COMMENT
to the

ADVISORY COMMITTEE ON EVIDENCE RULES
and its
SUBCOMMITTEE ON RULE 702

IN SUPPORT OF AMENDING RULE 702 TO ADDRESS THE PROBLEM OF INSUFFICIENT BASIS FOR EXPERT TESTIMONY

October 10, 2018

Lawyers for Civil Justice ("LCJ")[1] applauds the decision by the Advisory Committee on Evidence Rules ("Committee") to form a Subcommittee on Rule 702 ("Subcommittee") for the purpose of exploring possible amendments to Rule 702. The Subcommittee's work holds great promise to remedy the widespread misapplication of standards for expert testimony in civil litigation.

The Committee Chair has accurately described the situation: "a fair number of courts have treated the Rule 702 reliability requirements of sufficient basis and reliable application as questions of weight and not admissibility."[2] The Committee Reporter put it even more frankly: "the fact remains that some courts are ignoring the requirements of Rule 702(b) and (d)."[3] Both descriptions reflect that juries are routinely hearing expert testimony that does not satisfy the intent of Rule 702, which was amended in 2000 to capture the exacting standard of reliability of expert witness testimony outlined by the Supreme Court in *Daubert v. Merrell Dow Pharm., Inc.*,[4] and its progeny. When courts abandon their proper gatekeeper role in this way, they often

[1] Lawyers for Civil Justice ("LCJ") is a national coalition of corporations, law firms and defense trial lawyer organizations that promotes excellence and fairness in the civil justice system to secure the just, speedy and inexpensive determination of civil cases. For over 30 years, LCJ has been closely engaged in reforming federal procedural rules in order to: (1) promote balance and fairness in the civil justice system; (2) reduce costs and burdens associated with litigation; and (3) advance predictability and efficiency in litigation.
[2] Memorandum from Debra Ann Livingston, Chair, Advisory Committee Evidence Rules, to David G. Campbell, Chair, Committee on Rules of Practice and Procedure (May 14, 2018), Agenda Book for June 12, 2018 Standing Committee meeting (hereinafter "Standing Committee Agenda Book") at 402.
[3] Memorandum from Daniel J. Capra, Reporter, to the Advisory Committee on Evidence Rules (April 1, 2018), Agenda Book for Advisory Committee on Rules of Evidence April 26-27, 2018 meeting (hereinafter "April 2018 Agenda Book") at 100.
[4] 509 U.S. 579 (1993).

rely on the language from *Daubert* that "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence."[5] Such courts frequently focus on the first part of the sentence, but fail to heed its most important qualifying clause: that the evidence was admissible in the first place.[6] Examples of such improper analysis of *Daubert* factors abound.[7]

The Subcommittee should move forward with an amendment that, as the Subcommittee describes it, "would emphasize that sufficiency of basis and reliable application are questions of admissibility and not weight."[8] Such an amendment would address the fact that the allocation of responsibility between the judge and the jury for deciding preliminary questions under Rules 104(a) and 104(b) is often unrecognized and misunderstood by both the bench and the bar. As the Committee is well aware, those rules set forth two different tests and procedures for admissibility. Confusion about, and disregard of, these foundational requirements of Rule 702 result in the admission of expert testimony that fails to meet *Daubert* standards, undermining civil justice and eroding confidence in the courts.

As it clarifies the admissibility standards, the Subcommittee should also amend the rule to enhance understanding of Rule 702's specific requirements. For example, the rule would benefit from language clarifying that "sufficient facts or data" under 702(b) must reliably support the witness' opinion and that the application of "principles and methods to the facts of the case" under 702(d) must use generally accepted techniques. An amendment should also make clear that qualifications alone do not suffice to render an expert's opinion admissible.[9] It "is axiomatic that an expert, no matter how good his credentials, is not permitted to speculate,"[10] yet it is not uncommon for courts to allow opinion testimony on the basis of qualifications alone. The trial court's gatekeeping function requires more than simply "*taking the expert's word for it*."[11] Indeed, even a "supremely qualified expert cannot waltz into the courtroom and render opinions unless those opinions are based upon some recognized scientific method and are reliable and relevant under the test set forth by the Supreme Court in *Daubert.*"[12] Rule 702 should make clear that focus should be primarily on the reliability of an expert's methodology, not credentials. If the methodology is not based on sound scientific principles, the expert should not be allowed to testify based solely on his or her strong credentials. Other important ideas for the

[5] 509 U.S. at 595.
[6] *See also Seamon v. Remington Arms Co.*, LLC, 813 F.3d 983, 990 (11th Cir. 2016) ("The weight to be given to admissible expert testimony is a matter for the jury.").
[7] Among the most important examples (cited in the Committee's October 2018 Agenda Book at 175-177) is the First Circuit's decision in *Milward v. Acuity Specialty Prod. Grp., Inc.*, 639 F.3d 11, 13 (1st Cir. 2011), in which the court reversed the district court's exclusion of the expert testimony in part because "[t]he court's analysis repeatedly challenged the factual underpinnings of [the expert's] opinion," while endorsing the proposition that "'[t]he soundness of the factual underpinnings of the expert's analysis and the correctness of the expert's conclusions based on that analysis are factual matters to be determined by the trier of fact.'"
[8] April 2018 Agenda Book at 93.
[9] *Clark v. Takata Corp*., 192 F.3d 750 (7th Cir. 1999).
[10] *Goebel v. Denver & Rio Grande W. R.R. Co.*, 215 F.3d 1083, 1088 (10th Cir. 2000) (emphasis added).
[11] Advisory Committee Notes, Fed. R. Evid. 702 (emphasis added).
[12] *Clark*, 192 F.3d at 759 fn. 5.

Subcommittee's consideration are explained in the Bernstein and Lasker article,[13] and the Michigan statute[14] provides an excellent model for several other possible improvements.

In addition, an amendment to Rule 702 should clarify that, in the context of medical causation, Rule 702's requirement for "reliable principles and methods" requires a differential etiology rather than a differential diagnosis. "'Differential diagnosis' actually refers to a method of diagnosing an ailment, not determining its cause. 'Differential etiology,' on the other hand, is a causation-determining methodology."[15] "[I]n a differential etiology, a doctor rules in all the [reasonable] potential causes of a patient's ailment and then by *systematically* ruling out causes that would not apply to the patient, the physician arrives at what is the likely cause of the ailment."[16] A differential etiology "must be based on *scientifically valid decisions* as to which potential causes should be 'ruled in' and 'ruled out.'"[17] Detailed explanation of a medical causation expert's rationale for ruling in and ruling out various causes is therefore crucial to any assessment of the reliability of the expert's methodology. Unfortunately, courts frequently admit the testimony of medical causation experts based on a claim that they used a "differential diagnosis," a label that does not suffice as an evaluation of the reliable application of the methodology by a preponderance of the evidence. The Sixth Circuit explains:

> Whether we describe Dr. Carlini's causation methodology as "differential etiology" or "differential diagnosis," that does not make it reliable. "[S]imply claiming that an expert used the 'differential diagnosis' method is not some incantation that opens the *Daubert* gate." Calling something a "differential diagnosis" or "differential etiology" does not by itself answer the reliability question but prompts three more: (1) Did the expert make an accurate diagnosis of the nature of the disease? (2) Did the expert reliably rule in the possible causes of it? (3) Did the expert reliably rule out the rejected causes? If the court answers "no" to any of these questions, the court must exclude the ultimate conclusion reached.

Tamraz v. Lincoln Elec. Co., 620 F.3d 665, 673 (6th Cir. 2010) (citation omitted). The Subcommittee should clarify that, if a medical causation expert fails to rule in reasonable potential causes while performing a differential etiology, then the expert's opinion is not the product of sufficient facts and data, and it is not the product of reliable principles and methods that have been reliably applied to the facts of the case. Likewise, if the expert fails to explain his or her rationale for ruling in and ruling out various potential causes, then the court cannot assess whether the expert's decisions were scientifically valid, and it is therefore impossible for the proponent to satisfy the admissibility requirements.[18]

---

[13] David Bernstein & Eric Lasker, *Defending Daubert: It's Time to Amend Federal Rule of Evidence 702*," 57:1 William & Mary L. Rev. (2015).
[14] Mich. Rev'd Judicature Act of 1961, MCL 600.2955.
[15] *Higgins v. Koch Dev. Corp.*, 794 F.3d 697, 705 (7th Cir. 2015) (*citing Myers v. Illinois Cent. R.R. Co.*, 629 F.3d 639, 644 (7th Cir. 2010)).
[16] *Myers v. Ill. Cent. R.R. Co.*, 629 F.3d 639, 641 (7th Cir. 2010) (emphasis added).
[17] *Ervin v. Johnson & Johnson, Inc.*, 492 F.3d 901, 904 (7th Cir. 2007) (emphasis added).
[18] For a careful application of this principle, *see Joas v. Zimmer, Inc.*, 218 F. Supp. 3d 700 (N.D. Ill. 2016).

The Committee is justified in acknowledging the "rulemakers' lament" that a change in rule language may not change the behavior of recalcitrant judges and parties.[19] As the Committee discussed at its April 2018 meeting, "crafting an amendment that essentially tells federal courts to "apply the rule" may be challenging."[20] Challenging, yes, but not impossible. Two examples from the 2015 amendments to the Federal Rules of Civil Procedure may be helpful. First, the Advisory Committee on Civil Rules made clear that its decision to move the "proportionality" requirement from one part of Rule 26 to another "does not change the existing responsibility of the court and the parties to consider proportionality" but rather "reinforces the … obligation."[21] Second, the Advisory Committee on Civil Rules added an express recognition that courts can allocate discovery expenses despite the fact that "[a]uthority to enter such orders is included in the present rule, and courts already exercise this authority."[22] Both of those amendments are proving helpful to courts and parties even though they did not change the underlying obligations. The Subcommittee should proceed in a similar vein to develop a Rule 702 amendment and note that will assist stakeholders in understanding the correct standards to be applied under the rule. Amending the rule in this fashion would emphasize the role judges should play as gatekeepers in determining the admissibility of expert witness testimony and thus help ensure the aim of the 2000 Amendment by allowing only that which is admissible evidence from experts to be presented to the finder of fact.

[19] April 2018 Agenda Book at 100.
[20] Standing Committee Agenda Book at 433.
[21] Fed. R. Civ. P. 26, Committee Note to 2015 Amendment.
[22] *Id*.