expert is qualified but the opinion was net because it did not rely on sufficient factual information and opinion was bare conclusion.
04/26/2012	Musse v. Port Authority of NY and NJ	Π wanted to have an expert testify to negligence of a train engineer; claims he is qualified and opinion was not net.	Π's train engineer expert was barred at trial for being unqualified and offering a net opinion. He claimed that Δ was negligent because the train could have stopped in time before hitting Π and because it did not the engineer was inattentive.	Verdict for Δ affirmed (inadmissible).	Expert was qualified because he had extensive experience. Expert relied on hearsay statements that were not reasonably relied upon by experts in the field. His data was not based on hard facts or even his own measurements.
05/24/2012	State v. Chaparro	State's witness's testimony constituted	State had narcotics expert testify to the distribution of street level drug transactions.	Verdict for Π affirmed (admissible).	Expert's testimony described the distribution which would be above the ken of the average juror

		impermissible bolstering and usurped fact finder role.			and did not bolster any testimony.
06/14/2012	State v. Cordoba	Δ claims that state's expert offered an opinion on his guilt.	State's expert testified as to whether or not Δ was likely suffering from a seizure when committing crimes.	Verdict for Π affirmed (admissible).	Nothing in record suggests expert made a statement opining on Δ's guilt.
07/12/2012	Bello v. Merrimack Mutual Fire Insurance Co.	Δ asserts error in judge not striking portion of Π's expert's evidence.	At trial Π's insurance expert testified to the unreasonabless of a depreciation discount. Δ claimed this was net opinion. Judge allowed saying that the statements by the expert were based on his experience.	Verdict for Π affirmed (admissible).	Expert did not opine to a specific discount rate, but simply challenged the methods that Δ used to come up with their calculations.
07/25/2012	Leonard v. Consarc Corp.	Π wants to overturn the involuntary dismissal caused by the net opinion evidence of their expert.	Trial judge allowed Π's expert witness to testify based on his experience in industrial accidents despite no specific experience in vacuum induction and melting furnaces. After Π's expert testified Δ moved for voluntary dismissal which the judge granted because Π's expert gave a net opinion.	Verdict for Δ affirmed (inadmissible).	Expert's qualifications were minimal and he did not offer any specifics about alternate designs therefore giving a net opinion.
07/26/2012	Capasso v. Cavaluzzo	Whether Π's expert had the education and experience to be an expert witness with respect to an MRI reading	Π attempted to introduce a witness to give expert testimony on an injury. Question arose whether the expert was qualified to read an MRI. Judge decided that he was not qualified as an expert to read MRIs but could testify to clinical observation that did not involve MRI.	Verdict for Δ reversed (admissible). Remanded.	There is a liberal approach to qualifying experts. Any weaknesses in an expert's qualifications can be questioned on cross examination. The trial judge should not have imposed the requirement of additional training in order to read MRIs on a chiropractor. It was shown he has the minimum education and experience to read MRI results.
08/27/2012	State v. Coley	Δ claims error from letting state's expert answer a hypothetical question.	State's expert answered a hypothetical involving the distribution of drugs.	Verdict for Π affirmed (admissible).	Expert was qualified and hypothetical was within the required guidelines.
10/02/2012	Hanley v. Collingswood Manor	Π claims judge erred in not allowing expert's testimony because it did	Π's report reached the conclusion that it was Δ did not provide adequate care and attention after deceased's fall and that it deviated from the	Verdict for Δ affirmed (inadmissible). Remanded on other issues.	The opinion of the expert was net and did not find a causal link between Δ's behavior and the deceased condition.

		not use the term gross negligence	standard of medical care. Trial judge found the expert's report to be net opinion.		
10/18/2012	Rojas v. Rubenstein	Π's appeals dismissal of case because of lack of expert witness.	Π's expert was determined not to have credentials as an expert and was barred from testifying. The suit was then dismissed for lack of an expert.	Verdict for Δ reversed (admissible).	Expert had adequate credentials. It was fundamentally unfair to dismiss the case.
11/21/2012	Vinci v. Clifton Board of Ed.	Π claims error for barring their expert's opinion	Π attempted to have expert testify to the degree and nature of supervision that should happen at a school event. Trial judge excluded as net opinion.	Verdict for Δ affirmed (inadmissible).	No sources or authority were given for the basis of the expert's opinion. It was personal opinion.
01/02/2013	Pagan v. St. Joseph's Hospital and Medical Center	Π's appeal from a verdict of inadmissibility of a published article supporting their expert's testimony and therefore that they lacked the expert evidence needed which caused dismissal of the case	Π's expert was asked at deposition if he intended to rely on any literature at time of trial. He said no. Later that day expert referred Π to an article which they then sent to Δ. At trial Δ moved to bar expert from relying on the article saying Π had no provided the article in discovery and that article published in 2000 was not relevant at the time of Π's medical incident almost 13 years earlier. Judge barred testimony relating to the article. Then Δ argued that Π lacked any expert testimony. Judge agreed.	Reverse dismissal and remand for a 104 hearing.	The offered expert did not have his own orthopedic practice but instead referred patients out. Before barring the testimony entirely the trial judge should have explored granting a continuance and only excluding if the outcome is just and unreasonable. Trial would have benefitted from having a 104 hearing before excluding expert entirely.
01/07/2013	Olsen v. Classic Cruisers, Inc.	Π argues that expert's reports were based in fact, reliable methodology, and reasonable scientific certainty.	Π had expert reports from a bus stop expert. Trial judge found that the opinion lacked adequate support and had no factual basis as well as stating an incorrect legal standard. The judge determined this was net opinion.	Verdict for Δ reversed. 104 hearing ordered.	While some of expert's opinion was unfounded in factual basis, other portions were based on published guidelines and the report was therefore prematurely ejected and should be subject to a 104 hearing.
01/15/2013	Conlon v. Home Depot U.S.A., Inc.	Δ claims error by court in allowing late discovery to include Π's expert witness	Π hired expert witness in parking lot design to testify to liability in a personal injury case. Judge allowed testimony and report because Δ's	Verdict for Π affirmed (admissible).	While the language of the report was uncomplicated it was because the liability issues in the case were uncomplicated and therefore not net opinion. Additionally the

		report and testimony; expert opinion was also net opinion.	waiting until the eve of trial to object despite having plenty of time.		court agrees with the trial judge with respect to the time.
01/30/2013	State v. Dupont	Δ claims officer wrongly testified as an expert witness.	Officer testified to possession of drugs.	Verdict for Π affirmed (admissible).	An officer may qualify as an expert witness through his experience as a police officer, particularly when it involves narcotics.
03/08/2013	State v. Buccheri	Δ claims error admitting medical examiner's expert testimony because there the expert did not mention accidental shooting possibility.	Medical examiner testified that the manner of death of the victim was inconsistent with suicide and was likely a homicide.	Verdict for Π affirmed (admissible).	The issue at trial was whether or not the gunshot wound was self-inflicted. The medical examiner's testimony indicated that she did not think so. Additionally the expert ruled this way based on the facts available to her.
03/19/2013	State v. Gentilello	Δ claims state's accident reconstruction expert was unqualified to render his opinion on his impairment and that the methodology was flawed.	Prosecution's accident reconstruction expert opined that the Δ's BAC would have impaired his ability to safely operate the vehicle and that under normal conditions the road was safe.	Verdict for Π affirmed (admissible).	Expert was qualified in accident reconstruction but not in the effects of alcohol on behavior. Regardless this did not rise to plain error.
03/19/2013	State v. Wheeler	State appeals the decision not to allow a police officer to qualify as an expert	State wish to use a police officer as a narcotics trafficking expert for Jersey City. Δ said none of the issues were beyond the ken of the average juror. Judge sustained Δ's objection.	Verdict for Π affirmed (admissible).	Probative value of the expert opinion is outweighed by the prejudice of the investigating officer testifying as an expert. Even if there was error it was harmless.
04/04/2013	Mandal v. Port Authority of NY and NJ	Δ claims a previous person who had a fall's description of a mat crossed into expert witness territory.	In a slip and fall case Π had testimony read from a prior slip and fall victim who described the type of rubber that and construction of the mat that was slippery and caused his fall.	Reversed and remanded for other reasons.	Though the description was rationally based on his observations the man's testimony should be excluded (If objected to) at retrial because it may have assisted the jury in understanding why/how he slipped.
04/22/2013	Koseoglu v. Wry	Δ claims that Π's expert lacked the qualifications to testify.	Π's experts testified to cardiac problems despite being internists.	Verdict for Π affirmed (admissible).	The experts were both qualified. While they did not specialize in the particular disease, it was not a case involving misdiagnosis and they were internists and

					physicians who had appropriate training to identify after the fact.
04/30/2013	State v. Turner	Δ claims that state improperly used witness as expert without qualifying him.	State had an officer testify that he had seen a "hand-to-hand" transaction of heroin between the Δ and another person.	Verdict for Π reversed (inadmissible). Remanded for new trial.	Lay witness was testifying to information that should have required qualification as an expert to give. The prosecutor further exacerbated the problem by eliciting testimony about the officer's experience. Essentially the state portrayed him as an expert witness without going through the proper channels.
06/07/2013	Kowalewski v. Port Authority Trans-Hudson Corp.	Π claims court erred in excluding his expert's opinion.	Π attempted to have expert testify as to the work conditions which led to problems with his elbows. Δ objected because expert did not did not conduct any measurements of the work equipment himself or investigate at the PATH. Π claimed it was grounded in literature in the field. The trial judge excluded the testimony as net opinion as he was just repeating Π's testimony.	Verdict for Δ affirmed (inadmissible).	Expert could have testified to the activities the Π performed and his risk factors, but he overreached and gave net opinion. He could not opine on the standard of care of the PATH and conclude that that breach is what caused the injury.
06/10/2013	State v. Kabete	Trial court determined it needed additional scientific evidence to support the expert opinion and allowed the Δ extra time to obtain it in a supplemental report. Δ claims that scientific knowledge not required and expert has specialized knowledge.	Δ's expert participated in a 104 hearing in order to be admitted as forensic psychologist expert on the Δ's level of intoxication and mental state. The court ruled that the expert could not testify as is but that the expert could come back with sufficient scientific evidence to support his conclusion by the court's deadline.	Trial court's orders affirmed. Remanded.	Δ's expert has not sufficiently explained his methodology and its reliability. He did not provide literature or evidence of his conclusions. Because this evidence was lacking the trial court did not abuse discretion determining as it currently stood that his testimony was inadmissible. Additionally the court has discretionary authority to allow the development of expert testimony and there was no prejudice to the state by doing so. Therefore the court did not abuse their discretion in allowing the extra time for the expert to prove his reliability.
06/18/2013	In Re Civil Commitment of B.N.	Δ claims court erred in allowing expert opinion without first testing scientific reliability.	Expert introduced a form of pedophilia as a diagnosis for Δ that doesn't exist in the DSM and is generally not accepted by the court.	Verdict for Π affirmed (admissible).	The diagnosis of Δ simply had to be one that would cause risk to others. The record clearly reflects that.

06/20/2013	State v. Stewart	Δ claims court erred by not allowing the testimony of his expert for diminished capacity.	Δ attempted to introduce an expert report about the possibility of his being on drugs when the crime was committed. Judge denied.	Verdict for Π affirmed (inadmissible).	The report does not connect the Δ's drug use with the diagnosis that he was not in possession of the mental capacity form the requisite intent. The opinion was therefore net opinion.
08/02/2013	Kim v. Ahn, D.O.	Π appeals the bar of his expert for lack of enhanced credentials.	Π obtained an affidavit of merit from a physician for a malpractice case. Expert did not specify his specialty. After a 104 hearing the judge determined Π's expert was not qualified in the same field as Δ	Remanded to give Π time to find an appropriate expert.	While expert was not qualified, it would support gamesmanship that Δ tried to pull if they dismissed case entirely.
08/21/2013	Dept of Children and Families v. D.T.	Δ claims that state's expert is not qualified and his testimony should have been limited.	State had a pediatrician testify to child physiological issues and trauma related to abuse.	Verdict for Π affirmed (admissible).	Expert was qualified to opine on what he was asked about. He was not asked about the child's state of mind and did not talk about it.
08/26/2013	State v. Romeo	Δ claims it was improper to exclude his expert witness's testimony.	Δ tried to offer someone as an "eyewitness expert" to show the credibility of other witnesses' reports. The judge barred this testimony.	Verdict for Π affirmed (inadmissible).	Experts cannot testify as to the credibility of other witnesses.
09/20/2013	State v. R.D.	Δ claims that the court improperly admitted and relied on state's witness's testimony. Claims the scientific methods are unreliable.	Child abuse expert testified as to the delay in reporting of abuse by children.	Verdict for Π affirmed (admissible).	Other states rejecting the methodology does not make it the appellate court's responsibility to make new standards. Because there is no objection at trial the appellate court does not have the ability to fully review the scientific evidence for reliability.
10/07/2013	State v. Goldmsith	Δ claims error because testimony was given by officers who were not qualified as experts.	Police officers testified to seeing hand to hand drug exchanges.	Verdict for Π reversed (inadmissible). Remanded.	Officers should not have been allowed to testify they had witnessed drug transactions because they were not presented as experts. This is something the jury could have decided.
11/22/2013	Borough of Lodi v. Passaic Valley Water Commissio n	Δ challenges the qualifications of Π's expert.	Π used its municipal auditor as both a fact and expert witness. Δ objected. Court allowed him as an expert in accounting, but not in water utility. He testified	Verdict for Π reversed (inadmissible). Case affirmed in part, reversed in part.	Expert lacked the requisite experience and education to make an opinion on the term "wholesale water costs." He also based his opinion on hearsay from other officials which did not provide

			to what a term in a contract meant but could not give show where there was specific language to support that interpretation and based his opinion on what he had been told by town administrators over the years.		adequate factual basis for his opinion.
12/16/2013	State v. Patrick	State appeals the exclusion of its expert from certain testimony.	State presented a forensic expert who found amylase (commonly found in saliva) on clothing of victim. Δ counsel objected to the expert's testimony saying he needed time to retain his own expert. Instead judge agreed to a 104 hearing. Judge determined that expert could not speak to the amylase because there is no test to determine if it from saliva or some other bodily fluid.	Verdict for Δ reversed. Remanded for 104 hearing.	In appeal state presented evidence that wasn't available at trial including information about a test that is possible to be more specific that the amylase is from saliva. Because of this the case must be remanded to give the trial judge an opportunity to consider all the new information about the test.

Appendix 1
Statistical Information

	Total	% of Total
Admissible	81	57.45%
Inadmissible	47	33.33%
Other	13	9.22%

	Total	% of Total
Affirmed	106	75.18%
Reversed	23	16.31%
Other	12	8.51%

Verdict Favors	Total	% of Total
Plaintiff	82	58.16%
Defendant	45	31.91%
Other	14	9.93%

Total Cases	141

Document 3

History of the State v. Kelly Three-Part Test

The State v. Kelly three-part test is currently cited in the comments of N. J. R. E. 702 as an additional guide to determine whether expert testimony is permissible.[180] The test reads as follows:

> "(1)(T)he intended testimony must concern a subject matter that is beyond the ken of the average juror; (2) the field testified to must be at a state of the art such that an expert's testimony could be sufficiently reliable; and (3) the witness must have sufficient expertise to offer the intended testimony."[181]

In State v. Kelly this three-part test is cited back to the N. J. R. E. 1984, Comment 5 to Rule 56.[182] In this comment of the 1984 N. J. R. E. there is no similar wording to the State v. Kelly test,[183] which leads to the question of where did this test originate.

The three-part test is used in Kelly to determine whether "testimony satisfies the limitations placed on expert testimony by . . . relevant case law."[184] The case that is cited as relevant case law is State v. Cavallo. In Cavallo the Court uses the same "sufficiently reliable" and "sufficient expertise" that we see in the Kelly three-part test when it explains its understanding of Rule 56(2)(b). "Under Rule 56(2)(b) expert testimony is admissible only if the expert has sufficient expertise to offer the intended testimony and the testimony itself is sufficiently reliable."[185] This language from Cavallo is not quoted from an earlier source; instead it is a summarization of the New Jersey standard developed through case law. Prior cases that helped develop this New Jersey standard include State v. Hurd, which discusses a "standard of acceptability"[186]; and State v. Carey, which uses "sufficient scientific basis to produce uniform

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[180] Current N. J. Rules of Evidence, comment 1 on N.J.R.E. 702 (2014)
[181] State v. Kelly, 478 A.2d 364, 379 (1984).
[182] Id.
[183] N.J.R.E., (Anno. 1984) Comment 5 to Evid. R. 56
[184] State v. Kelly, 478 A.2d 364, 379 (1984).
[185] State v. Cavallo, 443 A.2d 1020, 1024 (1982).
[186] State v. Hurd, 432 A.2d 86 (1981).

and reasonably reliable results."[187] All of the cases that have been mentioned all trace back to Frye v. United States, which is known as the case that established the "general acceptance" standard.[188]

In Kelly there is also mention of the use of common law as a factor in the creation of the test. New Jersey wanted to incorporate the essentials of the FRE 702 into the N. J. R. E., so it is possible that the Kelly three-part test stems from the FRE 702. However, the FRE 702 (1973) was written "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." [189] This language is almost identical to the amended N.J. Rule 56, but still does not have the factors that are established in the three-part test.

After reviewing both the New Jersey case law and the Federal Rules that were prevalent during the creation of the Kelly three-part test, it appears that the three factors of the test were established through New Jersey case law; and State v. Kelly was the first case to put them together in a formalized manner.

Since the Kelly test was established in 1984 it has been used by almost all New Jersey cases that involve the admission of expert testimony. The case itself is cited directly by over 430 cases, and many other cases do not even cite the three-part test directly back to Kelly. The most notable case that cites the three-part test directly from Kelly is Landrigan v. Celotex Corp.[190] Kemp v. State is another important case that uses the three-part test because the Court in Kemp

[187] State v. Carey, 230 A.2d 384 (1967).
[188] Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923).
[189] Fed. R. Evid. 702
[190] Landrigan v. Celotex Corp., 605 A.2d 1079, 1084 (1992)

states that the rule can be traced back to the 1973 version of FRE 702.[191] This is important because the Court acknowledged that New Jersey has held its position based on the 1973 FRE, even though there have been amendments to FRE 702 since that time. The Court in Kemp also acknowledges the similarity between this standard and the Daubert test, but stated that it was not adopting the Daubert standard. The Daubert test provided guidelines for a trial court to assess when determining the admissibility of expert testimony, and impacted the current FRE 702.[192] Many states today use a test that sounds similar to the Kelly three-part test, but those guidelines stem from Daubert. Ohio, for example, discusses the same three parts in its 702 Rule including: "subject matter beyond the ken," "sufficiently reliable," and "sufficient expertise."[193] While there are similarities between the language of Daubert and that of Kelly, the New Jersey Court has made it clear that the Daubert standard is different than Kelly and therefore not the guideline used in New Jersey.

In conclusion the Kelly test was a formalized summarization of developed New Jersey case history. The test contains a similar standard that we see in the current FRE and other states' rules, but was developed ahead of its time based on the other national tests. Since New Jersey had it's own effective test when the Daubert decision was rendered it chose to continue to use its own Kelly test; which is still applied to current New Jersey cases that deal with the expert witness testimony. Consequently, New Jersey will not be placed in a position to alter its standards should the Federal courts alter the Daubert guidelines in anyway.

[191] Kemp ex rel. Wright v. State, 809 A.2d 77, 84 (2002).
[192] Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993).
[193] O.H. Rules of Evid. 702

Document 4

Statewide Civil Filings by Selected Casetypes

July 2003-June 2013

	Jul 2003 to Jun 2004	Jul 2004 to Jun 2005	Jul 2005 to Jun 2006	Jul 2006 to Jun 2007	Jul 2007 to Jun 2008	Jul 2008 to Jun 2009	Jul 2009 to Jun 2010	Jul 2010 to Jun 2011	Jul 2011 to Jun 2012	Jul 2012 to Jun 2013
Asbestos	339	230	163	132	197	140	148	149	146	135
Medical Malpractice	1,493	1,380	1,701	1,280	1,249	1,376	1,226	1,200	1,116	1,097
Other MCL*	6,312	2,354	6,834	11,678	1,795	2,379	1,865	6,986	8,199	5,237
Other Track 3**	1,507	1,570	1,548	1,560	1,571	1,627	1,748	1,805	1,811	1,770
Personal Injury	14,036	14,825	13,997	12,786	12,300	12,060	12,076	12,500	12,414	11,567
Product Liability	787	885	955	1,090	715	757	1,055	873	485	622
Professional Malpractice	620	591	639	625	611	645	610	600	655	557
Toxic Tort	480	122	169	97	198	69	259	56	50	43
Total	25,574	21,957	26,006	29,248	18,636	19,053	18,987	24,169	24,876	21,028

***Other MCL(formerly mass torts) includes multicounty litigation cases and centrally managed cases.**
For court year 2012 the other MCL cases were:
Accutane/Isotretinoin, All Derm Regen, Bextra/Celebrex, Bextra/Celebrex/Vioxx, Bristol-Meyers Squibb Environmental,
Depo-Provera, Fosomax, DePuy ASR Hip, Digitek, Gadolinium Based Contrast Agents, Hormone Replacement Therapy, J & J Stent,
Levaquin, Mahwah Toxic Dump, Mirena, NuvaRing, Ortho Evra, Pelvic Mesh J&J, Pelvic Mesh Bard, Plavix, Propecia, Prudential Tort Litigation, Reglan,
Risperdal/Seroquel/Zyprexa, Stryker Rejuvenate Hip Stem and the ABG II Modular Hip Stem, Stryker Implant, Vioxx, Yaz/Yasmin/Ocella, Zelnorm, Zometa/Aredia

**** Other Track 3 cases: Defamation, Inverse Condemnation, Whistle Blower/Conscientious, Employee Protection Act, Law Against Discrimination**

Document 5

NEW JERSEY
CIVIL
JUSTICE
INSTITUTE

May 8, 2014

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

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

Dear Judge Happas:

As president of the New Jersey Civil Justice Institute, I appreciate the Committee's efforts in reviewing our petition for updating New Jersey's Rules of Evidence standard for expert testimony.

I understand from Judge Grant's letter that the committee has been considering whether the current standard provides sufficient clarity and predictability in admissibility of expert testimony, and that you are also exploring the question of whether the existing standard contributes to other problems, such as attracting a disproportionate number of mass tort cases to New Jersey.

I would like to offer our assistance by sharing with you some of the materials that brought this issue to our attention.

Attached please find a solicitation letter from Weitz & Luxembourg in 2004, urging mass tort plaintiffs to consider filing Vioxx litigation in New Jersey state court in order to take advantage of the more relaxed standards for admittance of scientific evidence.

A study performed by McCarter & English in 2008 shows that Weitz & Luxembourg is not the only firm that got the message that New Jersey has weaker evidentiary standards. Data revealed that 93% of mass tort filings in New Jersey state courts were from out of state plaintiffs. McCarter revisited the study in

2012, and although they could not get data from every mass tort defendant that year, the data in the majority of cases indicated that little had changed. In fact, if anything, the national trend of additional states continuing to adopt some version of a *Daubert* standard would reinforce the incentive to file in the diminishing minority states who have not yet updated their rules.

Finally, I include for your use, some interesting academic work. Professor David Bernstein, among the nation's most prolific experts on rules of evidence, and on *Daubert* in particular, has recently written a useful overview of the evolution of admissibility rules. Please see "The Misbegotten Judicial Resistance to the *Daubert* Revolution," his 2013 study on the subject.

Again, we appreciate the care and consideration that the Committee is devoting to this significant issue. Please let us know if we can be of further assistance. This issue is of the utmost importance to our members, many of whom defend cases in many states and believe that his issue is critical to ensuring the continued fairness and predictability of litigation in New Jersey.

Sincerely yours,

Marcus Rayner

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

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Formerly the New Jersey Lawsuit Reform Alliance

Mass Tort Lawsuits Filed in New Jersey
by Non-New Jersey Residents

Litigation	Number of Cases Filed by New Jersey Residents	Number of Cases Filed by non-New Jersey Residents	Percentage of Cases Filed by non-New Jersey Residents
Diet Drug[1]	540	5,828	92%
Rezulin	115	269	71%
PPA	32	376	93%
Vioxx	1,088	16,782	94%
Accutane	26	287	92%
Bextra/Celebrex	67	1,455	96%
HRT	49	121	71%
Ortho-Evra	15	372	96%
Risperdal/Seroquel/ Zyprexa	50	2,071	98%
DPCI (Depo-Provera Contraceptive Injection)	3	157	98%
TOTAL	1,985	27,718	93%

[1] The Diet Drug litigation has been designated as a New Jersey mass tort on two occasions, in 1997 and again in 2003.