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Stephen A. Saltzburg
GWU School of Law

Edward J. Imwinkelried
UC Davis School of Law

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KEEPING THE REFORMIST SPIRIT ALIVE IN EVIDENCE LAW

STEPHEN A. SALTZBURG,[†] EDWARD J. IMWINKELRIED,^{††}
& DANIEL J. CAPRA^{†††}

"To state the facts of the cases, the decision, and the reasoning of his opinion will not show the overthrow of old doctrine. . . . Instead, it will show the application of existing doctrines with wisdom and discretion; an application that does not leave those doctrines wholly unaffected, but one that carries on their evolution as is reasonably required by the new facts before the court. When [he] is through, the law is not exactly as it was before; but there has been no sudden shift or revolutionary change."¹

These are the words that Professor Arthur Corbin used to describe the judicial work of Justice Benjamin Cardozo, one of the preeminent jurists of the twentieth century. Justice Cardozo was a superb judicial craftsman in the grand tradition of the common law.² Drawing on accumulated experience,³ he effected reform through evolutionary change in the law.⁴ Even at this point in his career—hopefully well before his retirement—Chief Judge Edward Becker has established himself as a reformer following a path strikingly similar to Cardozo's.

Judge Becker has been a reformer both as a district court judge and as a court of appeals judge. He has made his mark in many areas of the law, one of which is evidence. It has been a joy for us to teach with, talk with, and learn from Judge Becker. He has not only reformed the law of evidence, he has seen problems that others have missed and provided answers to questions that had not been asked before. While many judges tire of the routine of deciding cases and

[†] Howrey Professor of Trial Advocacy, Litigation, and Professional Responsibility, George Washington University Law School.

^{††} Professor of Law and Director of Trial Advocacy, University of California at Davis School of Law.

^{†††} Philip Reed Professor of Law, Fordham Law School, and Reporter to the Judicial Conference Advisory Committee on Evidence Rules.

¹ E. ALLAN FARNSWORTH & WILLIAM F. YOUNG, *CASES AND MATERIALS ON CONTRACTS* 81 n.a (3d ed. 1980) (quoting Professor Corbin).

² KARL LLEWELLYN, *THE BRAMBLE BUSH* 157-58 (1951).

³ *Id.* at 64-66.

⁴ KARL LLEWELLYN, *THE COMMON LAW TRADITION* 299-306 (1960) (discussing the work of Justice Cardozo).

find that many legal issues become repetitive and uninteresting, Judge Becker is virtually unique in his willingness to consider each case and each issue as though it were his first. We see this clearly not only in his opinions—where he has brought his incredible energy, insight, and judgment to clarify and advance the law of evidence—but in his other work as well.

I. JUDGE BECKER'S OPINIONS

As a district court judge, Judge Becker demonstrated an interest and skill in handling evidence issues most clearly in the Japanese Electronics Litigation, in which he filed much of a volume of the *Federal Supplement* with three extraordinary evidence opinions.⁵ Those opinions were a sign that Judge Becker was willing, if not eager, to tackle difficult evidentiary issues head on. He was not interested in deferring decisions or avoiding them; he addressed more evidence issues in those three opinions than, to our knowledge, any judge ever has before or since.

The first opinion is one of the most comprehensive analyses of the reliability problems attendant to public records.⁶ Indeed, we know of no other case in which a trial or appellate judge has been as discerning and as persuasive in dealing with the hearsay exception for public records set forth in Federal Rule of Evidence 803(8)(C).

His second opinion addressed a number of evidentiary issues and examined them more carefully than any other judge had.⁷ For example, Judge Becker ruled that only admissible evidence can be used to establish authenticity,⁸ a proposition that seems clearly correct but rarely recognized in other judicial opinions. Another example is Judge Becker's treatment of parent and subsidiary corporations. He sets forth guidelines on when and whether a subsidiary's statements

⁵ *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 505 F. Supp. 1313 (E.D. Pa. 1980), *aff'd in part, rev'd in part sub nom. In re Japanese Elec. Prods. Antitrust Litig.*, 723 F.2d 238 (3d Cir. 1983), *rev'd sub nom. Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 505 F. Supp. 1190 (E.D. Pa. 1980), *aff'd in part, rev'd in part sub nom. In re Japanese Elec. Prods. Antitrust Litig.*, 723 F.2d 238 (3d Cir. 1983), *rev'd sub nom. Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 505 F. Supp. 1125 (E.D. Pa. 1980), *aff'd in part, rev'd in part sub nom. In re Japanese Elec. Prods. Antitrust Litig.*, 723 F.2d 238 (3d Cir. 1983), *rev'd sub nom. Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

⁶ *Zenith Radio Corp.*, 505 F. Supp. 1125.

⁷ *Zenith Radio Corp.*, 505 F. Supp. 1190.

⁸ *Id.* at 1218.

can be introduced against the parent as admissions.⁹ Once again, the analysis is as good or better than any before or since.

In his third opinion in the trilogy,¹⁰ Judge Becker demonstrated how painstakingly he, as a trial judge, would screen expert opinions, particularly the bases of expert testimony. The opinion is one of the most sophisticated analyses of Federal Rule of Evidence 703 that has been done to date.¹¹ Judge Becker demonstrates so well his ability to distinguish the wheat from the chaff—between useful economic testimony that assists a trier of fact in understanding corporate behavior and spurious economic testimony that purports to be able to conclusively determine whether a conspiracy existed.

The third opinion in the Japanese Electronics Litigation required Judge Becker to determine whether experts could rely upon data which he had earlier excluded as unreliable. Judge Becker dealt deftly with the interface between hearsay and expert testimony and noted the close relationship between the hearsay exception for opinions contained in trustworthy public reports (Federal Rule of Evidence 803(8)(C)) and the standards regulating expert opinion in Article VII of the Federal Rules of Evidence. Implicit in the trustworthiness requirement in both sets of rules is the right of the opponent to attack the basis of the expert's opinion. Judge Becker then conducted a detailed, in-depth analysis of the reliability of various hearsay passages relied upon by the experts. That analysis led him to exclude several of the passages in the proffered expert reports. Although the Court of Appeals for the Third Circuit later rejected Judge Becker's construction of Rule 703,¹² Judge Becker would be vindicated. Ironically, the Third Circuit criticized Judge Becker's analysis because, in effect, he had assumed the gatekeeper role that the Supreme Court would later mandate. The Court of Appeals asserted that "[t]he proper inquiry is not what the court deems reliable, but what experts in the relevant discipline deem it to be."¹³ Ten years later, the Supreme Court would expressly direct district court judges to inquire into the reliability of proffered scientific

⁹ *Id.* at 1247.

¹⁰ *Zenith Radio Corp.*, 505 F. Supp. 1313.

¹¹ Rule 703 permits an expert to rely on inadmissible evidence, so long as it is the type of information that is reasonably relied upon by other experts in the field. FED. R. EVID. 703.

¹² *In re Japanese Elec. Prods. Antitrust Litig.*, 723 F.2d 238, 275-79 (3d Cir. 1983), *rev'd sub nom. Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

¹³ *Id.* at 276.

testimony and to reject the notion that the dispositive question is "what experts in the relevant discipline deem" reliable.

As it turns out, the Japanese Electronics Litigation opinions were only the first chapter in Judge Becker's substantial contributions to the law regarding expert testimony. No jurist has had more impact or made a more positive contribution than he has to an understanding of the judicial role in assessing the admissibility of expert opinions. In *United States v. Downing*,¹⁴ Judge Becker anticipated the Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,¹⁵ holding that the traditional, general acceptance test for the admissibility of scientific testimony set forth in the 1923 decision of *Frye v. United States*¹⁶ was no longer controlling in federal practice.¹⁷ The *Downing* opinion is a masterful interpretation of Federal Rule of Evidence 702, the main rule governing the admissibility of expert testimony. That rule essentially provides that expert testimony is admissible whenever it would be helpful to the fact-finder. In the following important passage from *Downing*, Judge Becker interpreted the Rule 702 standard of "helpfulness" as distinct from the traditional standard of "general acceptance":

Although we believe that "helpfulness" necessarily implies a quantum of reliability beyond that required to meet a standard of bare logical relevance, . . . it also seems clear to us that some scientific evidence can assist the trier of fact in reaching an accurate determination of facts in issue even though the principles underlying the evidence have not become "generally accepted" in the field to which they belong. Moreover, we can assume that the drafters of the Federal Rules of Evidence were aware that the *Frye* test was a judicial creation, and we find nothing in the language of the rules to suggest a disapproval of such interstitial judicial rulemaking. Therefore, although the codification of the rules of evidence may counsel in favor of a re-examination of the general acceptance standard, on balance we conclude that the Federal Rules of Evidence neither incorporate nor repudiate it.¹⁸

Downing surveyed case law and literature, assessed it with a keen eye, and arrived at a sensible approach that, like *Daubert*, incorporated the general acceptance analysis into a more refined, flexible, and multifaceted test for reviewing expert testimony.

Judge Becker described the proper approach to the admissibility

¹⁴ 753 F.2d 1224 (3d Cir. 1985).

¹⁵ 509 U.S. 579 (1993).

¹⁶ 293 F. 1013 (D.C. Cir. 1923).

¹⁷ *Daubert*, 509 U.S. at 587-89.

¹⁸ 753 F.2d at 1235.

of expert testimony in the following words:

The language of Fed. R. Evid. 702, the spirit of the Federal Rules of Evidence in general, and the experience with the *Frye* test suggest the appropriateness of a more flexible approach to the admissibility of novel scientific evidence. In our view, Rule 702 requires that a district court ruling upon the admission of (novel) scientific evidence, i.e., evidence whose scientific fundamentals are not suitable candidates for judicial notice, conduct a preliminary inquiry focusing on (1) the soundness and reliability of the process or technique used in generating the evidence, (2) the possibility that admitting the evidence would overwhelm, confuse, or mislead the jury, and (3) the proffered connection between the scientific research or test result to be presented, and particular disputed factual issues in the case.¹⁹

This language was clear, cogent, and convincing enough that Justice Blackmun borrowed extensively from *Downing* in his *Daubert* opinion.²⁰ As we look back on *Downing*, we cannot help but think that the paragraph quoted above sets forth a clearer test for scientific evidence and provides more guidance for trial judges than does *Daubert*. *Downing* is typical of a Becker evidence opinion. It is at once scholarly and practical. It is complete and careful, thoroughly researched and heavily footnoted, and it assists trial judges to understand precisely what is expected of them.

The Supreme Court decided *Daubert* eight years after *Downing*. The Court found that the enactment of the Federal Rules of Evidence in 1975 had impliedly overturned the traditional "general acceptance" requirement. The Court pointed out that Federal Rule of Evidence 402 states, "[a]ll relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority."²¹

The Court noted that the exceptive clause makes no mention of case or decisional law.²² The general acceptance test was a creature of case law. The Court added that it could find no language in the statutory text of the Federal Rules that could reasonably be interpreted to codify the general acceptance standard.²³ That omission had the effect of superseding the traditional general acceptance standard, since "[i]n principle, under the Federal Rules

¹⁹ *Id.* at 1237 (footnote omitted).

²⁰ *Daubert*, 509 U.S. at 591, 594 & n.12.

²¹ *Id.* at 587 (quoting FED. R. EVID. 402).

²² *Id.* at 587-88.

²³ *Id.* at 588.

[of Evidence] no common law of evidence remains."²⁴

However, writing for the majority, Justice Blackmun was quick to add that the abolition of the general acceptance requirement did not mean that "the Rules themselves place no limits on the admissibility of purportedly scientific evidence."²⁵ Quite to the contrary, Justice Blackmun emphasized that under the Federal Rules the trial judge has a vital "gatekeeping"²⁶ or "screening"²⁷ role to play. Justice Blackmun derived that role from the language of Federal Rule of Evidence 702. That statute refers to "scientific . . . knowledge."²⁸ *Daubert* asserted that the trial judge's task is to ensure that proffered testimony "both rests on a reliable foundation and is relevant to the task at hand."²⁹ Justice Blackmun wrote that the "overarching" concern "is the scientific validity—and thus the evidentiary relevance and reliability—of the principles that underlie a proposed submission."³⁰ He explained that the proponent must demonstrate the reliability of the proffered testimony by establishing that the underlying hypothesis has been validated by appropriate scientific methodology.³¹ Justice Blackmun then listed some of the factors that trial judges should consider in evaluating the sufficiency of the proponent's showing of reliability. For example, he mentions the known or potential error rate disclosed in the research.³²

Justice Blackmun gets the credit for authoring the *Daubert* opinion, but the analysis he chose to embrace bears the unmistakable imprint of Judge Becker. When Judge Becker rejected the general acceptance test "as an independent controlling standard of admissibility,"³³ he based that rejection in part on his construction of the pertinent Federal Rules of Evidence, including the very language in Rule 402³⁴ that Justice Blackmun would later quote in *Daubert*.³⁵ In *Downing*, Judge Becker endorsed the view that under Rule 702,

²⁴ *Id.* (quoting Edward J. Cleary, *Preliminary Notes on Reading the Rules of Evidence*, 57 NEB. L. REV. 908, 915 (1978)).

²⁵ *Id.* at 589.

²⁶ *Id.* at 589 n.7, 597.

²⁷ *Id.* at 589, 596.

²⁸ FED. R. EVID. 702.

²⁹ *Daubert*, 509 U.S. at 597.

³⁰ *Id.* at 594-95.

³¹ *Id.* at 592-95.

³² *Id.* at 594.

³³ *United States v. Downing*, 753 F.2d 1224, 1237 (3d Cir. 1985).

³⁴ *Id.* at 1233-35.

³⁵ *Daubert*, 509 U.S. at 587.

“reliability” is “a critical element of admissibility.”³⁶ Not only did Justice Blackmun reach the same conclusion, but he adopted the Becker view that in assessing the reliability of proposed scientific testimony, the trial judge should focus on whether the witness had employed sound scientific methodology to validate the underlying hypothesis.³⁷ Justice Blackmun also followed the lead of Judge Becker in his discussion of factors that a trial court might take into account in assessing the reliability of scientific expert testimony—for example, suggesting that the error rate of a technique should be considered by the trial judge.³⁸ Justice Blackmun essentially acknowledged the Becker contribution to *Daubert* in his several citations to *Downing*³⁹ and recognized that Judge Becker had anticipated and “aptly described” some of the prescriptions mandated by *Daubert*.⁴⁰

After *Daubert*, it was Judge Becker more than any other judge who explained what *Daubert* required; it was Judge Becker who provided guidance to trial judges as to how to perform their gatekeeping role. In *In re Paoli Railroad Yard PCB Litigation*,⁴¹ Judge Becker reviewed, in light of *Daubert*, a grant of summary judgment in a case alleging damages from exposure to PCBs. Judge Becker engaged in an extensive and incisive analysis of *Daubert*'s effect on the admissibility of scientific expert testimony. Among the more important points Judge Becker made about the gatekeeping function were these:

(1) Because a judge at an in limine hearing must make findings of fact on complex scientific issues, and because the in limine ruling is often dispositive, “it is important that each side have an opportunity to depose the other side’s experts in order to develop strong critiques and defenses of their experts’ methodologies.”⁴²

(2) Since the question of reliability is an admissibility requirement governed by Rule 104(a), a proponent must do more than simply make a prima facie case on reliability. Rather, the proponent must establish by a preponderance of the evidence that the testimony is reliable (although the “evidentiary requirement of reliability is lower than the merits standard of correctness”).⁴³

³⁶ *Downing*, 753 F.2d at 1238.

³⁷ *Id.* at 1237-39.

³⁸ *Id.* at 1239.

³⁹ *Daubert*, 509 U.S. at 591, 594.

⁴⁰ *Id.* at 591.

⁴¹ 35 F.3d 717 (3d Cir. 1994).

⁴² *Id.* at 739.

⁴³ *Id.* at 744.

(3) After *Daubert*, any distinction between methodology and its application is no longer viable. *Daubert* must be read as meaning that “any step that renders the analysis unreliable . . . renders the expert’s testimony inadmissible. This is true whether the step completely changes a reliable methodology or merely misapplies that methodology.”⁴⁴

(4) Because *Daubert* held that Rule 702 was the “primary locus of [a court’s] gatekeeping role,” the use of Rule 403 to exclude expert testimony should be left for the rare case. For exclusion to be warranted under Rule 403, “there must be something *particularly* confusing about the scientific evidence at issue—something other than the general complexity of scientific evidence.”⁴⁵

The guidance provided by *Paoli* has been important not only to trial judges in the Third Circuit, but also to judges elsewhere because it is the clearest available statement of what *Daubert* means.

More recently, Judge Becker provided additional guidance to trial judges on the meaning of *Daubert* in *Elcock v. Kmart Corp.*⁴⁶ The opinion addresses the tricky, neglected subject of whether a trial judge can consider an expert’s credibility when performing the gatekeeping function. Judge Becker reasoned cogently that the particular expert’s credibility as a witness must be separated from the reliability of the expert’s methods. A trial judge who excludes an expert’s testimony because she believes the expert to be a liar is operating not as a gatekeeper, but rather as a juror. Judge Becker in *Elcock* also had important things to say about *Daubert*’s application to nonscientific expert testimony—a discussion critical for judges, scholars, and lawyers in light of the Supreme Court’s extension of the trial court’s gatekeeping function to nonscientific experts in *Kumho Tire Co. v. Carmichael*.⁴⁷

Judge Becker has also sounded a much-needed note of caution to trial judges who might be tempted to apply *Daubert* with too heavy a hand. In the years immediately after *Daubert*, some reported cases seemed to hold that an expert’s testimony had to be perfect before it

⁴⁴ *Id.* at 745 (emphasis omitted).

⁴⁵ *Id.* at 747-48. Rule 403 gives the trial judge discretion to exclude relevant evidence if its probative value is “substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” FED. R. EVID. 403.

⁴⁶ 233 F.3d 734 (3d Cir. 2000).

⁴⁷ 526 U.S. 137 (1999).

could be admitted.⁴⁸ Trial judges occasionally took on the role of meta-expert, strictly scrutinizing an expert's research and methodology—as if the judge were a scientist reviewing a dissertation rather than a judge reviewing proffered expert testimony. These cases threatened to make the trial judge a super-juror, excluding expert testimony (and thereafter dismissing the case on summary judgment) simply because the trial judge found some minor imperfection in the expert's basis or methodology. Judge Becker's thoughtful and influential opinion in *Heller v. Shaw Industries, Inc.* counseled against this too-aggressive use of the gatekeeping function.⁴⁹ This was no small feat because the court in *Heller* ultimately affirmed the trial court's exclusion of the plaintiff's expert testimony. But in doing so, Judge Becker urged a cautious approach that he found necessary to protect the plaintiff's right to a jury's consideration of reasonably reliable expert testimony. Judge Becker emphasized that "an expert opinion must be based on reliable methodology and must reliably flow from that methodology and the facts at issue—but it need not be so persuasive as to meet a party's burden of proof or even necessarily its burden of production."⁵⁰ He noted that it should be permissible for an expert to rely at least in part on the temporal relationship between exposure and injury in concluding that the exposure caused the injury. He also ruled (despite rigid case law to the contrary) that a doctor may be permitted to testify on the basis of a properly conducted differential diagnosis. Judge Becker stressed that an expert is not required to rule out all possible alternative causes before opining on causation. He also rejected an absolute requirement that a scientific expert must rely on extensive scientific research and studies. As Judge Becker put it so eloquently:

Given the liberal thrust of the Federal Rules of Evidence, the flexible nature of the *Daubert* inquiry, and the proper roles of the judge and the jury in evaluating the ultimate credibility of an expert's opinion, we do not believe that a medical expert must always cite published studies on general causation in order to reliably conclude that a particular object caused a particular illness. . . . To so hold would doom from the outset all cases in which the state of research on the specific ailment or on the alleged causal agent was in its early stages, and would effectively resurrect a *Frye*-like bright-line standard, not by requiring that a

⁴⁸ See Daniel J. Capra, *The Daubert Puzzle*, 32 GA. L. REV. 699 (1998) (rejecting *Daubert*'s five factor test as too amorphous to be helpful in regulating expert testimony, but noting that *Daubert*'s test does provide a useful way to think about such testimony).

⁴⁹ 167 F.3d 146 (3d Cir. 1999).

⁵⁰ *Id.* at 152.

methodology be “generally accepted,” but by excluding expert testimony not backed by published (and presumably peer-reviewed) studies. We have held that the reliability analysis applies to all aspects of an expert’s testimony: the methodology, the facts underlying the expert’s opinion, the link between the facts and the conclusion, et alia. However, not only must each stage of the expert’s testimony be reliable, but each stage must be evaluated practically and flexibly without bright-line exclusionary (or inclusionary) rules.⁵¹

This passage from *Heller* is a wise reminder that the goal of evidence “reform” is not to establish a system of admitting only “perfect” evidence. Rather, the cause of evidence reform is advanced by sensible rules that guarantee fairness among adversaries and reasoned determination by the factfinder.

There are far too many Becker opinions on evidence for us to discuss in the space we are allocated. We have focused on expert testimony because his impact has been so obvious and his attention to the subject has occupied him for most of his career on the bench. It is evident that Judge Becker made a major contribution to shaping the judicial gatekeeping role, which the *Daubert* Court endorsed. No single opinion by Judge Becker worked a revolution, but in the tradition of Justice Cardozo, Judge Becker’s opinions “carrie[d] on the[] evolution” of the standards for admitting expert evidence.

II. JUDGE BECKER’S SCHOLARSHIP

While Judge Becker’s judicial opinions set the stage for the *Daubert* decision, in turn, the *Daubert* decision was in a line of authority that inspired one of his most important pieces of scholarship. In a line of cases dating back to 1984,⁵² a majority of the Supreme Court justices made it reasonably clear that they subscribed to a moderate school of the textualist approach to statutory interpretation.⁵³ In particular, as in *Daubert*, the majority indicated that to be enforceable, an exclusionary rule of evidence had to be codified. Although the general acceptance test dated back seventy years⁵⁴ and had been the overwhelming majority view,⁵⁵ the *Daubert* Court pronounced it dead

⁵¹ *Id.* at 155.

⁵² *United States v. Abel*, 469 U.S. 45 (1984); *see also* *Bourjaily v. United States*, 483 U.S. 171 (1987).

⁵³ Edward J. Imwinkelried, *A Brief Defense of the Supreme Court’s Approach to the Interpretation of the Federal Rules of Evidence*, 27 *IND. L. REV.* 267, 268-71 (1993).

⁵⁴ *Daubert*, 509 U.S. 579 (1993); *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

⁵⁵ 1 DAVID L. FAIGMAN ET AL., *MODERN SCIENTIFIC EVIDENCE: THE LAW AND*

because it had not been incorporated in the statutory text of the Federal Rules. The federal courts no longer enjoyed the common-law power to promulgate uncodified exclusionary rules.⁵⁶ Again, Rule 402 declares that all logically relevant evidence is admissible unless the court can exclude it on the basis of specified types of law, and case or decisional law is conspicuously absent from the list of types of law.

A number of commentators took the Court to task for this approach to statutory interpretation. In some cases, the commentators criticized the specific evidentiary rulings, which the Court issued as a result of this approach.⁵⁷ In other cases, commentators expressed the concern that the approach would impede the ongoing reform of evidence law.⁵⁸ If an exclusionary rule had to be codified to be enforceable, congressional intervention would be necessary even when it became patent that the rule was desirable or even necessary. Since Congress has such a busy agenda, there was a grave risk that deficiencies in federal evidence law would go uncorrected.

At this point, it was Judge Becker who put two and two together. He realized that the best solution was to reestablish the Advisory Committee on Federal Rules of Evidence. That committee had drafted the version of the Rules that had been approved by the Supreme Court and was later revised and enacted by Congress. The Committee, however, had been permitted to disband after the enactment of the Rules. In an often-cited article, Judge Becker proposed the reestablishment of the committee.⁵⁹ Early in the article, Judge Becker and his co-author, Professor Orenstein, pointed to the trend in the Supreme Court decisions "toward a 'plain meaning' interpretation of the Federal Rules" of Evidence.⁶⁰ Judge Becker appreciated that the trend might stultify the reform movement in evidence law. If a problem arose under the Federal Rules but

SCIENCE OF EXPERT TESTIMONY §§ 1-2.3 (1997).

⁵⁶ Edward J. Imwinkelried, *Whether the Federal Rules of Evidence Should Be Conceived as a Proprietary Index Code: Blindness Is Worse Than Myopia*, 40 WM. & MARY L. REV. 1595 (1999).

⁵⁷ Glen Weissenberger, *The Supreme Court and the Interpretation of the Federal Rules of Evidence*, 53 OHIO ST. L.J. 1307 (1992).

⁵⁸ Randolph N. Jonakait, *The Supreme Court, Plain Meaning, and the Changed Rules of Evidence*, 68 TEX. L. REV. 745 (1990).

⁵⁹ Edward R. Becker & Aviva Orenstein, *The Federal Rules of Evidence After Sixteen Years—The Effect of 'Plain Meaning' Jurisprudence, the Need for an Advisory Committee on the Rules of Evidence, and Suggestions for Selective Revision of the Rules*, 60 GEO. WASH. L. REV. 857 (1992).

⁶⁰ *Id.* at 864.

Congress lacked “sufficient institutional interest . . . to pursue the job”⁶¹ of remedying the problem, the problem might fester for years. As a realist, Judge Becker observed that although “sensational cases” might “capture Congress’ attention,” “Congress is too busy to focus on day-to-day monitoring” of evidentiary norms.⁶² Judge Becker argued that an advisory committee was a better vehicle for promoting the cause of evidence reform because it could engage in “responsible monitoring and selective revision” of the Federal Rules.⁶³

Judge Becker’s article was instrumental in persuading the United States Judicial Conference to reestablish an advisory committee devoted to the Federal Rules of Evidence.⁶⁴ In 1993—the year immediately after the release of Judge Becker’s article—the United States Judicial Conference appointed a new Advisory Committee on the Federal Rules of Evidence.⁶⁵

In short, while Judge Becker’s opinions have resulted in the reform of individual evidentiary doctrines, perhaps even more importantly, he played a leading role in creating the general procedural mechanisms ensuring that it will be feasible to reform evidence law in the future without going to the length of entreating congressional intervention.

III. JUDGE BECKER AND THE ADVISORY COMMITTEE

Judge Becker’s influence on the rulemaking process did not end with his groundbreaking article. He has been a constant source of support and guidance for the Advisory Committee. The Reporter to the Advisory Committee has often sought his advice on ways to approach difficult evidentiary questions, as well as the perils and politics of the rulemaking process.⁶⁶ For example, on one occasion, the Reporter called Judge Becker for his views on how Federal Rule of Evidence 615, providing for sequestration of witnesses, could be squared with congressional legislation granting crime victims the right to attend a trial. Judge Becker directed the Reporter to “take a step

⁶¹ *Id.* at 913.

⁶² *Id.*

⁶³ *Id.* at 914.

⁶⁴ 1 STEPHEN A. SALTZBURG ET AL., FEDERAL RULES OF EVIDENCE MANUAL 6-7 (7th ed. 1998).

⁶⁵ *Id.* at 7; 21 CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE: FEDERAL RULES OF EVIDENCE § 5008 (Supp. 2000).

⁶⁶ One of the authors of this tribute currently serves as Reporter to the Advisory Committee on Evidence Rules.

back and figure out the policy and history of sequestration. For that, of course, you need to go back to the Bible, the story of Susanna and the Elders. As you know, your namesake there did a great job.⁶⁷ Luckily, the Reporter did not have to betray his ignorance because Judge Becker terminated the conversation at that point.⁶⁸ The Reporter dusted off a Bible, and sure enough the story of Susanna and the Elders provided a perfect backdrop for an understanding of the policies supporting sequestration. Daniel sequestered the Elders and they testified inconsistently at “trial,” making it easy for Daniel to assess the credibility of conflicting witnesses. Judge Becker’s biblical allusion helped the Advisory Committee prepare its position on the pending victim’s rights legislation.

Judge Becker’s opinions have also had a profound impact on the work of the Advisory Committee and its efforts at evidence reform. His classic opinions on expert testimony, discussed above, provided the structure for the amendment to Federal Rule of Evidence 702 that went into effect on December 1, 2000.⁶⁹ That amendment is intended to codify the Supreme Court’s decisions in *Daubert* and *Kumho*, but it does so by clarifying that those cases mandate a step-by-step approach to gatekeeping. Under the amendment, the trial judge must find that the expert has a sufficient basis for the opinion, that the expert is using a reliable method, and that the method has been applied reliably to the facts of the case. All of these criteria are derived from Judge Becker’s post-*Daubert* opinions, most notably *Paoli*. The Committee Note to the amended Rule 702 relies on Judge Becker’s opinions at five separate points. *Paoli* is used to support the important proposition that “any step that renders the analysis unreliable . . . renders the expert’s testimony inadmissible. *This is true whether the step completely changes a reliable methodology or merely misapplies*

⁶⁷ The Reporter’s first name is Daniel.

⁶⁸ The text above cannot convey the speed with which this information was rendered by Judge Becker and the telephone conversation terminated. Anyone who has had a telephone conversation with Judge Becker knows what we are talking about; Judge Becker is the master of getting to the point and moving on. He has a lot to do.

⁶⁹ The amended Rule 702 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, *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.*

FED. R. EVID. 702 (emphasis added).

that methodology.”⁷⁰ The so-called “application” factor in the amendment is lifted from Judge Becker’s analysis in *Paoli*. And *Heller* is relied on in the Committee Note to caution against an excessive use of the gatekeeper function. The references to *Heller* were added to the Committee Note after the public comment period and are particularly important because they helped to allay concerns expressed by plaintiffs’ lawyers that the amendment would deprive plaintiffs with legitimate claims of their right to jury trial.

Judge Becker’s opinion in *Asplundh Manufacturing Division v. Benton Harbor Engineering*⁷¹ was the motivating force for the amendment to Federal Rule of Evidence 701 that took effect on December 1, 2000.⁷² In *Asplundh*, a party proffered a lay witness to give an opinion about the cause of a crane collapse. The witness was testifying on the basis of technical knowledge. The opponent challenged the testimony under *Daubert*, but the proponent argued that *Daubert* was inapplicable to lay witness testimony. Judge Becker presented a thorough and trenchant discussion of the case law on Rule 701 (the rule governing lay opinion testimony) and determined that courts applying that rule had blurred the line between expert and lay witnesses by permitting lay witnesses to testify on the basis of technical and specialized knowledge. This expansion of Rule 701 was problematic because it provided an incentive for parties to try to escape the strictures on expert testimony (specifically the *Daubert* requirements) by proffering shoddy experts as “lay” witnesses. Judge Becker concluded that the “spirit” of *Daubert* would be violated by such a subterfuge; therefore, a “lay” witness who testified on the basis of scientific, technical, or other specialized knowledge must satisfy the *Daubert* requirements. Judge Becker “invited” the Advisory Committee to consider whether Rule 701 should be amended to require that testimony based on scientific, technical, or other specialized knowledge is to be admitted under Rule 702 or not at all. Such an amendment was completely consistent with the cause of proper

⁷⁰ *Id.* committee note (quoting *Paoli*, 35 F.3d at 745) (omission in original).

⁷¹ 57 F.3d 1190 (3d Cir. 1995).

⁷² The amended Rule 701 provides as follows:

If the witness is not testifying as an expert, the witness’ testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness’ testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

FED. R. EVID. 701 (emphasis added).

evidence reform because it would close a gaping loophole in the Rules and prevent sharp practice.

The Advisory Committee accepted Judge Becker's invitation and crafted an amendment that essentially codified his opinion in *Asplundh*. Not surprisingly, Judge Becker's opinion was the foundation for the Committee Note to the amendment as well. Most critically, the Committee Note quotes Judge Becker for the proposition that the amendment is not intended to affect the

prototypical example[s] of the type of evidence contemplated by the adoption of Rule 701 relat[ing] to the appearance of persons or things, identity, the manner of conduct, competency of a person, degrees of light or darkness, sound, size, weight, distance, and an endless number of items that cannot be described factually in words apart from inferences.⁷³

Judge Becker also had a critical impact on the rulemaking process itself. In his role as Chair of the Executive Committee of the Judicial Conference, Judge Becker provided essential support for the Advisory Committee's package of amendments to the Federal Rules of Evidence. In particular, Judge Becker deftly deflected the attack by the Department of Justice on the amendment to Rule 701. The Department took the position that under the amendment it would have to qualify virtually all of its witnesses as experts. Judge Becker noted that the amendment was not nearly that dramatic—all it stated was that a party could not evade the constraints on expert testimony by simply labeling its witness as a "lay" witness. Judge Becker's measured responses to the overheated arguments of the Department of Justice helped save the amendment at a critical juncture in the rulemaking process.

IV. JUDGE BECKER'S LECTURES

Judge Becker has contributed to the cause of law reform on still another front. Despite his busy judicial schedule, he frequently appears as a speaker at continuing judicial and legal education programs. Each of us has been privileged to hear him speak and to teach side by side with him. Two of us recall vividly the power of his plenary address at an American Association of Law Schools Evidence Conference at the University of Iowa in 1991.⁷⁴ It was clear to us and to all who attended that Judge Becker, despite his busy schedule,

⁷³ *Asplundh*, 57 F.3d at 1196.

⁷⁴ *See* Becker & Orenstein, *supra* note 59.

makes time to stay abreast of the new scholarly literature in the evidence field. Moreover, it was clear to every listener that he has an abiding commitment to the reform of evidence law and a receptivity to new ideas. Every scholar in the audience came away energized because he or she realized that here was a leading jurist who was not only willing, but even eager, to entertain law reform proposals.

V. JUDGE BECKER'S COMMITMENT TO LAWYERS, JUDGES, AND THE DEVELOPMENT OF THE LAW

There is one other contribution that Judge Becker has made to the law of evidence as well as to the legal profession. He has demonstrated both as a district judge and as a court of appeals judge how much he values the law and the lawyers and judges who implement it. He treats each case as though it were the most important and interesting case he has seen to date. So many lawyers and judges become such creatures of habit that they resist change even when it would advance the law and promote justice. Judge Becker acknowledges and respects precedent, but his primary allegiance is to improving the law and providing the best possible justice for all. These higher goals inspire Judge Becker to view precedent through the ever-changing lens of experience. He has a profound regard for well-settled propositions of law, but he realizes that in the final analysis they are the means to the end of reaching a fair decision and promoting justice.

CONCLUSION

Judge Becker has already concluded thirty years of superb service to the American judiciary. As the tone of our remarks suggests, we sincerely hope that he remains on the bench for years to come. However, even at this point in his judicial career, he has left his mark on American evidence law. Like Justice Cardozo's treatment of contract doctrine, Judge Becker's analyses of evidentiary issues have carried on the evolution of evidence doctrine in a sensible, progressive spirit. Like Justice Cardozo, he has brought "wisdom and discretion" to the resolution of those issues.⁷⁵ Even more importantly, he has taken the lead in devising procedural mechanisms to prevent the stagnation or obsolescence of the Federal Rules of Evidence. Judge Becker has made a signal contribution to keeping the reformist

⁷⁵ FARNSWORTH & YOUNG, *supra* note 1, at 81.

spirit alive in evidence law.

We each have taught evidence for many years. At times, we know that we fall into the trap of thinking we have all the answers. It is the opinions of Ed Becker that remind us that we have not begun to think of all the questions and that sometimes our answers are old and tired and must be rethought.

Judge Becker is a hero to us. He treats the subject of evidence with a reverence and respect that is unique in our experience. We salute him for all he has already done and look forward to his further efforts to reform the law of evidence for a new century.

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