Approved by the Judicial Council
December 2, 2005

REPORT OF THE JUDICIAL COUNCIL CIVIL CODE ADVISORY COMMITTEE ON 2005 SB 53

BACKGROUND

In February of 2005, Senate Judiciary Chair John L. Vratil requested that the Judicial Council study 2005 Senate Bill No. 53, a bill that would amend the Code of Civil Procedure relating to expert and opinion testimony. This bill would amend K.S.A. 60-456 and 60-457, and would essentially replace the *Frye* test with the *Daubert* test for determining admissibility of expert and opinion testimony. At the June, 2005 meeting of the Judicial Council, the Council agreed to undertake the study of SB 53 requested by Senator Vratil. The Council assigned the study to the Judicial Council Civil Code Advisory Committee.

COMMITTEE MEMBERSHIP

The members of the Committee are:

J. Nick Badgerow, Chairman, practicing attorney in Overland Park and member of the Kansas Judicial Council

Hon. Terry L. Bullock, District Court Judge in 3rd Judicial District, Topeka

Prof. Robert C. Casad, Professor at The University of Kansas School of Law, Lawrence

Hon. Robert E. Davis, Kansas Supreme Court Justice, Topeka

Hon. Jerry G. Elliott, Kansas Court of Appeals Judge, Topeka

Hon. Bruce T. Gatterman, Chief Judge in 24th Judicial District, Larned

Barry R. Grissom, practicing attorney, Overland Park

Joseph W. Jeter, practicing attorney in Hays and member of the Kansas Judicial Council

Phillip Mellor, retired attorney, Wichita

David M. Rapp, practicing attorney, Wichita

Donald W. Vasos, practicing attorney, Fairway

Bruce Ward, practicing attorney, Wichita

STATUTORY AMENDMENTS PROPOSED IN 2005 SB 53

The issue before the Committee is whether K.S.A. 60-456 and 60-457 should be amended, and whether Kansas should adopt the *Daubert* test regarding expert testimony that is used in federal courts.

2005 SB 53, proposes the following amendments to K.S.A. 60-456 and 60-457:

> **60-456.** (a) If the witness is not testifying as an expert ~~his or her~~, the testimony in the form of opinions or inferences is limited to such opinions or inferences as the judge finds (a) may be rationally based on the perception of the witness and (b) are helpful to a clearer understanding of ~~his or her~~ the testimony of the witness.
> ~~(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.~~ 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.
> (c) Unless the judge excludes the testimony ~~he or she~~, the judge shall be deemed to have made the finding requisite to its admission. (d) Testimony in the form of opinions or inferences otherwise admissible under this article is not objectionable because it embraces the ultimate issue or issues to be decided by the trier of the fact.

60-457. (a) If a witness is not testifying as an expert, then the judge may require that a witness before testifying in terms of opinion or inference be first examined concerning the data upon which the opinion or inference is founded.
(b) If a witness is testifying as an expert, then upon motion of a party, the court may hold a pretrial hearing to determine whether the witness qualifies as an expert and whether the expert's testimony satisfies the requirements of subsection (b) of K.S.A. 60-456 and K.S.A. 60-458, and amendments thereto. The court shall allow sufficient time for a hearing. The court shall rule on the qualifications of the witness to testify as an expert and whether or not the testimony satisfies the requirements of subsection (b) of K.S.A. 60-456 and K.S.A. 60-458, and amendments thereto. Such hearing and ruling shall be completed no later than the final pretrial conference contemplated under subsection (d) of K.S.A. 60-216.

New Section. The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing or trial. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible into evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs the prejudicial effect.

INTRODUCTION

The *Frye* test originated in the Court of Appeals for the D.C. Circuit in 1923 when James Alphonzo Frye appealed his conviction for second degree murder. *Frye v. United States*, 293 F. 1013 (D.C.Cir. 1923). The lower court had not allowed the defendant's expert witness to testify regarding the results of a "systolic blood pressure deception test," which was an early lie detector test based on blood pressure readings. The appellate court affirmed the exclusion of this expert testimony, stating:

> ". . . while 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." *Frye,* 293 F. at 1014.

The *Frye* test of "general acceptance" to determine the admissibility of scientific expert testimony was adopted by the Kansas Supreme Court in *State v. Lowry*, 163 Kan. 622, 629, 185 P.2d 147 (1947). K.S.A. 60-456, which also relates to the admissibility of expert testimony, was part of the code of civil procedure enacted in 1963. The *Frye* test is used in addition to the statute when the expert testimony being offered is scientific in nature. In the nearly sixty years since *Lowry*, Kansas courts have continued to apply and fine-tune the *Frye* standard in determining the admissibility of scientific expert testimony. The Kansas Supreme Court recently reaffirmed that standard in an opinion handed down on September 30, 2005. *State v. Patton*, No. 89,481, 120 P.3d 760 (Sept. 30, 2005). The Kansas law is succinctly set forth in paragraphs 17-19 of the *Patton* Court's Syllabus as follows:

> "17. The admissibility of expert testimony is subject to K.S.A. 60-456(b), but the *Frye* test acts as a qualification to the K.S.A. 60-456(b) statutory standard. *Frye* is applied in circumstances where a new or experimental scientific technique is employed by an expert witness. *Frye* requires that before expert scientific opinion may be received into evidence, the basis of the opinion must be shown to be generally accepted as reliable within the expert's particular scientific field.
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> 18. The *Frye* test does not apply to pure opinion testimony, which is an expert opinion developed from inductive reasoning based on the expert's own experiences, observations, or research. The validity of pure opinion is tested by cross-examination of the witness. The distinction between pure opinion testimony and testimony based on a scientific method or procedure is rooted in a concept that seeks to limit application of the *Frye* test to situations where there is the greatest potential for juror confusion.
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> 19. The distinction between pure opinion testimony and testimony relying on scientific technique promotes the right to a jury trial. Judges generally are not trained in scientific fields and, like jurors, are lay persons concerning science. A Kansas jury has a constitutional mandate to decide conflicting facts, including conflicting opinions of causation. Cross-examination, the submission of contrary evidence, and the use of appropriate jury instructions form the preferred method of resolving factual disputes. The trial judge under K.S.A. 60-456(b) may exclude expert opinion evidence that would unduly prejudice or mislead a jury or confuse the question for resolution."

In federal courts, the *Frye* standard has been replaced pursuant to a trio of now famous cases referred to as the "*Daubert* trilogy." In the first case, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), the U.S. Supreme Court held that Rule 702 of the Federal Rules of Evidence had replaced the common law *Frye* test when the Rules were adopted in 1975. The Court ruled that the admissibility of scientific evidence must be determined by a reliability test instead of the "general acceptance" test set forth in the *Frye* case. The Court stated that judges have the "gatekeeping" responsibility of ascertaining whether "the reasoning or methodology underlying the testimony is scientifically valid and . . . whether that reasoning or methodology properly can be applied to the facts at issue." *Daubert*, 509 U.S. at 593. Although the Court set forth some general factors that could be considered in determining whether or not to admit scientific expert evidence, the new test was not clearly understood. There was disagreement about whether it was more liberal or more restrictive than *Frye*. The U.S. Supreme Court provided additional clarification when it decided *General Electric Co. v. Joiner*, 522 U.S. 136 (1997). The Court ruled that the test involves assessment of the reliability of not only the expert's general methodology, but also the expert's reasoning process. The final case in the trilogy, *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), extended the *Daubert* test from scientific expert testimony to all expert testimony.

In 2000, the *Daubert* trilogy was codified in the Federal Rules of Evidence when Rule 702 was amended to append to the end of the rule the "reliability" factors culled from the three cases. Although federal procedural rules are not controlling in state courts, some states have changed their evidence rules in response to *Daubert*. Kansas has not. The Kansas statute regarding expert testimony, K.S.A. 60-456, has not been amended since it was enacted in 1963.

Section 1 of 2005 SB 53 would incorporate Rule 702 of the Federal Rules of Evidence into K.S.A. 60-456. Section 3 of 2005 SB 53, the proposed new section, is identical to Rule 703 of the Federal Rules of Evidence.

COMMITTEE FINDINGS

The Committee is unanimously opposed to 2005 SB 53's proposed amendments to K.S.A. 60-456, 60-457 and 60-458. The following findings set forth the basis for the Committee's position and recommendation.

1. K.S.A. 60-456, superimposed by the *Frye* test when the expert testimony is scientific in nature, has worked well in Kansas for decades, and there is no compelling reason for the proposed amendments.

The Committee members include trial and appellate judges, a prestigious professor and expert on Kansas civil procedure, and civil practitioners with literally hundreds of years of cumulative practical experience in the application of K.S.A. 60-456 and the *Frye* test to determine the admissibility of scientific expert testimony in Kansas cases. The Committee is unaware of any problems with the way the law is interpreted and/or applied in Kansas or of any genuine call for change coming from either the judiciary or the bar. The Committee has reviewed the testimony of conferees appearing on behalf of 2005 SB 53 and has found that the support for these amendments came from groups arguing from outcomes-based positions, but offering no credible evidence that the current rules operate poorly or unjustly. It is the Committee's position that a change of this magnitude to the code of civil procedure requires very thoughtful consideration and, at a minimum, evidence of some consensus among the Kansas bar or judiciary that a problem exists and that change is needed. There has been no such showing. It would be ill-advised to turn such important Kansas law on its head on the basis of the testimony presented in support of this bill.

2. There is a compelling reason against these amendments. Enacting the proposed K.S.A. 60-457(b) would needlessly impose upon Kansas courts an unacceptable and perhaps insurmountable burden.

The Committee is very concerned by 2005 SB 53's proposed amendment to K.S.A. 60-457, specifically the proposed subsection (b) which provides for "pretrial hearings" to rule in advance on the admissibility of expert testimony. It is not known whether the drafter of 2005 SB 53 borrowed this language from another jurisdiction or merely created it, but this language is not found anywhere in the Federal Rules of Evidence. What is certain is that these "Daubert hearings" now take up a great deal of time and resources in our federal courts, and enactment of this amendment would impose an unacceptable burden on Kansas state courts and on our district judges. Under current budget restraints, district courts do not have the time or resources to conduct the hearings that would be required if this bill were enacted. A vivid and accurate picture of how this plays out in federal court is provided by this section from an *amicus* brief in the *Kuhmo Tire* case:

> "We are astounded by the number of civil cases during the past several years in which opponents of expert testimony . . . have been permitted to impose huge burdens on the judicial system by filing blunderbuss motions asserting that the other side's expert testimony is inadmissible. These motions lead to the filing of voluminous memoranda in which the lawyers for both sides try their case on paper. Often the parties request, and may be granted, live hearings (so-called '*Daubert* hearings') which resemble mini-trials and can last days, even weeks." Brief of Margaret A. Berger, Edward J. Imwinkelried, and Stephen A. Saltzburg as *Amicus Curiae* in Support of Respondents at 20.

These mini-trials are not something that is needed in Kansas to fairly and competently determine the admissibility of expert testimony. In fact, Kansas courts do not have the resources to conduct such additional, time consuming proceedings. The *Daubert* test is too burdensome and complex to be reasonably applied. The federal courts are obligated to apply the *Daubert* test in spite

of how unwieldy and burdensome the application has become. Kansas has a choice, and the federal court's experience should not be ignored in making that choice.

3. Juries are adept at determining the credibility of expert testimony, and it is the jury's constitutionally mandated function to decide fact issues and weigh evidence.

The Committee's position is that it is not necessary and perhaps not even appropriate for the judge to take over the duty of assessing the reliability of expert testimony. Juries do this every day in Kansas, and they do it well. There is no reason to believe that judges would do a better job. The Arizona Supreme Court said it well:

> "Implicit in (the *Daubert* test) is the assumption that trial judges as a group will be more able than jurors to tell good science from junk, true scientists from charlatans, truthful experts from liars, and venal from objective experts. But most judges, like most jurors, have little or no technical training 'and are not known for expertise in science,' let alone the precise discipline involved in a particular case." *Logerquist v. McVey*, 1 P.3d 113, 129 (Ariz. 2000) (citations omitted).

Juries in Kansas do a fine job of discerning the reliability of expert testimony and are just as qualified to do so as judges. Further, it comes perilously close to encroaching on the province of the jury to have pretrial determinations on that issue.

4. Kansas is not lagging behind the rest of the country in its refusal to adopt *Daubert*. Only nine states have adopted the entire *Daubert* trilogy.

There are many conflicting surveys regarding just how many states have adopted *Daubert*. The confusion is probably due to the fact that there is little uniformity among the states that have rejected the *Frye* test. Some states have adopted one or two of the cases in the trilogy, but not all three. Others consider the trilogy as instructive only or consistent with the test their state has traditionally applied. According to one commentator, the jurisdictions that continue to apply the

Frye test include all but two of the most populous states in the U.S. and collectively contain nearly half of our country's population. "Frye is thus not only alive, but it is the plurality rule in state courts, which are the venue for the vast majority of litigation." David E. Bernstein, *Frye, Frye, Again: The Past, Present and Future of the General Acceptance Test*, 41 Jurimetrics J. 385, 401 (2001).

COMMITTEE'S RECOMMENDATION

The Committee has carefully considered the amendments proposed in 2005 SB 53 and recommends that this legislation not be enacted. There is no evidence of a problem with the application and operation of the current statutes that needs to be solved, and ample evidence that the proposed amendments would instead create significant problems if enacted.