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Edward J. Imwinkelried

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# Professor Margaret Berger, the Epitome of the Fully Engaged Scholar and Friend of the Court

*Edward J. Imwinkelried*<sup>†</sup>

Today's law professors are no longer content to remain in the "ivory tower." Rather, they aspire to be fully engaged in the process of law reform. They not only hope that their scholarship will be creative and theoretically sound; they also want it to have real world impact. Margaret Berger's scholarly career is a model for any academic who entertains that aspiration.

To be sure, Professor Berger is a prominent figure within the "ivory tower." For decades, she has been a coauthor of one of the leading evidence casebooks, *Evidence: Cases and Materials*, with Judge Weinstein and Professors Mansfield and Abrams.<sup>1</sup> Moreover, she has published widely cited articles in many of the most highly regarded law reviews.<sup>2</sup>

However, her influence extends far beyond the world of legal education. Law reform organizations have often turned to her for guidance and insight. She has been a member of several National Academy of Sciences committees, including the Committee on DNA Technology in Forensic Science. She was the Reporter for the Post-Conviction Issues Working Group of the National Commission on the Future of DNA Evidence. The

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<sup>†</sup> Edward L. Barrett, Jr. Professor of Law, University of California Davis.

<sup>1</sup> JACK B. WEINSTEIN, JOHN H. MANSFIELD, NORMAN ABRAMS & MARGARET A. BERGER, *EVIDENCE: CASES AND MATERIALS* (9th ed. 1997).

<sup>2</sup> A small sample includes: Margaret A. Berger & Aaron D. Twerski, *From the Wrong End of the Telescope: A Response to Professor David Bernstein*, 104 MICH. L. REV. 1983 (2006); Margaret A. Berger & Aaron D. Twerski, *Uncertainty and Informed Choice: Unmasking Daubert*, 104 MICH. L. REV. 257 (2005); Margaret A. Berger, *Eliminating General Causation: Notes Towards a New Theory of Justice and Toxic Torts*, 97 COLUM. L. REV. 2117 (1997); Margaret A. Berger, *Procedural Paradigms for Applying the Daubert Test*, 78 MINN. L. REV. 1345 (1994) [hereinafter Berger, *Procedural Paradigms for Applying the Daubert Test*]; Margaret A. Berger, *The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restraint Model*, 76 MINN. L. REV. 557 (1992); Margaret A. Berger, *A Relevancy Approach to Novel Scientific Evidence*, 26 JURIMETRICS J. 245 (1986).

prestigious Carnegie Commission on Science, Technology, and Government has also called on her as a consultant.

For its part, the practicing bar pays special attention to Professor Berger's writing. She is the coauthor of the foremost treatise on federal evidence law, *Weinstein's Federal Evidence: Commentary on Rules of Evidence for the United States Courts and Magistrates*.<sup>3</sup> I teach Trial Practice. I devote one class session to evidentiary objections. In that session, I discuss the question of which secondary authorities the trial attorney should cite to the judge. I have told literally thousands of students that when you have time at sidebar to cite only one authority to a federal judge, that authority should be *Weinstein's Evidence*. It undeniably carries more weight with sitting federal District Court judges than any other treatise or text.

Judges not only have a high regard for Professor Berger's contributions to the Weinstein treatise; she has published other works that are typically at the fingertips of federal judges. After the Supreme Court handed down its decision in *Daubert*,<sup>4</sup> the Federal Judicial Center decided that it needed to provide the federal judiciary with research tools to help judges deal more knowledgeably with scientific issues. The center has released two editions of its celebrated *Reference Manual on Scientific Evidence*.<sup>5</sup> Every federal District Court judge in the United States has that text either on the bench or in chambers. Professor Berger contributed substantial articles to both editions. In the first edition, she authored "Evidentiary Framework,"<sup>6</sup> which gave judges an overview of the impact of *Daubert*. The second edition includes her article, "The Supreme Court's Trilogy on the Admissibility of Expert Testimony."<sup>7</sup> That article not only contains further perspective on the original *Daubert* decision; the article adds a discussion of *Daubert's* progeny, *Joiner*<sup>8</sup> and *Kumho*.<sup>9</sup> It was expectable that

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<sup>3</sup> Jack B. Weinstein & Margaret A. Berger, *Weinstein's Federal Evidence: Commentary on Rules of Evidence for the United States Courts and Magistrates* (2nd ed., 1997).

<sup>4</sup> *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

<sup>5</sup> FED. JUDICIAL CTR., *REFERENCE MANUAL ON SCIENTIFIC EVIDENCE* (1994); FED. JUDICIAL CTR., *REFERENCE MANUAL ON SCIENTIFIC EVIDENCE* (2d ed. 2000).

<sup>6</sup> Margaret A. Berger, *Evidentiary Framework*, in *REFERENCE MANUAL ON SCIENTIFIC EVIDENCE* (1994), *supra* note 5, at 37.

<sup>7</sup> Margaret A. Berger, *The Supreme Court's Trilogy on the Admissibility of Expert Testimony*, in *REFERENCE MANUAL ON SCIENTIFIC EVIDENCE* (2d ed. 2000), *supra* note 5, at 9.

<sup>8</sup> *Gen. Elec. Co. v. Joiner*, 522 U.S. 136 (1997).

when the Judicial Conference reconstituted the Advisory Committee on the Federal Rules of Evidence, Professor Berger was named the first Reporter for the committee.

These facts give a sense of the extent of Professor Berger's influence. However, in this article I would like to focus on the considerable influence she has had as a friend of the Court—as the author of amicus briefs submitted to the United States Supreme Court. During her long career, Professor Berger has submitted a large number of amicus briefs in cases pending before the Court.<sup>10</sup> However, two amicus briefs are especially noteworthy, namely, her amicus briefs in the original *Daubert* litigation<sup>11</sup> and her brief in the subsequent *Kumho* case.<sup>12</sup> A careful comparison of the contents of Professor Berger's briefs in those cases and the Court's ultimate opinions reveals the remarkable degree to which Professor Berger's arguments seemingly influenced the Court's ruling and reasoning in both decisions.

#### I. PROFESSOR BERGER'S AMICUS BRIEF IN *DAUBERT*

In 1992, Professor Berger was the lead author of an amicus brief in *Daubert* on behalf of the Carnegie Commission on Science, Technology, and Government.<sup>13</sup> In the long term, one of the most important passages in *Daubert* will prove to be Justice Blackmun's observation that "arguably, there are no certainties in science."<sup>14</sup> Prior to *Daubert*, many courts had

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<sup>9</sup> *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999).

<sup>10</sup> See, e.g., Motion for Leave to File and Brief Amicus Curiae of the Am. Civil Liberties Union and the ACLU Of Va., in Support Of Petitioner, *Lilly v. Virginia*, 527 U.S. 116 (1999) (No. 98-5881), 1998 WL 901782 (with Professor Richard Friedman of the University of Michigan School of Law); Brief of Law Professors Paul F. Rothstein, Ronald J. Allen, Margaret A. Berger et al. as Amici Curiae in Support of the Petitioner, *Office of the President v. Office of Independent Counsel*, 521 U.S. 1105 (1997) (No. 96-1783), 1997 WL 33549611; Brief of the American Civil Liberties Union as Amicus Curiae in Support of the Respondent, *Idaho v. Wright*, 497 U.S. 805 (1990) (No. 89-260), 1989 WL 1127312; Brief of Margaret A. Berger and Jerome Kassirer as Amici Curiae in Support of Plaintiffs-Appellants, *Sidharath v. Sandoz Pharmaceuticals Corp.* (11th Cir. 2001).

<sup>11</sup> Brief of the Carnegie Commission on Science, Technology, and Government as Amicus Curiae in Support of Neither Party, *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993) (No. 92-102), 1992 WL 12006530 [hereinafter *Daubert* Amicus Brief].

<sup>12</sup> Brief of Margaret A. Berger, Edward J. Imwinkelried & Stephen A. Saltzburg as Amicus Curiae in Support of Respondents, *Kumho Tire Co. v. Carmichael*, 536 U.S. 127 (1999) (No. 97-1709), 1998 WL 762013 [hereinafter *Kumho* Amicus Brief].

<sup>13</sup> *Daubert* Amicus Brief, *supra* note 11.

<sup>14</sup> *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 590 (1993).

subscribed to the naïve belief that at least the “exact” sciences could yield absolutely certain conclusions.<sup>15</sup> Justice Blackmun shattered that naïveté in *Daubert*. In her amicus brief in *Daubert*, Professor Berger had urged the Court to do precisely that. She noted that in the past, the courts had “assume[d] that there is much more definiteness in science than actually exists.”<sup>16</sup> As she described the scientific process, even in fields such as physics and chemistry the experimental/observational methodology yields only “contingent,”<sup>17</sup> “provisional”<sup>18</sup> conclusions. Since it is always conceivable that a subsequent experiment will falsify a hypothesis supported by earlier experiments, scientific investigators cannot lay claim to “final or permanent” truth.<sup>19</sup>

In large part, the Court agreed with Professor Berger’s position because the Court embraced her conception of the scientific process itself. The brief repeatedly described the essence of the scientific method as the “formulati[on] [of] hypotheses”<sup>20</sup> and “[r]igor[ous] . . . testing of [the] hypotheses”<sup>21</sup> to validate or falsify them.<sup>22</sup> Justice Blackmun’s description of the scientific method in his lead opinion in *Daubert* is strikingly similar: “a process for proposing and refining theoretical explanations about the world that are subject to further testing and refinement.”<sup>23</sup>

The *Daubert* Court drew a number of doctrinal implications from its conclusions about the nature of the scientific enterprise—the very implications that Professor Berger identified in her amicus brief. First, Justice Blackmun abandoned the traditional general acceptance test for the admissibility of scientific testimony.<sup>24</sup> The Justice characterized

<sup>15</sup> Edward J. Imwinkelried, *Evidence Law Visits Jurassic Park: The Far-Reaching Implication of the Daubert Court’s Recognition of the Uncertainty of the Scientific Enterprise*, 81 IOWA L. REV. 55, 59-60 (1995).

<sup>16</sup> *Daubert* Amicus Brief, *supra* note 11, at \*9.

<sup>17</sup> *Id.* at \*5.

<sup>18</sup> *Id.* at \*9.

<sup>19</sup> *Id.* at \*4.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *See id.* (“how science is conducted”); *id.* at \*8 (“an extensive examination of the hypotheses being put forth”); *id.* at \*10 (“the process by which the theory was generated or tested”).

<sup>23</sup> *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 590 (1993) (emphasis omitted) (quoting Brief for the Am. Assoc. for the Advancement of Sci. and the Nat’l Acad. of Sci. as Amici Curiae Supporting Respondent at 7-8, *Daubert v. Merrell Dow Pharm. Inc.*, 509 U.S. 579 (1993) (No. 92-102), 2003 WL 13006281).

<sup>24</sup> *See id.* at 587-89.

the test as too “austere [a] standard.”<sup>25</sup> He criticized the test as being “at odds with the ‘liberal thrust’ of the Federal Rules [of Evidence].”<sup>26</sup> In her brief, Professor Berger had asserted that a realistic understanding of the nature of scientific methodology “require[d] rejection” of the 1923 *Frye*<sup>27</sup> case that announced the general acceptance test.<sup>28</sup> She explained that the traditional test was “simplistic”<sup>29</sup> and “incompatible with the essence of the scientific endeavor.”<sup>30</sup> She wrote that the *Frye* test, if “taken literally[,] rejects valuable insights that bear all the hallmarks of acceptable science.”<sup>31</sup>

Justice Blackmun supplanted the traditional standard with an essentially methodological test.<sup>32</sup> He declared that the focus should be on the soundness of the scientific methodology supporting the expert’s opinion<sup>33</sup> rather than the judge’s view of the correctness of the conclusion reached by the expert. The Justice elaborated that the opinion’s proponent must convince the trial judge that the opinion is “derived by the scientific method,”<sup>34</sup> that is, “supported by appropriate validation.”<sup>35</sup> Those passages echoed the part of Professor Berger’s amicus brief in which she argued that

[t]he question is not whether the judge agrees with the results of the study . . . . Rather the court must decide whether the study was set up and carried out in a manner that conforms to standards in the scientific community.<sup>36</sup>

Professor Berger’s brief even anticipated the manner in which Justice Blackmun would rationalize his holding as a matter of statutory interpretation. He reasoned that “[t]he primary locus” for deriving the test was Rule 702.<sup>37</sup> More specifically, he ruled that when marshaling testimony about

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<sup>25</sup> *Id.* at 589.

<sup>26</sup> *Id.* at 588 (citation omitted) (internal quotation marks omitted).

<sup>27</sup> See *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

<sup>28</sup> *Daubert* Amicus Brief, *supra* note 11, at \*2, \*7.

<sup>29</sup> *Id.* at 7.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> Edward J. Imwinkelried, *The Daubert Decision: Frye Is Dead, Long Live the Federal Rules of Evidence*, TRIAL, Sept. 1993, at 60, 62-63.

<sup>33</sup> *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579, 595 (1993).

<sup>34</sup> *Id.* at 590.

<sup>35</sup> *Id.*

<sup>36</sup> *Daubert* Amicus Brief, *supra* note 11, at \*17; see also *id.* at \*12 (“the methodology”).

<sup>37</sup> *Daubert*, 509 U.S. at 589.

the scientific methodology underpinning the expert's opinion, the proponent must demonstrate the expert's reasoning is reliable "scientific . . . knowledge" within the meaning of that expression in Rule 702.<sup>38</sup> This was the identical statutory basis that Professor Berger's brief singled out. Citing Rule 702, she stated that the trial judge ought to inquire whether the expert's reasoning "conform[s] to the characteristics of 'scientific knowledge.'"<sup>39</sup>

After announcing the general methodological test, Justice Blackmun proceeded to list several factors that trial judges should consider in deciding whether the expert's opinion rests on sound scientific methodology.<sup>40</sup> His list is quite similar to the list of such factors included in Professor Berger's amicus brief. The Justice's list includes these factors:

- Whether the hypothesis is empirically testable;<sup>41</sup>
- Whether it has been tested;<sup>42</sup>
- Whether the research has been subjected to peer review (although he cautioned that peer review "is not a *sine qua non* of admissibility");<sup>43</sup>
- Whether the hypothesis is generally accepted to the extent that general acceptance is circumstantial evidence that other scientists have scrutinized the research and found it to be methodologically sound;<sup>44</sup> and
- Whether the expert's methodology has a known or ascertainable error rate.<sup>45</sup>

The list in Professor Berger's amicus is remarkably parallel:

- Whether the theory "is capable of being proven false through observation or experimentation";<sup>46</sup>
- Whether the theory "has in fact been subjected to an empirical scrutiny";<sup>47</sup>

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<sup>38</sup> *Id.* at 589-90 (quoting FED. R. EVID. 702).

<sup>39</sup> *Daubert* Amicus Brief, *supra* note 11, at 11-12.

<sup>40</sup> *Daubert*, 509 U.S. at 593-94.

<sup>41</sup> *Id.* at 593.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 594.

<sup>45</sup> *Id.*

<sup>46</sup> *Daubert* Amicus Brief, *supra* note 11, at \*13.

<sup>47</sup> *Id.* at \*14.

- Whether the research has been peer reviewed (although she cautioned that peer review should not be an invariable requirement);<sup>48</sup>
- Whether the theory has been generally accepted to the extent that such acceptance is circumstantial proof that other scientists have concluded that the underlying research was “produced in conformity with the scientific process”;<sup>49</sup> and
- What the technique’s “error rate” is.<sup>50</sup>

Professor Berger’s brief not only sketched the basic outline of Justice Blackmun’s opinion, it also furnished some of the fine print. After describing the validation test he derived from Rule 702, the Justice cited Rule 401 and added that to be relevant, the expert’s theory must “fit” the specific facts of the case.<sup>51</sup> In her amicus brief, Professor Berger cited the same statute and emphasized that to satisfy Rule 401, the expert’s research has to “fit” the “facts in the case.”<sup>52</sup> Procedurally, Justice Blackmun stressed that Federal Rule 104(a) governs the trial judge’s determinations under the validation test.<sup>53</sup> Professor Berger made precisely that point in her brief.<sup>54</sup> In short, to a considerable extent, Professor Berger’s amicus brief presaged the content of Justice Blackmun’s opinion in *Daubert*. The coincidence is so extensive that the conclusion is well nigh unavoidable that her brief was a major influence on the *Daubert* Court’s decision.

## II. PROFESSOR BERGER’S AMICUS BRIEF IN *KUMHO*

Six years after its *Daubert* decision, the Supreme Court revisited the topic of expert testimony in *Kumho Tire Co., Ltd. v. Carmichael*.<sup>55</sup> *Kumho* raised the question of the standard for determining the admissibility of non-scientific expert testimony.<sup>56</sup> As in *Daubert*, Professor Berger was the lead

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<sup>48</sup> *Id.* at \*25-28.

<sup>49</sup> *Id.* at \*5-6.

<sup>50</sup> *Id.* at \*16-17.

<sup>51</sup> *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579, 587, 590-91 (1993) (citations omitted) (internal quotation marks omitted).

<sup>52</sup> *Daubert* Amicus Brief, *supra* note 11, at \*11, n.11.

<sup>53</sup> *Daubert*, 509 U.S. at 592.

<sup>54</sup> *Daubert* Amicus Brief, *supra* note 11, at \*12.

<sup>55</sup> 526 U.S. 137 (1999).

<sup>56</sup> *Id.* at 141.

author of an amicus brief in *Kumho*.<sup>57</sup> Just as Justice Blackmun's opinion in *Daubert* reflected the persuasiveness of her brief in that case, it is easy to discern the imprint of Professor Berger's amicus brief on Justice Breyer's opinion in *Kumho*. Professor Berger's brief urged a balanced approach which Justice Breyer endorsed in his opinion.

On the one hand, in her brief Professor Berger argued that the rigorous validation standard enunciated in *Daubert* was sometimes inappropriate for assessing the reliability of non-scientific expertise such as medical testimony.<sup>58</sup> In his opinion, Justice Breyer concurred, observing that *Daubert* "referred only to 'scientific' knowledge" because "that [wa]s the nature of the expertise at issue" there.<sup>59</sup> Elaborating, Professor Berger asserted that in a case involving non-scientific expertise, it would sometimes be wrong-minded to apply the factors enumerated in *Daubert*.<sup>60</sup> Justice Breyer approved of that view in his opinion.<sup>61</sup>

Next, Professor Berger generally cautioned against attempting to "construct a complex," rigid classification system of types of expertise.<sup>62</sup> The Justice agreed, stating that "it would prove difficult, if not impossible, for judges to administer evidentiary rules under which a gatekeeping obligation depended upon . . . distinction[s]" among various kinds of expert testimony.<sup>63</sup> In his judgment, "conceptual efforts" to fashion such sharp distinctions were "unlikely to produce clear . . . lines capable of application in particular cases."<sup>64</sup> More specifically, Professor Berger asserted that, in at least some

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<sup>57</sup> *Kumho* Amicus Brief, *supra* note 12.

<sup>58</sup> *See id.* at \*4, \*18.

<sup>59</sup> *Kumho Tire Co.*, 526 U.S. at 148 (alteration in original) (quoting *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579, 590 n.8 (1993)).

<sup>60</sup> *See Kumho* Amicus Brief, *supra* note 12, at \*4.

<sup>61</sup> *Kumho Tire Co.*, 526 U.S. at 150-51 ("We agree with the Solicitor General that '[t]he factors identified in *Daubert* may or may not be pertinent in assessing reliability, depending on the nature of the issue, the expert's particular expertise, and the subject of his testimony.' . . . [W]e can neither rule out, nor rule in, for all cases and for all time the applicability of the factors mentioned in *Daubert*, nor can we now do so for subsets of cases categorized by category of expert or by kind of evidence" (first alteration in original) (citation omitted) (quoting Brief for the United States as Amicus Curiae Supporting Petitioners at 19, *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999) (No. 97-1709), 2002 WL 541947).

<sup>62</sup> *Kumho* Amicus Brief, *supra* note 12, at \*14.

<sup>63</sup> *Kumho Tire Co.*, 526 U.S. at 148.

<sup>64</sup> *Id.*; *see also id.* at 151 ("We do not believe that Rule 702 creates a schematism that segregates expertise by type while mapping certain kinds of questions to certain kinds of experts.").

instances, an expert's experience could be an adequate foundation for an opinion.<sup>65</sup> Justice Breyer also posited that a witness's experience can be a sufficient basis for an expert opinion.<sup>66</sup>

On the other hand, Professor Berger argued that the trial judge must demand that the expert's proponent demonstrate that the expert's opinion amounts to more than the witness's "subjective belief."<sup>67</sup> For his part, Justice Breyer came to the same conclusion.<sup>68</sup> In her brief, Professor Berger asserted that "experience-based knowledge should not be automatically inadmissible . . . ."<sup>69</sup> Likewise, Justice Breyer stressed that the trial judge must scrutinize even "experienced-based testimony."<sup>70</sup> Professor Berger contended that the judge ought to insist that in preparing his or her testimony, the expert "exercis[ed] the same level of intellectual rigor that generally characterizes that expert's field of expertise."<sup>71</sup> In formulating his holding, Justice Breyer echoed Professor Berger's brief; he wrote that the trial judge must ensure that "an expert, whether basing testimony on professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field."<sup>72</sup>

In the final analysis, Professor Berger called on the Court to grant trial judges discretion both in applying Rule 702's substantive admissibility standard and in devising procedures for doing so. Substantively, Professor Berger recommended that the Court "accord the trial judge a substantial measure of discretion" in selecting the factors to be used in gauging the reliability of nonscientific expertise.<sup>73</sup> She counseled against "bright-line test[s]."<sup>74</sup> Procedurally, while

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<sup>65</sup> See *Kumho* Amicus Brief, *supra* note 12, at \*6-7.

<sup>66</sup> See *Kumho Tire Co.*, 526 U.S. at 152.

<sup>67</sup> *Kumho* Amicus Brief, *supra* note 12, at \*13 (quoting *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579, 590 (1993)).

<sup>68</sup> See *Kumho Tire Co.*, 526 U.S. at 147-48 ("In *Daubert*, the Court specified that it is the Rule's word 'knowledge' . . . that 'establishes a standard of evidentiary reliability.' Hence, as a matter of language, the Rule applies its reliability standard to all 'scientific,' 'technical,' or 'other specialized' matters within its scope." (quoting *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579, 589-90 & n.8 (1993)).

<sup>69</sup> *Kumho* Amicus Brief, *supra* note 12, at \*19.

<sup>70</sup> *Kumho Tire Co.*, 526 U.S. at 151.

<sup>71</sup> *Kumho* Amicus Brief, *supra* note 12, at \*3.

<sup>72</sup> *Kumho Tire Co.*, 526 U.S. at 152.

<sup>73</sup> *Kumho* Amicus Brief, *supra* note 12, at \*14.

<sup>74</sup> *Id.* at \*3.

some had asked the Court to recognize a right to a pretrial *Daubert* hearing, in her brief Professor Berger staked out the position that the trial judge should also have a significant measure of discretion in fashioning procedures for administering Rule 702.<sup>75</sup> In his opinion, Justice Breyer came down on both issues in the same fashion. On the substantive question, the Justice stated that “in a particular case,” the trial judge has “broad latitude” in choosing the factors that are “reasonable measures of reliability.”<sup>76</sup> Procedurally, the Justice declared:

The trial court must have the same kind of latitude in deciding how to test an expert’s reliability, and to decide whether or when special briefing or other proceedings are needed to investigate reliability . . . . That standard applies as much to the trial court’s decisions about how to determine reliability as to its ultimate conclusion.<sup>77</sup>

#### CONCLUSION

It is fair to say that *Daubert* and *Kumho* are the two most important expert testimony opinions ever rendered by the United States Supreme Court. They not only control in federal court; they have been widely cited and followed by state courts as well.<sup>78</sup> A comparison of those decisions with Professor Berger’s amicus briefs reveals a remarkable degree of similarity between the views she urged and the positions ultimately taken by the Court. At the very least, Professor Berger is an incredible prognosticator. More likely, though, her briefs were instrumental in convincing the Court to embrace those positions. By venturing beyond the “ivory tower” and joining the fray in *Daubert* and *Kumho*, Professor Berger helped shape two of the most important evidence decisions of this era. To a degree, her amicus briefs provided the Court with blueprints for those decisions, just as her distinguished career has become the blueprint for any member of the academy who aspires to take up the challenge of engaging in real world law reform.

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<sup>75</sup> See *id.* at \*21-26; see also Berger, *Procedural Paradigms for Applying the Daubert Test*, *supra* note 2, at 1361-63.

<sup>76</sup> *Kumho Tire Co.*, 526 U.S. at 153; see also *id.* at 152 (“[A] trial court should consider the specific factors identified in *Daubert* where they are reasonable measures of the reliability of expert testimony.”).

<sup>77</sup> *Id.* at 152 (emphasis omitted).

<sup>78</sup> 1 PAUL C. GIANNELLI & EDWARD J. IMWINKELRIED, *SCIENTIFIC EVIDENCE* § 1.14 (4th ed. 2007).