IN THE SUPREME COURT OF THE STATE OF MINNESOTA

ADM10-8047

IN RE:
PROPOSED AMENDMENTS TO THE
MINNESOTA RULES OF EVIDENCE

COMMENT OF MINNESOTA DEFENSE LAWYERS ASSOCIATION, DRI-THE VOICE OF THE DEFENSE BAR, INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL, FEDERATION OF DEFENSE & CORPORATE COUNSEL, ASSOCIATION OF DEFENSE TRIAL ATTORNEYS, AND LAWYERS FOR CIVIL JUSTICE ON PROPOSED AMENDMENT TO RULE OF EVIDENCE 702

We are the leading organizations representing lawyers who primarily represent defendants in civil litigation. Over 22,000 attorneys are members of the Minnesota Defense Lawyers Association, DRI-The Voice of the Defense Bar, International Association of Defense Counsel, Federation of Defense & Corporate Counsel, Association of Defense Trial Attorneys, and Lawyers for Civil Justice.

We believe strongly that the Court should amend Minnesota Rule of Evidence 702 to mirror Federal Rule of Evidence 702 (the *Daubert* standard).[1] This standard is applied in all federal courts and two-thirds of the states. It is neither pro-plaintiff nor pro-defendant. It focuses on ensuring that expert testimony is reliable and not based on "junk science."

If the Court chooses not to adopt the federal approach, the compromise approach recommended by the Minnesota Supreme Court Rules of Evidence Advisory Committee would be an improvement over existing law. The Advisory Committee's proposal is from a model law developed by the non-partisan National Conference of Commissioners on Uniform State Laws.

I. MINNESOTA RULE OF EVIDENCE 702 SHOULD MIRROR THE FEDERAL RULE

A. The Federal Standard

Effective December 1, 2000, Federal Rule of Evidence 702 was amended to reflect a trilogy of U.S. Supreme Court holdings: *Daubert v. Merrell Dow Pharmaceuticals, Inc*., 509 U.S. 579 (1993), *General Electric Co. v. Joiner*, 522 U.S. 136 (1997), and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999).

Under Federal Rule 702, trial courts must act as gatekeepers and screen all proffered expert testimony to ensure that it "is not only relevant, but reliable."[2] To help trial courts assess reliability, the U.S. Supreme Court has provided a nonexclusive list of key factors for trial courts to consider:

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[1] *See* Lorie S. Gildea, *Sifting the Dross: Expert Witness Testimony in Minnesota After The Daubert Trilogy*, 26 Wm. Mitchell L. Rev. 93, 116 (2000) ("The Daubert trilogy provides a uniform approach for assessing expert testimony that does not allow trial courts to relinquish their responsibility for determining admissibility of expert opinion. This standard should be adopted in Minnesota.").

[2] *Daubert*, 509 U.S. at 589; *see also Kumho Tire Co.*, 526 U.S. at 154-55.

- whether the theory or technique can be and has been tested;
- whether it has been subjected to peer review and publication;
- whether, in respect to a particular technique, there is a high "known or potential rate of error" and whether there are "standards controlling the technique's operation"; and
- whether the theory or technique enjoys general acceptance within the relevant scientific community.[3]

The Federal Rules Advisory Committee, in amending Rule 702, recognized several additional factors that courts have considered in determining reliability:[4]

- whether the evidence was developed independently of the litigation or expressly for the purpose of testifying;[5]
- whether there is "an analytical gap" between the expert's data and methodology and the conclusion he or she is to offer to the jury; [6]
- whether the expert has ruled out obvious alternative explanations;[7]
- whether the expert "is being as careful as he would be in his regular professional work outside his paid litigation consulting";[8] and
- whether the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would give.[9]

The federal approach provides trial judges with flexibility to acknowledge developments in science and technology that have an objective, proven, and sound foundation. "Scientific certainty" is not required, just "good grounds, based on what is known."[10]

B. The Federal Approach is the Clear Majority Rule

Since the U.S. Supreme Court decided the *Daubert* trilogy in 1990s and Federal Rule 702 was amended in 2000, a clear majority of states have embraced the federal approach. While tallies of "*Daubert*," "*Frye*," and "Other" states vary due to nuances in application, more than two-thirds of states follow an approach that is either identical to or consistent with the federal rule.[11] For

[3] *See Kumho Tire Co.*, 526 U.S. at 149-50 (citing *Daubert*, 509 U.S. at 592-94).

[4] *See* Fed. R. Evid. 702, Committee Notes on Rules—2000 Amendment.

[5] *Id*.

[6] *Id*. (quoting *Joiner*, 522 U.S. at 146).

[7] *See id*. (citing *Claar v. Burlington N. R.R.*, 29 F.3d 499 (9th Cir. 1994)).

[8] *Id*. (quoting *Sheehan v. Daily Racing Form, Inc*., 104 F.3d 940, 942 (7th Cir. 1997) and citing *Kumho Tire Co.*, 526 U.S. at 152 (recognizing that *Daubert* requires trial court to assure itself that the expert "employs in the courtroom the same level of rigor that characterizes the practice of an expert in the relevant field")).

[9] *See id*. (citing several cases).

[10] *Daubert*, 509 U.S. at 590.

[11] Since the Minnesota Supreme Court adopted the current form of Rule 702, several states and the District of Columbia have moved to the federal approach *See* Ala. Code § 12-21-160; Ariz. R. Evid. § 702; Fla. Stat. Ann. §§ 90-702, 90-704; Kan. Stat. Ann. § 60-456(b); Mo. Rev. Stat. Ann. § 490.065; N.C. Gen. Stat. § 8C-1, 702(a) (N.C. R. Evid. 702); *Motorola, Inc. v. Murray*, 147 A.3d 751 (D.C. 2016); *Mason v. Home Depot U.S.A., Inc*., 658 S.E.2d 603 (Ga. 2008) (applying Ga. Code Ann. § 24-7-702); *but see In re Amendments to the Florida Evidence Code*, 210 So. 3d 1231 (2017) (declining to adopt amended expert testimony standard to the extent amendments were procedural). Even the California Supreme Court, which has long adhered to *Frye*, has signaled that trial courts should undertake a gatekeeping role. *See Sargon Enter., Inc., v. Univ. of S. Cal*., 288 P.3d 1237, 1252 (Cal. 2012).

example, South Dakota adopted the *Daubert* approach in 1994, amended its Rule of Evidence 702 to be substantively identical to the 2000 version of Federal Rule 702 in 2011, and reaffirmed its adherence to *Daubert* in 2013.[12] Wisconsin adopted a statute identical to the federal rule in 2011.[13]

Minnesota is increasingly an outlier in following a variation of the *Frye* standard ("*Frye-Mack*"), albeit with some recognition of the value of reliability. In cases involving a "novel scientific theory,"[14] the proponent of the evidence must establish that "the underlying scientific evidence is generally accepted in the relevant scientific community" and that "the particular scientific evidence in [the case has] foundational reliability."[15] There is now a "mishmash between the current rule and current case law" in Minnesota, as the Advisory Committee explained.[16]

C. The Federal Approach Increases Judicial Efficiency and Reduces Forum Shopping

The proper exercise of the gatekeeping function by trial courts can facilitate earlier resolution of cases, reducing cost and delay. *Daubert*'s gatekeeping role for trial court judges does not require significant additional time and expense for the judiciary.[17] In addition, heightened scrutiny of the reliability of expert testimony leads lawyers to more closely screen their cases and select reputable experts. Further, adoption of an approach consistent with the Federal Rule would reduce the potential for forum-shopping and inconsistent results in Minnesota's federal and state courts. Minnesota would also be less attractive to forum-shopping plaintiffs from *Daubert* states.[18]

II. ADVISORY COMMITTEE'S APPROACH WOULD BE AN IMPROVEMENT

The Advisory Committee's proposal comes from Uniform Rule of Evidence 702, a product of the non-partisan National Conference of Commissioners on Uniform State Laws. The NCCUSL approach "combines the modified historic *Frye* standard" with the reliability standards established in *Daubert* and its progeny.[19]

Consistent with the federal approach, the NCCUSL approach requires expert testimony to be the product of a reliable principle, theory, or method, based on sufficient facts or data, that the expert has reliably applied to the facts of the case.[20] Several of NCCUSL's recommended factors for admitting expert testimony, including "the extent to which the principle or method has been

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[12] *See State v. Yuel*, 840 N.W.2d 680, 683 (S.D. 2013) (citing *State v. Hofer*, 512 N.W.2d 482, 484 (S.D.1994)); *see also* S.D. Codified Laws § 19-19-702 (S.D. R. of Evid. 702).

[13] *See* S.B. 1, 2011-12 Leg., Spec. Sess. (Wis. 2011) (amending Wis. Stat. §§ 907.02, 907.03).

[14] *See* Minn. R. Evid. 702; *Goeb v. Tharaldson*, 615 N.W.2d 800, 814 (Minn. 2000).

[15] *See Doe v. Archdiocese of St. Paul*, 817 N.W.2d 150, 156 (Minn. 2012) (quoting *Goeb*, 615 N.W.2d at 814).

[16] Report and Proposed Amendments to the Minnesota Rules of Evidence, Minnesota Supreme Court Rules of Evidence Advisory Committee, ADM10-8047, Feb. 28, 2018, at 4; *see generally* Zach Alter, Note, *Unpacking Frye-Mack: A Critical Analysis of Minnesota's Frye-Mack Standard for Admitting Scientific Evidence*, 43 Mitchell Hamline L. Rev. 626 (2017).

[17] *See* Nicole L. Waters & Jessica P. Hodge, *The Effects of the* Daubert *Trilogy in Delaware Superior Court* 16-23 (Nat'l Ctr. for State Courts 2005) (no "excessive or unnecessary cost or delay as a result of *Daubert*").

[18] *See, e.g.*, Ned Miltenberg, *Out of the Fire and Into the* Frye*ing Pan or Back to the Future*, Trial, Mar. 2001, at 19, 25 n.35 (advising plaintiffs' lawyers to file cases in states that continue to apply the *Frye* test and name a local defendant to defeat federal diversity jurisdiction).

[19] Uniform Rules of Evidence Act - Comment, Nat'l Conf. of Comm'rs of Uniform State Laws, at 60 (Mar. 8, 2005) *at* http://www.uniformlaws.org/shared/docs/rules%20of%20evidence/uroea_final_99%20with%2005amends.pdf.

[20] *Compare* Fed. R. Evid. 702 *with* Report and Proposed Amendments to the Minnesota Rules of Evidence, Minnesota Supreme Court Rules of Evidence Advisory Committee, ADM10-8047, Feb. 28, 2018, at 11.

tested," "the adequacy of research methods employed in testing," and "the rate of error," also go directly to the objective reliability of scientific evidence incorporated into the federal standard.[21] The Advisory Committee's approach would be an improvement to the existing Minnesota Rule.

Conclusion

The widespread acceptance of the federal standard makes it our preferred option for the Court to adopt. In addition, adoption of the federal standard would harmonize the evidentiary rules applied in Minnesota's state and federal courts. This would bring about greater uniformity and predictability and reduce the incentive for forum-shopping. If the Court does not adopt the federal approach, the Advisory Committee's approach would be an improvement over existing Rule 702.

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[21] Uniform Rules of Evidence Act, Nat'l Conf. of Comm'rs of Uniform State Laws, at 60.