TRANSCRIPT OF PROCEEDINGS

In the Matter of:	)
	)
PUBLIC HEARING ON PROPOSED	)
AMENDMENTS TO THE FEDERAL	)
RULES OF EVIDENCE 106, 615,	)
AND 702 BEFORE THE JUDICIAL	)
CONFERENCE ADVISORY COMMITTEE	)
ON EVIDENCE RULES	)
	)

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BEFORE THE ADMINISTRATIVE OFFICE OF THE U.S. COURTS

In the Matter of:	)
	)
PUBLIC HEARING ON PROPOSED AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE 106, 615, AND 702 BEFORE THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON EVIDENCE RULES	)

Remote Hearing
Suite 206
Heritage Reporting Corporation
1220 L Street, N.W.
Washington, D.C.

Friday,
January 21, 2021

The parties met remotely, pursuant to notice, at 9:30 a.m.

BEFORE: HONORABLE PATRICK J. SCHILTZ
Chair to the Advisory Committee

ATTENDEES: (Via Videoconference)

HON. JAMES P. BASSETT
HON. SHELLY DICK
HON. THOMAS D. SCHROEDER
HON. RICHARD J. SULLIVAN
HON. ROBERT J. CONRAD, JR.
HON. CAROLYN B. KUHL
HON. SARA LIOI
HON. JOHN D. BATES
TRACI L. LOVITT, ESQ.
ARUN SUBRAMANIAN, ESQ.
PROF. DANIEL J. CAPRA
PROF. LIESA RICHTER
BRIDGET HEALY
SHELLY COX
BURTON DEWITT
BRITTANY BUNTING

WITNESSES:

REBECCA E. BAZAN, Duane Morris LLP
DOUGLAS K. BURRELL, DRI Center for Law & Public Policy
LARRY E. COBEN, Anapol Weiss
ALEX R. DAHL, Lawyers for Civil Justice
GARDNER M. DUVALL, Whiteford Taylor Preston LLP
RONNI E. FUCHS, Troutman Pepper
JAMES GOTZ, Hausfeld LLP
WAYNE HOGAN, Terrell Hogan
KATIE R. JACKSON, Shook, Hardy & Bacon L.L.P.
ANDREW E. KANTRA, Troutman Pepper
TOYJA E. KELLEY, DRI Center for Law & Public Policy
ERIC G. LASKER, Hollingsworth LLP
MARY MASSARON, Plunkett Clooney Attorneys & Counselors at Law
JOHN M. MASSLON II, Washington Legal Foundation
LEE MICKUS, Evans Fears & Schuttert LLP
AMIR NASSIHI, Shook, Hardy & Bacon L.L.P.
LESLIE W. O'LEARY, Ciresi Conlin LLP
JARED M. PLACITELLA, Cohen, Placitella & Roth, P.C.
BILL ROSSBACH, Rossbach Law, P.C.
THOMAS J. SHEEHAN, Shook, Hardy & Bacon L.L.P.
GERSON SMOGER, Smoger & Associates, P.C.
NAVAN WARD, American Association for Justice
MICHAEL J. WARSHAUER, Warshauer Law Group

P R O C E E D I N G S

(9:30 a.m.)

CHAIR SCHILTZ: Good morning, everyone. We'll get the hearing started. I want to introduce myself. My name is Patrick Schiltz. I'm a federal judge in Minneapolis, where it was 35 below zero wind chill this morning when I left my home, which reminds me that this meeting was supposed to be in Miami, but, instead, we're doing it this way. I'm sorry we couldn't meet in person, but, obviously, with the Omicron variant, we wanted to keep everybody safe.

We are here today to have a hearing on several amendments that we have proposed to the Federal Rules of Evidence, an amendment to Rule 106 regarding the Rule of Completion, an amendment to Rule 615 regarding the exclusion of witnesses from the courtroom, and an amendment to Rule 702 regarding expert testimony.

The way I'd like to do this today is I'd like to ask everybody to keep their videos and their microphones off. We have, like, 60 or 70 people participating today, so if you could all keep your videos and your microphones off, except for Professor Capra and me and whoever's doing the speaking at the time.

For you speakers, when I call your name, if you could turn on your video and your microphone, obviously, we'd like to see and hear from you at that point. And then, as to the Committee members, if you have any questions or you want to make a comment about something that a speaker has said, turn your video on, and when I see your face pop up on my screen, I'll know that you're waiting to ask a question or to make a comment, and I'll call on you at the appropriate time. So, unless you're actually speaking, please keep your microphones and your videos off.

Just a couple more ground rules. The hearing will be recorded by the Administrative Office. If any of you are disconnected, please use the original meeting link to rejoin the hearing. If that doesn't work, you can use the conference bridge number to join by audio, or you can email Brittany Bunting at the Administrative Office and she can help you rejoin the meeting.

As I mentioned, we have a lot of people participating today. We have about two dozen people who want to speak today, so we ask that you all limit yourself to no more than five minutes each. I think most or all of you have submitted written comments, and we will read those comments very carefully.

Please don't try to summarize all of your comments in your five minutes. Just, if you could, just emphasize a couple of the highlights, and please respect the time limits so that we can hear from everybody today.

So, with that, I'm going to call on the first speaker, and let's see, Mr. Burrell, you may have missed it, but if you could keep your video off, please, until it's your time to speak. I'll call on you at that time. Thank you.

The first speaker is Rebecca Bazan. Ms. Bazan or Bazan, I don't know how to pronounce it. There you are. How do you pronounce your last name?

MS. BAZAN: Bazan. You got it right the first time.

CHAIR SCHILTZ: Got it right the first time. So I'm batting 100 so far. If you could just introduce yourself and then we'd be happy to hear whatever you'd like to say.

MS. BAZAN: Good morning, and thank you to the Committee for allowing me to testify today. My name is Rebecca Bazan, and I'm a litigation partner in the Washington, D.C., office of Duane Morris LLP. Duane Morris submitted a written comment in support of the proposed changes to Federal Rule of Evidence 702, and our comment and my testimony today will focus on

the practical implications of the proposed rule changes, particularly how they could affect product liability cases.

Duane Morris frequently litigates product liability cases, especially in the life sciences and toxic tort areas, for which expert testimony is often crucial. First, I want to mention some problematic trends that we've observed in product liability cases when Rule 702 has been misapplied and then discuss how adoption of the proposed changes could help remedy those problems.

What we often see when Rule 702 is misapplied is that speculative and unreliable expert testimony is deemed admissible and what should be fatal flaws are left to cross-examination at trial and passed on to the finder of fact to make a credibility determination. So, in other words, a judge may say, sure, there's problems with this expert, but they go to the weight, not the admissibility. And what that means is that a lot of what should be inadmissible expert testimony gets presented to juries.

One place where we see this happen a lot in the product liability context is on the issue of causation. Oftentimes, evidence of general causation is scant, but an expert is permitted to leap to

specific causation or the expert is permitted to conflate risk and causation. So, for example, exposure to a chemical may present a risk of cancer and, therefore, a proffered expert might opine that a particular person's cancer was caused by exposure to that chemical without looking at dose, epidemiology, what specific type of cancer is involved, or other important specific causation determinants.

We've also encountered engineering experts in medical device cases attempting to support design defect claims with general design criticisms of an entire category of products without any consideration of the specific product or design at issue.

We've also seen pathologists attempting to offer specific causation opinions based on general examples of adverse tissue reactions to certain materials without actually reviewing a particular plaintiff's pathology slides.

Another problematic trend we've observed is experts being allowed to testify outside of their fields. Sometimes, in an effort to save costs, litigants will present expert testimony from a single witness in several different fields, including fields outside of a witness's true expertise, and juries can be ill-equipped sometimes to determine an expert's

credentials in a single field, let alone multiple fields, and the mere appearance of expertise in one field can lead credibility to testimony in others, exposing juries to prejudicial testimony by a witness with little or no expertise at all.

And allowing expert testimony like this to get to the jury distracts and can confuse the jury and de-emphasize the substantive issues in the case, and that has ripple effects backwards through the life cycle of a case. If litigants know that there's a strong likelihood that they can get to the jury with very weak experts, they're more inclined to file weaker and more speculative cases than if they were put to the task of demonstrating all aspects of expert admissibility by a preponderance of the evidence. And it also incentivizes some litigants to merely attempt to survive summary judgment by presenting passable expert testimony for the lowest possible cost in the hopes of drastically increasing the settlement value of a case before trial. So this type of gamesmanship prolongs a case and improperly inflates settlements.

So how the proposed changes will help, they reaffirm the trial court's gate-keeping function by clarifying that proponents of experts bear the burden of establishing the four prongs of expert

admissibility by a preponderance of the evidence.

What this means in practice is that more inadmissible expert testimony will be excluded before trial and it will increase the quality of expert testimony that's ultimately presented to the jury. This would benefit courts, juries, and litigants by, number one, cutting down on the number of very weak or speculative cases that are filed to begin with. This would help federal courts manage their dockets, especially as to multi-district litigations, which make up more than 50 percent of the federal docket and many, if most, require expert testimony.

Number two, it will result in more accurate settlement assessments pretrial because they'll no longer be inflated and propped up by very weak experts.

And, number three, it will streamline the issues that actually make it to trial and cut down on jury confusion by minimizing exposure to speculative or unreliable expert testimony. So we therefore support the proposed changes, and I thank the Committee for its time and consideration of this testimony and our written comment.

CHAIR SCHILTZ: All right. Thank you, Ms. Bazan.

MS. BAZAN: Thank you.

CHAIR SCHILTZ: Do any Committee members have any questions or any comments?

(No response.)

CHAIR SCHILTZ: All right. Seeing none, thank you again, Ms. Bazan.

MS. BAZAN: Thank you very much.

CHAIR SCHILTZ: Next, we'd like to hear from Douglas Burrell or Burrell. Mr. Burrell, I hope I didn't mispronounce your name.

MR. BURRELL: Well, you did it right, it's Burrell. Thank you.

CHAIR SCHILTZ: All right.

MR. BURRELL: First of all, I thank you, Committee, for agreeing to listen to my comments here today. I am an attorney in Atlanta, Georgia, with Drew Eckl & Farnham, and I am the current president of DRI, Lawyers Representing Business.

Myself and two of my DRI colleagues will be testifying today. As background information, DRI is and has been the leading U.S. organization of civil defense attorneys and in-house counsel for more than 60 years. DRI hosts 29 substantive practice group committees and is home to the Center for Law and Public Policy.

The Center is the national policy arm of DRI. It acts as a think tank and serves as the public face of DRI, undertaking in-depth studies and publishing scholarly works on a variety of issues, including changes to the Federal Rules of Civil Procedure and the Federal Rules of Evidence. The Center strongly supports the amendment of Federal Rule of Evidence 702 as currently proposed, and it appreciates the Advisory Committee taking on this task. And DRI has submitted its comments as well.

I am here to speak in support of expressly stating in Rule 702 (d) that admissibility requires that the expert's opinion reflects a reliable application of the principles and methods of the facts of the case. This is necessary because many decisions entirely turn over the determination of reliability to the jury even though Federal Rule of Evidence 702 intends that the court will be the gatekeeper of reliability.

The current committee note from the 2000 amendment of Rule 702 states, "The amendment specifically provides that the trial court must scrutinize not only the principles and methods used by the expert but also whether those principles and methods have been properly applied to the facts of the

case."

As the Court noted in In re Paoli RR Yard PCB, 35 F.3d 717, 745 (3rd Cir. 1994), "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. Unfortunately the two did not prove sufficient.

For instance, the 2018 MDL ruling in In re C.R. Bard, Inc. expressly disregarded reliability of the expert's conclusion as not a subject for gate-keeping. Rather than pay attention to the committee note from 2000, that MDL court cited a 20-year-old 1998 decision that is contrary to the intent of the 2000 amendment. Our objective at this time is to amend Rule 702 in ways that cannot be ignored so that its intent is routinely applied instead of being regularly disregarded.

As part of the diminishing gate-keeping employed by the courts, the statement is made that there is a presumption in favor of admitting expert testimony, which is not correct because there is no presumption. The draft committee note now says, "Unfortunately, some courts have required the expert's testimony to appreciably help the trier of fact."

Applying a higher standard than helpfulness to otherwise reliable expert testimony is unnecessarily strict.

We are asking that the proposed note go on to say Rule 702 favors neither admission nor exclusion of evidence but rather states the process for determining admissibility. Prior decisions that stated either a heightened burden of admissibility or a presumption in favor of admissibility are not consistent with Rule 702. This addition neutrally balances out erroneous rulings that either favor or disfavor the admission of expert evidence.

I would like to thank you for your time and, as I stated before, two other of my DRI colleagues will be testifying to this Committee later.

CHAIR SCHILTZ: All right. Thank you, Mr. Burrell.

Any Committee members have any questions or comments?

(No response.)

CHAIR SCHILTZ: All right. Thank you again, Mr. Burrell.

Next, Mr. Coben?

MR. COBEN: Yes.

CHAIR SCHILTZ: Good morning, sir. If you

could introduce yourself, please.

MR. COBEN: Sure. Good morning. My name is Larry Coben, and I'm providing this testimony regarding some comments and changes that were proposed to Rule 702 in my capacity both as a trial lawyer and as chief counsel for the Attorneys' Information Exchange Group. AIEG is a nonprofit organization of over 800 civil litigators who work throughout the United States representing thousands of consumers who unfortunately suffer serious injury as a result of the design or manufacturing flaws in products.

These lawsuits almost always require direct analysis by competent experts in a host of scientific fields. We do this with an understanding and an appreciation of the requirements of Rule 702 and have uniformly found that as it currently exists and as it is applied across the United States, Rule 702 provides appropriate criteria and boundaries, affording jurors an opportunity to decide civil disputes with reasoned opinion evidence.

Support for this suggested rule change language, as I understand it, has been based on criticism of how some trial courts have applied Rule 702. In our view, this criticism is substantively and procedurally misplaced. The comment that the

preponderance of the evidence should be added because some decisions have failed to mention this criteria of proof, frankly, is itself an opinion that does not meet 702.

Trial judges routinely apply this well-recognized requirement every day they are confronted with expert testimony, and its application does not demand a restatement of that preponderance rule in each published opinion. In our view, adding preponderance of the evidence language to Rule 702, which is equivalent to showing something is more likely than not, is neither necessary and, in fact, it's a misnomer.

If any new phraseology must be added, and we think not, it should be the preponderance of the information because experts can rely upon and refer to all sorts of information to formulate opinions. They are not limited to admissible evidence. We think, therefore, that this phrase is in conflict with Rule 703, allowing the use of non-admissible evidence. We are more concerned that some may think that this rule change compels an analysis of whether an expert's proffered opinion satisfies a party's burden of proof. That would be a mistake. You see, our courts have not had any problem distinguishing between a party's

substantive burden of proof and what is required of an expert before allowing her testimony.

But we fear this distinction will be lost now. It is critical that the Committee recognize that expert testimony is an essential element in civil litigation which needs to be protected against unwarranted challenges, which, for the most part, frankly, are contrived rather than real.

As counsel to plaintiffs in trials involving product liability design and manufacturing defects, substantive state law requires that consumer victims proffer expert testimony related to issues of alternative design, design defect, and proximate causation. Invariably, the burden of proof dictates the use of experts, and, routinely, our colleagues on the defense bar challenge expertise or methodology, our witnesses, despite the fact that the defense has disclosed experts with similar qualifications and using similar methodology.

Given these competing arguments, it's not surprising that the filed commentary has aligned the proponents and opponents to these perverse changes along litigation lines. Why do we have lineup of support and opposition to these changes if they are only meant to remind courts of the existing standard?

In truth, whenever changes in procedural or evidentiary rules are obtained, the wordsmithing ensures an avalanche of new legal arguments which will undoubtedly precipitate more litigation.

Adding this phraseology, in our view, will have the opinion of causing some judges to think a change of substance has happened, now requiring, for instance, the trial court to find that the opinion is more likely correct than not or that the trial court must find that the methodology used is more likely the correct methodology than the methodology chosen by a party's opponent, or that the trial court must find that the facts or data considered in reaching an opinion are more likely than not.

Each of these potential constructions of this semantical change would have the effect of hugely altering a proponent's burden of proof and would convert the trial judge into a thirteenth juror. We do not believe that this change is necessary, and we believe it will simply promote additional litigation and argument and burden our courts. Thank you very much for allowing me to make these comments. And, of course, we've submitted written comments as well.

CHAIR SCHILTZ: Thank you. Thank you for appearing.

Do any Committee members have any comments or questions?

(No response.)

CHAIR SCHILTZ: All right. Hearing none, thank you again, Mr. Coben.

MR. COBEN: You're welcome.

CHAIR SCHILTZ: Next is Alex Dahl.

MR. DAHL: Thank you, Your Honor, and good morning.

CHAIR SCHILTZ: Good morning.

MR. DAHL: Thank you for allowing me to testify before the Committee on behalf of Lawyers for Civil Justice, which supports the Committee's Rule 702 amendment. LCJ's comments and research demonstrate that there is a widespread misunderstanding of the rule's requirements. We have two recommendations for improving the proposal, reflecting both what the proposal is meant to do—clarify date-keeping requirements—and what it is meant to undo, which is reliance on the misunderstanding that there's a presumption in favor of admissibility and that questions about sufficiency go to weight rather than admissibility.

The undoing part is hard because these misunderstandings are deeply ingrained in case law and

legal culture. You may be familiar with Michael Lewis's book, *The Undoing Project*, which describes the famous collaboration between Amos Tversky and Daniel Kahneman. What they were undoing is ingrained ways or habits of thinking. Their fundamental insight is that people who have a set idea or a viewpoint tend to downplay or ignore information that's inconsistent with it and instead look for information that supports it.

The book recounts Tversky's advice to Delta Airlines: you're not going to educate experienced pilots out of making mistakes, but you can greatly reduce accidents by training people to communicate in a way that gets the captain's attention when they're trying to help avoid the problem. Many judges and lawyers will look at an amendment that purports to clarify rather than change Rule 702 and see it as not changing anything. Opponents of Rule 702 standards will make this argument in court, and, in fact, you might hear some of that today.

It's important that the amendment get the reader's attention about two fundamental problems. First, the rule should state expressly that the court, not the jury, decides admissibility. Adding the phrase "preponderance of evidence" is a good and

helpful and necessary addition and it does mean that the court decides, but it relies on the reader to draw the inference that the court decides. There's a gap between what the amendment means and what it says, and that difference will invite continued misunderstanding and litigation.

Our second recommendation is to make clearer that the amendment rejects the case law that's inconsistent with the rule. This is important because the very reason people will read the note will be to figure out what to do when the rule and the prevailing case law disagree. At the recent standing committee meeting, it was perceived that the suggestion to give guidance about the case law was based on a desire for scolding judges who have gotten it wrong. LCJ strongly agrees with those who said the note should not be used for that purpose. In fact, we see it the very opposite.

As scolding means rebuking people for past error, the opposite is helping people to avoid mistakes in the future. The note should assume that its readers want to get it right, and the best way to help those people is clarity. The proposed note says these rulings are an incorrect application. That's somewhat helpful, but it's not enough. It fails to

communicate that you'll get it wrong if you follow those cases. Restoring the draft language “this amendment rejects those holdings” is more likely to get the readers' attention. And even more effective would be expressly identifying the lines of cases that will lead readers to make yet another misstatement of the standards, and the three most commonly cited of those are Loudermill, Viterbo, and Smith.

In closing, the proposed amendment is important for both what it needs to do—clarify the gate-keeping standards—and for what it needs to undo: the misunderstandings about those standards. The undoing part of that is much harder because those misunderstandings are deeply ingrained and people will automatically look to the amendment for confirmation of their current thinking rather than for a challenge to it. Future judges and lawyers are going to turn to the rule and note when they need guidance on what to do when the rule is inconsistent with the case law, so the text of the rule and the note should make it as easy as possible for them to get it right. Thank you.

CHAIR SCHILTZ: Thank you.

Do any Committee members have any questions or comments?

(No response.)

CHAIR SCHILTZ: All right. Seeing none, thank you again, Mr. Dahl.

Next, we'll turn to Gardner Duvall.

MR. DUVALL: Thank you very much for this opportunity to speak. I have been trying civil cases for 35 years in state and federal courts, and I am the chair of the Legislation and Rules Committee of the DRI Center for Public Policy. What I want to do today is speak in some brief rebuttal to some oppositions to amending Rule 702, and those oppositions say that the rule is being applied as intended when, very often, it is not.

The comment that we submitted focuses on cases that in approach or in outcome vary from the current Rule 702 and the committee note to it. These are cases that exemplify and refute the claim that 702 is being applied as intended. So, for instance, in 2014, the Ninth Circuit in the City of Pomona case rejected the statement that, "[A]ny 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."

That statement, however, is quoted in the committee note for the 2000 amendment from In re

Paoli. The Ninth Circuit expressly says that it has a standard that's different from what other circuits have and it's different from what was expressly intended when Rule 702 was amended in 2000.

Another case that I think is important as an example here is the case of Johnson v. Mead Johnson in the Eighth Circuit in 2014. When you look at the district court decision in the case, the trial court expressly walked through the steps that are laid out in Rule 702 to determine whether or not the evidence was admissible and reliable, and he found that that particular evidence was not. And in the appeal, the Eighth Circuit looked at that and they did not go through step by step the elements of Rule 702 the way that the trial court had done, and, instead, what the court said was, well, it's a differential diagnosis and we accept differential diagnosis and so it's admissible testimony.

And I don't ask anyone to relitigate which of those courts got the admissibility correct. I don't think that's a useful process at all, but what is important is that there's a judicial process that 702 sets out, and that is to say there are four elements that the proponent has to prove and it really should be a checklist. It's a process. It's a

method. And that's what the district court did. And, on appeal, it was reversed by an appellate court that didn't go through any of those things, did not apply what the rule intends to be a method, and it exemplifies where things are going wrong.

In fact, the Eighth Circuit's decision there was very much like a Frye ruling that said this is an acceptable technique and, therefore, this is admissible evidence and that's the beginning and the end of the analysis. We, in our comment, and many others have noted that a large number of decisions after the year 2000 and up to the present really cite back to cases that predate the Rule’s 2000 amendment, and, thereby, they undermine what was intended when the amendment was last made.

These decisions often brush off the reliability standard that was added in Rule 702(d) and say that reliability is for juries and not for the court. So the record in this proceeding is replete with citations that Rule 702 is not being applied consistently among the circuits and it is not being applied as intended. This Committee has identified a failure in judicial process that passes to juries the role of the judge in considering what is often critical and challenging evidence. And, therefore, we

encourage you to move forward with your amendments to Rule 702 and also with the proposed changes to those that were submitted in the comment by DRI and its Center for Public Policy. I want to thank you very much for your time and for listening to me today.

CHAIR SCHILTZ: Thank you. Thank you, Mr. Duvall.

Any Committee members have any comments or questions?

(No response.)

CHAIR SCHILTZ: All right. Thank you again.

Next, we'll go to Ronni Fuchs.

MS. FUCHS: Yes. Thank you. Thank you for allowing me to address the Committee today. My name is Ronni Fuchs. I'm a partner at Troutman Pepper, which is a national law firm. For about 30 years, I've been representing clients in product liability and mass tort cases and largely focusing on expert testimony and Rule 702, so I've observed firsthand the misunderstanding, as many others have explained, of the rule that leads to disparate decision-making and the effect on litigation.

But what I'd really like to talk to you about today is the effect on client decision-making. Other people have spoken to many of the other issues,

and although I've spent most of my career at large firms, I counsel both large and small clients, and they ask for what's going to happen in a case.

So, in our cases, in almost all of my cases, they turn on the admissibility of scientific evidence. My clients are usually facing novel claims based on complex scientific analysis, and whether there's a common understanding of what the burden of proof is for a party putting forward an expert is absolutely critical. The process of analyzing the scientific support proffered by somebody making a novel claim is lengthy and costly. I suspect that many of you have seen the fruit of this work, the briefing that can go on and be very lengthy, but also hearings and witness testimony. What you may not see is all the work that goes on behind the scenes. Sometimes years of very expensive and extensive work goes into preparing for what is ultimately presented to the courts.

And a litigant faced with new claims based on novel evidence has to decide whether they're going to invest in experts of their own who will challenge unreliable methodology or application of methods and whether to do the work that is required to present that to the courts, and as clients consider this, they want predictability. They want to understand what is

the standard that will apply to the expert testimony.

As it stands today, federal judges don't apply the rule using the same standard. As you've heard and as the submissions state, as a result, we have to counsel clients that the standard is not predictable and that there's a risk that no matter that the experts who are proffered against them should not be admissible under what we believe the standard is under Rule 702, that an expert's opinion has to be the product of reliable principles and methods and that the expert must reliably apply those principles and methods to the facts of the case, some federal courts nonetheless will say that the standard for admitting expert testimony is a liberal one, that there is a presumption against excluding expert witnesses, which blunts the consideration of the unreliable evidence as we believe it should be.

Or they do so by finding that failures of reliability simply go to the credibility rather than the admissibility of the expert's testimony. And for clients, the absence of predictability, the failure of a uniform understanding really frustrates the goal of their rational decision-making. For litigants facing these decisions, having clarification of the rule that corrects the misunderstanding is really essential. It

will allow them to make rational decisions going forward and allow us to counsel them more clearly.

At the end of the day, predictability is a friend of the process, and a rule that disfavors predictability or prevents predictability is a rule that needs to be amended. Thank you.

CHAIR SCHILTZ: Thank you, Ms. Fuchs.

Any comments or questions by any of our Committee members?

(No response.)

CHAIR SCHILTZ: Seeing none, we'll move on then to Mr. Gotz, James Gotz.

MR. GOTZ: Good morning, Judge. Good morning, Professor and members of the Committee.

CHAIR SCHILTZ: Good morning.

MR. GOTZ: My name is James Gotz. I'm a partner at Hausfeld. I'm calling in from Portland, Maine, where it's also in the negatives, Judge. I'm a plaintiffs lawyer. I represent folks in pharmaceutical mass torts and in environmental cases. My written submission is at Tab 6 of today's materials. They focus on Rule 702 and more specifically the note and the proposed changes and additions to the note. The intention here is to offer what I'll call pragmatic and humanistic observations

and suggestions. And specifically today, I've suggested two sentences to be added to the note, one offering more guidance on assessing weight versus admissibility and another adding express reference to the continued relevance and guidance of the 2000 note.

So maybe this is simplistic, but this is how I think about this rule and this complicated area of practice. There's a rule. It needs to be followed. I understand the Committee's perception that there's a need to clarify it, and there needs to be as much clarity in the rule itself as possible, consistent with its intention and its purpose. But there needs to be enough guidance in the note to help the bench and the bar understand how best to follow the rule. We need to make sure the judges know where the gate-keeping begins and where it ends so as not to invade the province of the jury.

And so long as the judge is following the rule, I think we should also keep the following in mind: Judges are human. They're typically not steeped in scientific training. They're necessarily using their judgment and their discretion. And the note needs to be as useful and helpful as possible in supplying practical guidance for all members of the bench and the bar, not just the most seasoned and the

most sophisticated but everyone.

So, on the topic of weight versus admissibility, again, being simplistic, what we're talking about here is there's a flaw or at least a perceived flaw in the expert's methods, and the question for the judge, does it go to weight? Does it go to admissibility? And how do I, the judge, figure this out?

Scientists are also human, and perfection in their methods and conclusions is not the standard that we use to assess admissibility. So how does a judge figure this out? Because there's no if/then formula to figure out weight versus admissibility. The note currently explains, and properly so, not everything goes to admissibility. Some things go to weight. I think examples are useful, but my concern about the current proposed example and, frankly, any example is this, is that it can be misread or misunderstood or intentionally used to argue that per that example it is always so.

And that doesn't mean that examples are necessarily a bad idea, but whether or not there are examples in the note, there should be some further guidance related to the example. I've suggested a sentence as follows: Whether an opponent's challenge

is a matter that goes to weight or to admissibility is necessarily a case-specific inquiry for the court to assess, to be guided by the nature and the context of the particular challenge.

In other words, context matters when you're trying to figure out weight versus admissibility. This one additional sentence or something akin to it should help the judge better appreciate the need for what I'll call a holistic approach to the how-to part of the process while also helping to avoid unintended consequences from turning the example into a perceived if/then solution.

Concerning the 2000 note, in my written submission, also in red, I offer the following suggested additional sentence for the note: "Because Rule 702 is being clarified and not changed, the 2000 committee note remains relevant and should continue to be used as guidance by the court and practitioners."

You heard a little while ago from Mr. Dahl for Lawyers for Civil Justice. He states in his written comment that Rule 702 and not case law sets the standards for admissibility of expert evidence. This rule amendment, as proposed, will not and, by its language, it's not intended to extinguish or replace the decades of case law that have developed since the

Supreme Court's ruling in Daubert, and that includes the cases cited as important guidance in the 2000 note. Whether from the Supreme Court, the courts of appeal, or the district courts, that jurisprudence remains just as centrally important as the rule. They coexist. Here's just a few examples from the 2000 note that continue to be relevant in motion practice about expert admissibility.

The trial court's role as gatekeeper is not intended to serve as a replacement for the adversary system. Proponents do not have to demonstrate that the assessments of their experts are correct, only that their opinions are reliable. Experts can reach different conclusions based on competing versions of the facts and it's not for the judge to decide which version of the facts to believe.

These and other guidance from the 2000 note are just as legally accurate and helpful to the bench and to litigants today as they were 22 years ago, and the bench and the bar should be expressly directed in this new note back to the 2000 note for continued guidance. Doing so should prevent both misunderstandings and mischief as well. Thank you for the time today.

CHAIR SCHILTZ: Thank you, Mr. Gotz.

Any questions or comments by the Committee?

(No response.)

CHAIR SCHILTZ: All right. We will move on then to Mr. Wayne Hogan. Good morning, sir.

MR. HOGAN: Good morning, Your Honor, and good morning to the Committee. I appreciate having the opportunity to participate today. My own practice has been in the State of Florida, and I represented the Code and Rules of Evidence Committee before the Florida Supreme Court recently, relatively recently, as to whether they should adopt the Daubert standard, 702, and served on the Judicial Nominating Commission, the Federal Judicial Nominating Commission that is bipartisan in the history of Florida and chaired that for a number of years.

But, because my own practice has been in state courts for the most part, in preparation for this meeting with you, I looked at some of the rules that govern the process that you're involved in. You're a key part of the Supreme Court's work with Congress on the rules, and you help, as the Court does, prescribe the rules for 330 million Americans. And you are mindful that U.S. Code Section 2072 is explicit in saying that such rules shall not abridge any substantive right.

In this particular proceeding, the right most at risk is the right to trial by jury. And given your advisory role, Subsection D requires independent review by the standing committee. There, there is an added protection: a subcommittee that is to ensure that the rules are "written in clear and consistent language." I'll focus on just that, clear and consistent language, because the language of the first change in the draft rule is not clear and it is not consistent with Rules 104 and 1101.

In the mid-sixties, there was a movie called "Cool Hand Luke" and it coined a famous phrase, "What we've got here is failure to communicate." And, frankly, that's what we've got here on Line 5 of the draft that's before you, the draft text, a failure to communicate. If you were to start reading now down into the draft committee note, it would take 10 paragraphs down to the very last one before it reveals that the text of the draft rule is incorrect, 10 paragraphs to learn that if this draft goes forward as is, this Committee did not mean what it said in the text of the rule.

There's a compounding error. The text of the committee note itself repeats the error three times, even in its first substantive sentence. Simply

put, that's not how this should work, not in a careful committee like this.

In fact, if you go to uscourts.gov and the communication to the bench, the bar, and the public, we're told, "The pervasive and substantial impact of the rules demands exacting and meticulous care in the drafting of rule changes." To be specific, if the Committee were to decide to change the text of Rule 702, the resulting text should be correct. Justice Kagan famously said not that long ago of the career of Justice Scalia, "We're all textualists now." Therefore, the text of an amended rule should, quite simply, not have to be corrected by the note.

To be specific about what's wrong with the draft text on this point, no one should have to read the committee note to learn that the Committee did not mean evidence when it said preponderance of the evidence, but it in actuality meant preponderance of the information presented. Why the attempted fix in the note? To belatedly correct the text of the draft because it is inconsistent with Rule 104 and 1101. That's why it's done, both making it clear that for preliminary questions, and these questions that we're talking about in 702 are preliminary questions to be decided by the judge, witness qualification and

admissibility, under those circumstances, the court is not bound by evidence rules.

So the text of the draft is neither clear nor consistent with the Federal Rules of Evidence. Why create this confusion in the first place? But there's something else, the states. The states are impacted by the work that is done by this Committee and the federal courts and the federal rules. Many states model their evidence rules on the federal rules, and many do that by statute. Evidence statutes enact rules. They do not enact committee notes. And, therefore, judges in those states that adopt a change that you might make are going to apply the literal text of the rule and not going to be looking 10 paragraphs down to something that their legislature did not adopt.

This committee should have its eyes on the future. Every time this committee proposes a rule, that rule must say what it means. It must not be a rule that begs for correction in a committee note, where the committee is then saying, oh, by the way, we didn't mean what we said in the text of the rule. It bears repeating from above by the U.S. courts to the public, the bench, and the bar, the pervasive and substantial impact of the rules demands exacting and

meticulous care in the drafting of rule changes.

If I have a second, here's an analogy: the result of the current drafting before the Committee is the case of the tail, the committee note, wagging the dog, attempting to correct the rule. As between the rule and the note, the text of the rule is far more important. This is beyond what Mark Twain said about the almost right word versus the right word. This is about the wrong word, evidence, versus the right word, information, right there in the text of the rule. I appreciate very much having the opportunity to speak with the Committee.

CHAIR SCHILTZ: All right. Thank you, Mr. Hogan.

Does the Committee members have any questions or comments?

MR. CAPRA: Yeah, I do, if I might, Judge.

CHAIR SCHILTZ: Yes, go ahead.

MR. CAPRA: Thanks for your guidance. The term “evidence” was used because that's actually the term that's used by the Supreme Court in the Bourjaily case, preponderance of the evidence standard, and they're the court that construed 104(a). So we're relying on the Supreme Court for that term evidence. And evidence means information brought before the

court. Evidence might be inadmissible. There's admissible evidence and there's inadmissible evidence. What 104(a) says is that the court's not bound by admissibility, but it's all evidence that's in front of the court. And that's what the Supreme Court understood in Bourjaily.

So that was the -- just to tell you in terms of the carefulness of the drafting, which I think you're questioning, that was the providence.

MR. HOGAN: Do you mind if I speak to that?

MR. CAPRA: Sure.

MR. HOGAN: If you look at Bourjaily, you'll see that the question there was not evidence or information. The question was whether there should be a higher standard than preponderance that was being raised by the defendants. The use of the word evidence there was shorthand for what Professor Capra has just said is correct, information presented.

MR. CAPRA: But, in Bourjaily, actually, the trial court considers inadmissible evidence. The statement itself that's inadmissible evidence, I think, actually was the context.

MR. HOGAN: And that's why it's not necessary and misleading to say in the text of the rule evidence when we mean information presented.

CHAIR SCHILTZ: All right. Thank you.

Any Committee members have any other comments or questions?

(No response.)

CHAIR SCHILTZ: All right. Seeing none, thank you, Mr. Hogan, for your presentation.

MR. HOGAN: Thank you.

CHAIR SCHILTZ: Next, we'll turn to Katie Jackson.

MS. JACKSON: Good morning, Your Honor, and thank you for allowing me to testify this morning about the proposed amendments to Rule 702. My name is Katie Jackson, and I'm an attorney with the law firm Shook, Hardy & Bacon. I'm appearing today in my capacity as a fellow for the Lawyers for Civil Justice. You've already heard Alex Dahl on this. As an LCJ fellow this past year, I was able to conduct a year-long research project assessing how courts admit expert evidence under Federal Rule 702. My colleagues and I reviewed over a thousand federal cases decided in 2020 in which the judge either admitted, excluded, or partially admitted expert testimony.

We reviewed each case individually, looking for specific factors. One of those factors was whether the court articulated a standard requiring the

proponent of proffered expert testimony to show proof of its admissibility by a preponderance of the evidence. This, of course, is the preponderance standard that we've been discussing this morning, which is reflected in the Federal Rules explicitly in Rule 104(a) and then incorporated by comment in Rule 702.

We compiled all of our findings into a report. This report was filed with the Committee in September as an official comment. So, overall, we found that the federal courts across the country are split over whether to apply the preponderance standard when admitting expert evidence. This split occurs within 57 of the 93 federal judicial districts, which, of course, covers every federal circuit court's jurisdiction in the country.

The research contains several specific findings. I'll discuss some of those specific findings with you today, and then I would direct the Committee's attention to the LCJ research comment that we filed for the full results.

First, the research shows that nearly two-thirds of the time, so in about 65 percent of the cases reviewed, courts do not mention the proponent's burden of proof or that a preponderance standard

applies to a Rule 702 analysis.

Inversely, this means that only about a third of the time, so in about 35 percent of the cases that we reviewed, courts mentioned that the proponent bears the burden of proving admissibility by a preponderance of the evidence. Of course, a court's silence regarding the standard does not prove the court allowed inadmissible evidence at trial, but it does indicate that the Rule 702 admission process may need clarification. And, after all, clarification would aid the parties' advocacy efforts before the court, as well as an appellate court's ability to review the trial judge's analysis.

To understand why clarification is needed on this point, the Committee may wish to consider this scenario playing out in other contexts. For example, imagine if two-thirds of opinions on prior restraint failed to mention the strict scrutiny standard or if two-thirds of opinions evaluating the scope of discovery failed to mention Rule 26(b)(1).

So the takeaway from this major first finding is that the majority of courts do not "show their work" when coming to an admissibility determination, making it more likely that issues, if they do exist, will only be compounded in the future.

Turning to the second major research finding, that one reveals that in about 13 percent of cases, courts included language reflecting a presumption of admissibility. This has already been discussed this morning, but it includes comments such as the federal rules having a "liberal thrust favoring admission." So, at least in this percentage of cases, we know that there was a clear presumption in favor of admissibility, which does directly conflict with the intent of Rule 702.

And the final finding that I'll discuss today is perhaps the most interesting finding for the Committee's purposes. In a number of cases, courts inconsistently required both a showing of admissibility by a preponderance of the evidence, as well as a presumption favoring admissibility. This data point is particularly interesting because these two standards directly conflict with each other, and so it indicates that there is general confusion among the courts over whether the preponderance standard applies under Rule 702. It might also reveal deeper confusion about what those separate standards mean.

In conclusion, Your Honor, these results indicate that Rule 702 is not applied consistently across the country or even within the same federal

circuit or judicial district. The proposed amendment to Rule 702 would clarify that 702 requires courts to apply a preponderance standard prior to admitting expert evidence. I'm available to answer any of the Committee members' questions, but I would otherwise direct the Committee to the LCJ comment, which we filed and which includes more additional research for you. Thank you.

CHAIR SCHILTZ: Thank you.

Do any of the Committee members have any comments or questions?

(No response.)

CHAIR SCHILTZ: All right. Thank you again, Ms. Jackson.

Next, we will move to Andrew Kantra.

MR. KANTRA: Good morning.

CHAIR SCHILTZ: Good morning.

MR. KANTRA: My name is Andy Kantra. I'm a partner at Troutman Pepper, and for the last 25-plus years, I've been spending my time counseling clients and leading challenges on expert witness issues in MDLs and mass torts, primarily in the pharmaceutical context, and it is with that experience that I've observed firsthand the types of misunderstandings of Rule 702 that have led to decisions to admit

unreliable opinions.

Today, what I want to do is focus on one MDL in which I was involved, which is the Zyprexa MDL, that helps to explain why I support the amendments to Rule 702. With respect to Zyprexa, a little bit of background. It was formed in 2004. It was before Judge Weinstein in the Eastern District of New York. And Zyprexa was an antipsychotic medication that was used to treat schizophrenia and bipolar disorder, and the allegations were that it caused diabetes and excessive weight gain. The plaintiffs included thousands of individual patients, as well as the state attorneys general and a third-party payer litigation as well.

And so, with that context in mind about the MDL, I want to turn to Judge Weinstein's decisions. Between June of 2007 and May of 2009, Judge Weinstein made rulings on the admissibility of the opinions of 30 different experts and he admitted all of them. In particular, in the third-party payer litigation, there were 21 experts across multiple disciplines, including many complicated damages calculations.

But, in evaluating those, Judge Weinstein disposed of the plaintiffs' challenges with one paragraph that described each of defendant's experts

as "a distinguished scientist whose expertise probably will be helpful." And with respect to the plaintiffs' experts, Judge Weinstein conducted a sua sponte review under Rule 702 without the benefit of briefing from the parties and concluded in two sentences that they should be admitted.

To explain these rulings, he invoked the "liberal standard of admissibility for expert opinions," citing to a Second Circuit opinion, Nimely. He then went on to cite pre-Daubert Second Circuit case law to support a presumption in favor of admissibility. But, in May 2009, Judge Weinstein held for the first time that an expert witness needed to be excluded in Zyprexa under Rule 702. This particular matter involved an endocrinologist whose name was Dr. Stephen Hamburger. He was proposed as a specific causation expert on behalf of 20 different plaintiffs.

So two years after the initial rulings that Judge Weinstein issued under Rule 702 that I just described and with the benefit of greater knowledge about the benefits and risks of anti-psychotic medications like Zyprexa, Judge Weinstein correctly noted that "precision with respect to relevant scientific knowledge and its application to the facts and individual cases is expected."

And when he looked at Dr. Hamburger's testimony, his conclusion was as follows: he was shockingly careless about the facts and the cases that he proposes to opine about. Faced under oath with consistent extensive factual discrepancies in his analyses, he merely shrugged them off or flippantly shifted to a new theory and explanation to establish causal relationships. He repeatedly and impermissibly stretched the truth to support findings of causality.

Judge Weinstein, looking at that, said that he could not allow the Zyprexa MDL to become the subject of the kind of "rubber-stamp expert opinions" that have so marred mass litigations, and he said that doing so, admitting Dr. Hamburger's testimony, would "negate the struggle of the Supreme Court in cases like Daubert and Kumho and of many individuals to improve the utilization of science by law."

So what are the lessons that I take away and offer to you as you consider these amendments? Judge Weinstein was smart. He was independent-minded. He was a respected jurist and he wrote the book on the Federal Rules of Evidence, but the current version of Rule 702 and the related advisory committee notes led him to conclude that there is a presumption of admissibility of expert testimony that only allows

exclusion in the most extreme instances, such as Dr. Hamburger's. That's a far cry from the intent behind Rule 702, as the testimony of others makes clear.

The proposed amendments do what needs to be done. They are essential to clear up the misunderstandings and help direct that judges must scrutinize the scientific methodology and reliability of expert opinion rather than presuming its admissibility. Doing so in Judge Weinstein's words will improve the utilization of science by the law, and that is why I support these amendments. Thank you for your time and your consideration.

CHAIR SCHILTZ: Thank you, Mr. Kantra.

Are there any questions or comments from the Committee?

(No response.)

CHAIR SCHILTZ: Seeing none, we'll turn then to Mr. Kelley. Mr. Kelley, good morning. Thank you for joining us.

MR. KELLEY: Good morning. My name is Toyja Kelley, and I'm here in my capacity as president of DRI's Center for Law and Public Policy. I practice complex commercial litigation in the Washington, D.C., office of Locke Lord LLP. I'm here to speak in support of expressly stating the proponent's burden in

admitting expert evidence and of bolstering that change by stating clearly the trial court's role in making that determination. It is the Center's view that the best amendment to Rule 702 would state, "If the proponent has demonstrated to the court by a preponderance of the evidence."

Rule 104 does not have an express preponderance of evidence standard, but the Supreme Court in Bourjaily interpreted Rule 104 to use that standard. This articulation was reiterated in Daubert, and yet, in practice, courts are often overlooking this standard, and, on occasion, trial courts have been reversed for actually applying it, as detailed in the comment provided by DRI and the Center.

As our written comments note, there are decisions stating that the proponent of expert evidence does not have to prove anything and others stating that there is a presumption in favor of admitting any evidence proposed under Rule 702. Thus, in order to achieve what Rule 702 has intended for more than 20 years, the preponderance of evidence standard must be stated in the text of Rule 702. As drafted, however, the preponderance standard can be misconstrued in accordance with the many decisions

that confuse the jury's fact-finding role with the court's gate-keeping role.

The proposed amendment is not meant to reiterate the civil burden of proof and it should not be misconstrued that way. Because of the abundance of decisions that seemingly punt the court's Rule 702 role to the jury, the text should be admitted to negate that construction by saying that the court must find that there is a preponderance of evidence establishing each Subpart A through D of Rule 702.

In closing, I think it's important to note that my perspective on this issue is guided by the fact that I'm often on both sides of the VMI cases. As a result of that perspective, I see the proposed changes to Rule 702 as critical to the fair administration of justice, whether I'm representing a plaintiff or defending a defendant. Thank you for your time. And DRI's Center for Law and Public Policy appreciates the opportunity to address the Committee.

CHAIR SCHILTZ: All right. Thank you, Mr. Kelley.

Are there any questions or comments from the Committee?

(No response.)

CHAIR SCHILTZ: All right. We will move

then to Mr. Lasker, Eric Lasker.

MR. LASKER: Good morning, Your Honor, members of the Committee. My name is Eric Lasker. I'm a partner at the Washington, D.C., law firm Hollingsworth LLP. I am a co-author of the 2015 Law Review article that first called upon the Committee to amend Rule 702. At the invitation of the Committee, I also spoke at a roundtable discussion at the University of Denver in October 2018, and I have submitted additional thoughts to the Committee in written comments submitted in August of 2021.

Having thus followed the Committee's deliberations from the beginning, I seek first to commend the Committee on its good work and support the proposed amendment to Rule 702. While the Committee did not adopt all the language that I had suggested in my Law Review article, I believe that the proposed amendment goes a long way to improving the administration of justice in the federal courts.

I also urge the Committee to consider the proposal by the Lawyers for Civil Justice to add the language "if the court determines" to the text of Rule 702. While I can understand the objection that might be made that this requirement is already implicit in the rule, misunderstanding of this Committee's prior

work in amending Rule 702 in 2000 demonstrates that what should be implicitly understood is too often overlooked when it comes to the issue of admitting expert testimony.

My main purpose today, though, is to impress upon this Committee the broader importance of its work in amending Rule 702 and to call upon the Committee to take further steps to ensure that its work is not undone in the same fashion as the work this Committee did back in 2000.

Members of the Committee, the need for institutions like the judiciary to stand firm in support of sound and reliable science could not be more pressing. We are today in the seemingly unending grasp of a COVID pandemic that has caused nearly 900,000 deaths in this country. Most tragically, we know that a substantial number of those individuals were lost as much due to a disbelief in the science behind COVID vaccines as to the virus itself.

Scientific skepticism has become ingrained in our society, in our politics, and in our understanding and misunderstanding of the world. The distrust in science is not limited to one political party or one segment of society. It is widespread, bipartisan, and endemic. Much of us can do little to

remedy this problem, but this Committee can do a lot. The admission of shoddy scientific evidence in courts undermines the public faith in science at every level of society. In the realm of criminal law, organizations like the Innocence Project have highlighted how scientifically unreliable and speculative testimony has improperly condemned innocent people.

In the realm of civil tort law, where I have spent most of my practice, the failure of some courts to fulfill their gate-keeping responsibility has, to paraphrase Justice Breyer, led to the misuse of science, not to reduce or eliminate the right substances, but to destroy the wrong ones. Obviously, the proposed amendments to Rule 702 are not going to solve all the problems of scientific skepticism, but it is an important step, and it is an important step this Committee can take and must take.

Which leads me to my second point, which is that this Committee must view amending Rule 702 as only the first step in ensuring that judges live up to their gate-keeping responsibility. When I began my research for my 2015 Law Review article, I was frankly stunned when I read the Committee's deliberations and fully understood what the Committee was seeking to do

back in the late 1990s when it last amended Rule 702.

I have been practicing in the field of product liability and tort law for roughly 25 years. My practice has heavily focused on cases involving scientific evidence, and my firm has been involved in many of the leading decisions addressing the admissibility of unreliable scientific evidence.

Throughout this entire period, though, I had the misunderstanding that this Committee in 2000 intended solely to codify Daubert in its amendments to Rule 702. This misunderstanding, which I believe is widespread throughout the legal and judicial committee, had the practical effect of robbing Rule 702 of independent meaning.

As a result of this Committee's work, in 2000, Rule 702 was significantly revised to provide a rigorous and structured approach, and it is far different than the language of the old Rule 702 that the Supreme Court interpreted in the Daubert trilogy, but only some courts took notice. Many other courts ignored the rule amendments altogether. This history must not be allowed to repeat itself. The Committee must be mindful not only of the importance of amending the language of the rule but on educating courts about the rule change to make sure that the amendment

actually achieves its purpose in ways that the 2000 amendment regrettably did not.

Again, the Lawyers for Civil Justice have proposed new language in the advisory committee note to more clearly guide courts away from following cases that are not compatible with the language of Rule 702. I urge the Committee to adopt these regulations, but, beyond that, I call upon the Committee to consider what other steps might be necessary to make certain that this time Rule 702 is properly and uniformly applied in every federal court and circuit around the country. Thank you.

CHAIR SCHILTZ: Thank you, Mr. Lasker.

Are there any comments or questions for Mr. Lasker?

(No response.)

CHAIR SCHILTZ: Seeing none, we will move on to the next speaker then, who is Mary Massaron. Good morning, ma'am.

MS. MASSARON: Good morning. Good morning. I speak to you today and thank you for allowing me to address the Committee as an appellate lawyer with approximately 30 years practicing in state and federal courts, principally in Michigan and around the country. And in my experience, when I am working on a

case where a jury trial has resulted in an aberrant result, it's often due to expert testimony that was unreliable but was allowed into evidence and persuaded the jury.

District courts around the country, as well as appellate courts, are applying different standards and different understandings of Rule 702, which is a huge problem. And what I see happening all too often is that district courts look at the expert's credentials, but they leave the rigorous examination of whether the methods and principles that the expert is relying on are reliable and, even more, leave the reliable application of those principles to the facts to the jury. This is the most problematic approach in my view.

Research shows that when jurors lack the ability to understand scientific methodology and principles, and, after all, that's why the expert testimony is supposed to be allowed in, they fall back on external cues to determine whether to accept what the expert says as valid. So a highly credentialed expert who is not using reliable principles and methods that would be used outside the courtroom or is misapplying those principles to the facts or is purporting to apply those methods and principles where

there are not facts that would support their application, it's exactly in that circumstance that the jury is highly likely to fall back on the expert's credentials and accept those opinions.

It would be nice to think that all of the experts who come into court are bound by their oath and give unbiased and accurate testimony to the best of their ability, but I'm sure it's no surprise to anyone who's been involved in the litigation system in our country that there are, often enough to be a significant problem, experts who make a career out of testifying and who are merely paid advocates or partisans for the position of whoever is paying the fee for their testimony.

And it's at that problematic moment that the district court's rigorous consideration of whether that testimony is reliable becomes most important. Once those experts are allowed to present testimony, they throw up clouds of confusion, and yet their testimony may be given credence by the jury, not because it's well-founded but because they've been presented something as scientific and the jury is relying on the fact that they have some degrees or experience or credentials. So the jury simply accepts their analysis and reaches a wrong conclusion.

Psychologists have studied this, and in the written letter that I sent to the Committee, I cited one article at least that talks about this problem with juries relying on the external cues and why that's a significant problem.

When we see these problems, as an appellate lawyer, I would like to think I can correct them, help the clients reach the result that they should on appeal, but that is very often difficult. The federal appellate circuit courts of appeal have varied standards. It's not consistent around the country or even in some cases within circuits.

In addition, it's very difficult to overturn a wrong admission of expert testimony on appeal because the standard of review is often articulated as one that affords discretion to the trial court's ruling, and, of course, the harmless error standard is an easy fallback for an appellate court that doesn't want to upset a lengthy, complicated trial.

Because of that, it's absolutely essential, in my view, for the Committee to adopt these proposed changes. And I think even more essential than the changes to the rule, it's vital to include in the comment the list of cases that are out there creating huge confusion amongst well-meaning jurists who are

trying to do the right thing because those cases rely on the law before the amendment of Rule 702 and are not consistent with what the language of the rule is trying to do, what the Committee intended for the rule to do, and what's a proper understanding.

So I don't want to take any more of this Committee's time than is necessary. Those were the key points, and I did send a letter that elaborates a bit on them. I'd be very happy to answer any questions.

CHAIR SCHILTZ: Thank you.

Are there any questions or comments?

(No response.)

CHAIR SCHILTZ: All right. Seeing none, we'll move on to the next speaker, which is Mr. Masslon, John Masslon. Good morning, sir.

MR. MASSLON: Thank you, Your Honor, for giving me the chance to testify on behalf of Washington Legal Foundation. As explained more fully in our formal written comments, we support the proposed amendments to Rule 702. The amendments fix the problem of courts requiring the party objecting to expert testimony to show that the testimony was inadmissible. They also fix the problem of expert opinions unmoored from the application of reliable

methods and principles to the facts of the case.

But today I'll discuss minor tweaks to the proposed amendments that would further ensure that district courts properly act as gatekeepers to prevent juries from hearing unreliable expert testimony.

First, the Committee should take all steps possible to ensure that lower courts follow Rule 702's plain text and the Supreme Court's decisions interpreting the rule. There are outdated cases that courts disproportionately rely on when admitting expert testimony that violates Rule 702. There is an easy way for the Committee to stop courts from citing these cases: the Committee should add a comment that explicitly clarifies that those cases are not good law.

The Committee took this approach in 2015. Then the Committee added a note stating that the rule expressly rejects the holding of a Second Circuit case that other courts had relied on when perpetuating the error. The Committee should add a comment that Rule 702 rejects the Eighth Circuit's decision in Loudermill v. Dow Chemical Company. There, the court said that, "As a general rule, the factual basis of an expert opinion goes to the credibility of the testimony, not the admissibility." That, of course,

is incorrect. Under Rule 702, courts must decide this question. Yet many courts quote that decision's language that disregards Rule 702's gate-keeping requirement.

Similarly, the Committee should explicitly reject the Fifth Circuit's decision in Viterbo v. Dow Chemical Company. There, the court said that, "As a general rule, questions related to the bases and sources of an expert's opinion affect the weight to be assigned that opinion rather than its admissibility." Again, that is wrong. A court should not be able to cite that decision to bypass Rule 702's gate-keeping requirement.

And in Smith v. Ford Motor Company, the Seventh Circuit incorrectly said that, "Soundness of the factual underpinnings of the expert's analysis" are "factual matters to be determined by the trier of fact." By adding a comment abrogating those cases, the Committee would ensure that they receive a red flag on Westlaw and Lexis, which in turn would help courts to avoid erroneously citing the cases. And for those plaintiffs' attorneys who continue to cite these cases, explicitly rejecting them in the committee's note would allow courts to impose sanctions under Federal Rule of Civil Procedure 11 for relying on the

cases.

Second, the Committee should ensure that courts apply Rule 702 fairly. The clarification the proponent of expert evidence must prove by a preponderance of the evidence that it's admissible under Rule 702 is a positive development. But further clarification would ensure that courts understand how the burden of proof operates. The Committee should add a note that states there is no presumption that district courts should admit expert evidence.

There's nothing explicit in the rule that explains why the court should apply a presumption when deciding a Rule 702 issue. The Committee should fix this by adding a note that explicitly states that there is no presumption. Rather, district courts must decide whether the party proffering the expert testimony has satisfied the preponderance of the evidence standard. If so, then the evidence is admissible. If not, it's admissible [sic].

Finally, the Committee should ensure courts, not juries, decide the admissibility of expert evidence. Adding the burden of proof to Rule 702 presents an opportunity for enterprising plaintiffs' attorneys and district courts to skirt the rule's requirements by having the jury decide whether the

expert's evidence is admissible. They could argue that since a preponderance of the evidence standard should apply it’s a factual question for the jury, not the judge.

There's an easy solution to this potential problem. The Committee should propose amending Rule 702 as follows: "A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the court finds that the proponent has demonstrated by a preponderance of the evidence that." These four words would ensure that judges, not juries, decide the admissibility of expert evidence. Thank you.

CHAIR SCHILTZ: Thank you.

Are there any questions or comments from the Committee?

MR. CAPRA: Judge, I do have a question if you don't mind.

So I'm a bit concerned about the coexistence of two statements. One, it's determined by a preponderance of the evidence, and two, there's no presumption at all with respect to expert testimony. I find those as inconsistent. If there's a preponderance of the evidence standard, then all

things being equal, there is a presumption against the admissibility of expert testimony, a mild one, but it is. So to add presumptions in there just seems to me to be very confusing. I guess that's my first point.

My second point, I guess, is -- I'll leave the second point. That's the only one I want to talk about.

CHAIR SCHILTZ: Okay. Mr. Masslon, go ahead if you wanted to respond.

MR. MASSLON: I disagree. I think that by saying “a preponderance of the evidence,” you only need a feather on the scale of justice that shows that the evidence is admissible. I think the key is to say that there is no presumption that the evidence is admissible because that's what district courts are doing. They're saying that there's a presumption that expert evidence is admissible. And by saying that there is no such presumption that it's admissible, rather that the proponent must show by a preponderance of the evidence that it's admissible, you're making clear what that burden is and who it falls on.

MR. CAPRA: I understand that part, but the suggestion that's in the submission is that there's no presumption one way or the other. I don't understand that.

MR. MASSLON: I think that you have to evaluate the evidence and see whether there is a preponderance of the evidence. And to say that there is a presumption against it would indicate something more than a preponderance of the evidence standard in my mind.

MR. CAPRA: Okay. Thank you.

CHAIR SCHILTZ: Any other questions or comments?

(No response.)

CHAIR SCHILTZ: All right. Thank you, Mr. Masslon.

MR. MASSLON: Thank you.

CHAIR SCHILTZ: Next, we'll go to Lee Mickus or Mickus.

MR. MICKUS: Lee Mickus, Your Honor. And thank you very much for the opportunity to present my views to the Committee. I'm a civil litigator who defends manufacturers in product liability cases around the country, and in that capacity, I encounter Rule 702 disputes on a very regular basis. I support the proposed amendment but encourage the Committee to add a direct reference to the court as decision-maker to the text of the rule.

First, I'd like to spend a moment, just a

moment, on the need for the amendment. I think there is a need because courts are presently not clear on their gate-keeping role and, frankly, they're presently caught between the text of Rule 702 and some problematic case law that gives contrary direction about what they should do. You've seen in the comments from Bayer, from Lawyers for Civil Justice, from the Colorado Civil Justice League and others that some hundreds of Rule 702 decisions in the last several years contain statements showing that courts do not understand that they must determine that the sufficiency of an expert's factual basis or the reliability of the methodological application are matters for the court.

Instead, these judges frequently pass that responsibility to the jury, despite Rule 702(b). Many of these decisions follow pre-Daubert case law statements, such as those just mentioned by the last speaker, Loudermill, Viterbo, and Smith in particular.

Those cases do not interpret Rule 702. They were decided before it came into being as it currently exists. The reliance on these cases indicates that current courts are frequently distracted by these problematic prior rulings and are deeply confused as a result on the standard that they should apply. The

large body of decisions that overlook essential aspects of Rule 702 demonstrate that the current rule simply does not provide adequate guidance to the courts about their gate-keeping responsibility, and amending Rule 702 to add the preponderance of evidence standard into the rule will better convey the elements of Rule 702 are all admissibility considerations.

But the amendment can be made even better. Rule 702's text needs to give unambiguous guidance that the court is the decision-maker on the enumerated admissibility considerations. Adding the phrase "if the court determines" or similar language to the text of the rule would provide that clarity about the court's role, and doing so will help those courts that are caught in that bind between the text of the rule and these problematic case law get out of that bind.

Judges are likely to look first to the text of the rule itself for direction. If they have a mis-impression of the court's role due to that mistaken case law, the most effective way to communicate their responsibility is to tell them in the text of the rule that the judge must consider and decide the listed elements. Doing so will convey that these are not matters that can be conveyed to the jury. And I noted in my written testimony that members of the Committee

themselves have used phrasing similar to "if the court determines" when describing how Rule 702 in either its present or in its proposed amended form should operate. That certainly suggests to me that these words provide a clear explanation that other courts could draw guidance from.

Far from being confusing, as my friends at the AAJ have suggested, placing "if the court determines" into the rules language would unmistakably signal that the judge's gate-keeping responsibility includes evaluating the sufficiency of factual basis or the application of methodology, as Rule 702 intends. Further, this phrase would provide an answer to any possible uncertainty about the status of incorrect case law declaring general rules about factual basis or methodological application being matters of weight and not admissibility. By adding that phrase to the text, the rule would necessarily render those opinions incompatible with the text of the rule.

Also, I don't expect that courts would interpret the phrase "if the court determines" to establish a new universal requirement to perform a Rule 702 review even without an objection. I know that concern has been raised with the Committee. The

adversary system operates on an understanding that an opponent must object to evidence in order to initiate the court's scrutiny, and that expectation applies across all rules of evidence.

In order to shift this thinking to conclude that Rule 702 alone, among all the evidence rules, would obligate judges to sua sponte conduct a review, the rule and the note would need to contain direct and explicit language indicating that major change in practice, but the words "if the court determines" just don't support that conclusion that a fundamental change in approach is intended.

If amended to add this phrase, the rule and the note would contain no direct statement that a party need not object, and nothing in the note, as presently drafted, suggests that a purpose is to create a new requirement that judges must conduct a detailed review for every expert who must testify objection or no.

If the Committee truly fears that some judges may over-read that phrase, "if the court determines," to create this new obligation for sua sponte review, that possible interpretation could be controlled by a statement within the committee note indicating that that is not the intent of these few

words that are being added to the rule. That's an appropriate and frequently taken approach in committee notes.

Alternatively, if the Committee is truly concerned that this is a possibility, adding to the text of the rule a phrase such as "on timely request," such as Rules 105 and 201(e) contain, or "at a party's request," as Rule 615 contains, would provide direction that courts should act in response to an objection and not act sua sponte.

With this amendment to add "if the court determines," the proposed amendment would put all the necessary information in the text of the rule, so there will be no ambiguity when a judge opens up the rule book and decides what he or she is supposed to do. The preponderance standard, the burden of production is there in the rule.

The direction that this is a court decision, not something to be deferred to the jury, is in the text of the rule. Everything that's necessary in terms of the elements of admissibility are listed out in the text of the rule. That will present in one tight package what the court needs, and putting that in an amendment will provide courts that are currently confused about their responsibility with the guidance

that they need and it'll go far to unify the courts in a single approach to Rule 702 objections. Thank you, Your Honor, and I'd be happy to answer any questions.

CHAIR SCHILTZ: Thank you, Mr. Mickus.

Are there any questions or comments by the Committee members?

(No response.)

CHAIR SCHILTZ: Okay. Thank you again.

At this point, we've gone over an hour and a half. I want to just take a short break. We'll take a 10-minute break. We'll come back, and then we have about eight or nine speakers to hear from. I will be back in 10 minutes.

(Whereupon, a brief recess was taken.)

CHAIR SCHILTZ: All right. We will resume our hearing at this point. The next speaker is Amir Nassihi. I don't know if I'm pronouncing that correct.

MR. NASSIHI: That is absolutely correct. Thank you. Good morning.

CHAIR SCHILTZ: Good morning.

MR. NASSIHI: Thank you all for letting me come and speak today. My name is Amir Nassihi. I'm a partner at Shook, Hardy & Bacon and co-chair its class action group. I really do appreciate the chance to

talk today about how Rule 702 interacts with Rule 23, which governs class actions. Much of my practice involves defending class actions, and much of the debate over certifying class actions really boils down to whether you can trust the experts offered on either side.

Rule 23 requires a rigorous analysis before certifying a class, and both sides often provide expert evidence at that certification stage. But courts do not always treat that expert evidence according to the guidelines of Rule 702, and, in fact, there is a split among appellate circuits in how courts treat expert evidence in class certification. Some circuits, namely the Third, Fifth, and Seventh, mandate a correct application of whether expert evidence meets Rule 702 standards and recognizes the gatekeeper responsibility of the courts.

By contrast, the Eighth follows a focus standard, which lets in more questionable expert evidence, and the Sixth has no discernible standard. Finally, the Ninth has issued a series of cases that create confusion about what is and is not appropriate in a 702 analysis at certification. One opinion, Sali v. Corona Regional Medical Center, had a panel affirm certification based on pseudo-expert evidence

submitted by a paralegal. In another, the Grodzitsky v. Honda decision, another panel affirmed a denial of certification that was based on excluding questionable testimony of an expert. And another more recent opinion in Olean v. Bumble Bee Foods, the Ninth Circuit attempted to set out the correct standard for addressing 702 issues and making clear the gate-keeping requirement of the judge. It also sought to resolve ambiguities in certification standards in making clear that the preponderance of the evidence standard applied to demonstrating all aspects supporting certification.

Now the dissent in that case disagreed with different parts of the decision but agreed with those core components related to Rule 702 and related to preponderance of the evidence in relation to demonstrating the all facts supporting classification, but the dissent related to standing issues, and the opinion was thus vacated on those grounds and an en banc panel is rehearing it, focusing on the standing issue, and it's unclear if it'll even address Rule 702 aspects of the original decision.

So it's my view that the proposed amendment will help courts understand that the expert evidence must be handled according to Rule 702's requirements

with care at high-stake hearings. I understand the Committee is also considering revising the comments to the rule, and my view is that the clear and uniform judicial gate-keeping standard is critical in class actions since the admission or exclusion of expert testimony really makes a difference between facing an individual lawsuit or facing the company litigation with the associated pressures to resolve.

As a couple of examples, in one case, I'm defending a product manufacturer. The court allowed in questionable expert testimony to support certification, and the proper gate-keeping standard under 702 was very much a focus of the debate. The court ultimately did so not because the evidence was particularly reliable but because it believed a lesser Rule 702 standard applied at certification. But Rule 702 does not have gradations of rigor. Either expert opinions are well-founded or they're not.

So I also support further elaboration and comments on how to apply the preponderance standard. A recent case I defended involved a pet food company and submission of expert testimony that heavy metals bioaccumulate in pet food. Now the phenomena of bioaccumulation as described in the case matched the description of what many courts have derived as the

any exposure theory of toxic substances, and under this theory, which lacks scientific rigor, any exposure can cause ill effects because exposures accumulate.

The theory as articulated required constant speculative leaps to maintain, but the trial court, even though it referenced a preponderance standard, in the same paragraph, it also talked about 702 being a flexible standard, and following that, the court then rejected all critiques of the foundation of the expert's theory as a matter of weight and not reliability, even though they specifically addressed the scientific soundness of the opinion.

Now these examples are all too common. I just the other day read a relatively new Ninth Circuit decision from last month in a case called MacDougall v. Honda, and there, the Ninth Circuit reversed the trial court's exclusion of a damages expert in a class action. The expert testimony had been the sole support to show that injury could be proven on a class-wide basis. The defendant had challenged the report's methodology because it had not addressed any market considerations at all that were relevant. It had selected the wrong attributes. It had improperly used averages. But, in an all too familiar refrain,

the Ninth Circuit in an unpublished decision held that all these challenges go to the weight and not admissibility.

So, for these reasons, I support what the Committee is doing, and I very much thank you for the opportunity to testify.

CHAIR SCHILTZ: Thank you, Mr. Nassihi.

Are there any questions or comments?

(No response.)

CHAIR SCHILTZ: Hearing none, we'll move on then to Leslie O'Leary.

MS. O'LEARY: Thank you, Your Honors and members of the Advisory Committee. I'm Leslie O'Leary. I'm an attorney at the law firm Ciresi Conlin LLP in Minneapolis. For the last 23 years, I've represented plaintiffs in --

CHAIR SCHILTZ: Oh, Ms. O'Leary, I'm sorry, I can hear you but not see you. Do you have a camera you can turn on?

MS. O'LEARY: Now I do. Thank you.

CHAIR SCHILTZ: There you go. All right. Thank you.

MS. O'LEARY: Okay. So, to start over, my name is Leslie O'Leary. I'm an attorney at the law firm Ciresi Conlin in Minneapolis. I've represented

plaintiffs in product liability actions both in federal and state court, and, in fact, a great deal of my life's work has been focused on the admissibility of expert testimony under Rule 702. I'm here today to express concern over the proposal by various interest groups to insert a comment in the Rule 702 --

(Technical interference.)

MS. O'LEARY: -- certain opinions, appellate court decisions, as wrongly decided.

While it's understandable that any losing party on a contested issue such as this will disagree with the court's holding and analysis, it shouldn't be the function of this Committee to declare that a rule of decision is invalid and must no longer be followed. The Advisory Committee isn't a court of law. It's not empowered to decide legal matters, and whether a federal court of appeal has wrongly interpreted or misapplied Rule 702 or any rule of evidence for that matter is an issue that's properly resolved by the Supreme Court through the judicial appellate process.

So taking sides on judicial opinions not only creates an appearance of bias and detracts from the Committee's important work, it creates a more fundamental risk. It forces the Committee to make assumptions about the volumes of data the trial judge

and the appellate court thoroughly considered in deciding these admissibility questions. And without comprehensively reviewing the entire record in each case and assessing all the information and witness testimony, as both the trial court and the reviewing court did, how can the Committee conclude with certainty that a case was, in fact, wrongly decided.

And, relatedly, the court shouldn't accept at face value the argument that appellate decisions should be officially renounced for creating bad precedent. The Loudermill opinion in the Eighth Circuit is a really good case in point. Defense organizations dislike Loudermill's rule that the court may exclude an expert opinion if it is so "fundamentally unsupported that it can offer no assistance to the jury." They contend this standard sets such a low bar to admissibility that it essentially mandates admission of expert testimony.

But Loudermill doesn't stand for the proposition that defense groups claim. In fact, the Eighth Circuit recently clarified in the In re Bair Hugger opinion that Loudermill's so fundamentally unsupported standard is simply another way of stating the rationale announced by the Supreme Court in Joiner that testimony may be excluded if it is too great an

analytical gap between the actual bases for the expert's opinions and the conclusions they generate.

The detractors of the current Rule 702 have cherry-picked cases like Loudermill to create a false narrative that junk science has run rampant in the federal courts, but this dire depiction simply isn't true. In fact, as I was preparing for this hearing, I ran a quick check of Eighth Circuit decisions on admissibility of testimony under 702, and from this very cursory review, I found no fewer than a dozen Eighth Circuit decisions that excluded the plaintiff's expert opinions, nearly all of them citing Joiner or Loudermill or both for the rationale that there was too great an analytical gap or unsupported speculation for their opinions.

So this further confirms that in practice trial courts and appellate courts are not confused or blindly admitting testimony or misconstruing the standards of admissibility. To the contrary, over the last 22 years since the amendments to 702 were adopted in 2000, courts have remained consistent and consistently cautious and vigilant in screening expert testimony.

So, in closing, I would urge the Committee to avoid wading into the partisan fray and not call

out established appellate decisions and decree them invalid. It would dishonor the judiciary and do unnecessary harm to the Committee's esteemed reputation as a neutral advisory body. Thank you so much for this opportunity to be before you today.

CHAIR SCHILTZ: Thank you, Ms. O'Leary.

Any questions or comments from the Committee?

(No response.)

CHAIR SCHILTZ: All right. Next, we'll move to Jared Placitella. Mr. Placitella? Hope I have that right.

MR. PLACITELLA: Yes, you do, Your Honor. Good afternoon, Your Honor and Committee members. My name is Jared Placitella, and I'm an attorney with Cohen, Placitella & Roth. We are located in New Jersey and Philadelphia and represent plaintiffs in toxic tort cases. I rise to tell this Committee that it should refrain from enacting the proposed amendments for the text of Rule 702 and the committee note. The revisions will not fix the alleged problems, such as managing congested court dockets or experts offering opinions outside their expertise that have been previously raised.

The stated intention of the amendment is to

clarify that the requirements of Rule 702 must be established by a preponderance of the evidence for the expert's testimony to be admissible. But a test that analyzes evidence is not supported by judicial precedent. And a preponderance standard has been incorporated into Rule 702 for the last 20 years and it has been applied by trial courts, whether expressly stated in their opinions or impliedly so since that time.

In Daubert, the court instructed that in using Rule 104(a) to determine whether an expert seeks to testify to scientific knowledge helpful to the trier of fact, trial judges "are not bound by the rules of evidence" and that "these matters should be established by a preponderance of the proof."

Yet, by requiring that Rule 702 be established by a preponderance of the evidence rather than a preponderance of the proof or, better yet, a preponderance of the information, as suggested in the draft committee note, trial courts and the advocates before them may mistakenly find that they are bound by the rules of evidence, which is not what Daubert envisioned.

In comparing weight versus admissibility, the note further reinforces that trial courts should

conduct an analysis of only admissible evidence. That is especially true if this Committee were to reinsert "if the court determines" back into the preamble, as others have advocated. But the note later states that the amendment means that the judge must find on the basis of the information presented that the proponent has shown the requirements of the rule to be met.

But the explicit contradiction between preponderance of the evidence in the rule and basis of the information in the note will sow unnecessary confusion among trial courts of what burden should be applied and what proof should be considered in deciding whether to admit expert testimony. For instance, Rule 702 as written would contradict Rule 703, which permits experts to base their opinions on inadmissible facts or data.

Yet, under the proposed rule, only admissible evidence can be used to show that the expert's methodology and opinion are reliable. If this Committee decides to move forward with an amendment, the Committee can simply substitute information for evidence in the text of the rule's preamble to eliminate any possible confusion and to inform state court judges around the country whose states will not incorporate or codify the committee

note.

The proposal to amend Rule 702 is also unnecessary. The Committee explained that this amendment is essential because jurors may be unable to evaluate the reliability of an expert's methodology and assess whether the conclusions generated are supported by it. Besides underestimating jurors, this revision has the practical and unintended potential to cause the court to mistakenly believe that it, not the jury, must decide the correctness of scientific evidence.

That invasion of the province of the jury undermines a hallmark of our civil justice system that recognizes the collective wisdom of the jury is superior to the perspective of any single individual. Indeed, the current rule and 2000 committee note already address the stated problem that the proposed amendment seeks to fix by reminding trial courts to follow Joiner's teaching that they should consider whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion. The current framework emphasizes that your trial judge must exercise its gate-keeping function to the expert's ultimate opinion as well as his or her methodology.

Practically, the amendment to Rule 702(d) risks transforming Daubert hearings into mini-trials whereby trial judges, who are not qualified to evaluate the correctness of an expert's conclusion, review each scientific study individually for whether it reliably supports the ultimate conclusion being advocated or opposed. That would be contrary to the scientific method itself.

Finally, the note explains that the amendment to Rule 702(d) is especially pertinent to the testimony of forensic experts in both criminal and civil cases. Instead of amending Rule 702(d), which applies to the opinions of all experts in all disciplines in all cases, further education may be provided to trial judges or the forensics chapter of the reference manual on scientific evidence may be supplemented in order to provide trial judges with any further necessary guidance. Your Honor, thank you for the opportunity to address this Committee.

CHAIR SCHILTZ: Thank you, Mr. Placitella.

Any comments or questions from the Committee? Professor Capra, I can't tell if you're about to comment or not. Okay. You had the look.

All right. We will turn next to then Mr. Bill Rossbach. Mr. Rossbach?

MR. ROSSBACH: Yes. Am I on screen? I can't -- I'm not sure I am.

CHAIR SCHILTZ: Yeah, you are. You're a little not centered, but we can both see and hear you.

MR. ROSSBACH: Okay. Thank you very much. As stated, my name is Bill Rossbach. I'm a plaintiffs' trial attorney in Missoula, Montana. And I want to thank you for giving me the opportunity this morning to provide comments regarding the proposed amendments.

I have practiced 40 years litigating exclusively cases involving medicine, engineering, and science. Every case that I have litigated and tried in Montana and many other states has required at least one and often as many as 20 or more expert witnesses. As I described in my letter to the Committee that is included at Tab 19, I would like to focus here on three points. First is a simple, straightforward one, following on what Ms. O'Leary said, if the primary goal of the amendments is clarification and education, then the criticisms of the courts in the comment will be counterproductive and jeopardize the credibility of the committee note. As Mr. Dahl from the Defense Bar labeled it, scolding is rarely a sound pedagogical strategy. I strongly urge removal of all references

critical of court and jury decisions.

Second, and this is where I'm somewhat handicapped a little bit by following Mr. Placitella, if clarification and education is the goal here, then the use of the term “preponderance of evidence” is a significant backward step and will likely create confusion, not clarity.

“Evidence” is a legal term of art. It describes information that meets the requirements of admissibility and can be introduced and considered by the finder of fact. “Information” is not evidence until it is deemed admissible. The addition of the preponderance standard is a principal amendment to the rule. Whether it's needed or not, I'm not going to comment, but to use the term evidence in that standard directly contradicts Rule 104, which expressly states that in making a preliminary determination, the court is not bound by the rules of evidence. If it's not bound by the rule of evidence, then it is inconsistent and conflicts with Rule 104 to use the term evidence in the preponderance standard.

I would like to take a couple of minutes to follow up a little bit on the two cases, one of which is cited in the comment and the case which is, I think, the case from which Rule 702 arises. The first

is Bourjaily, which is the bridge that connects Rule 104 and Rule 107(o)(2). While not a paragon of clarity, as Professor Capra noted, the court, in several instances, used the term “preponderance of evidence,” but it does not take a close reading to realize that the court is referring to what is described in Rule 104 as information, not evidence.

If you look at page 175 of 48 U.S., the court says, "We have traditionally required that these matters," referring to 104, "be established by a preponderance of proof." Evidence is placed before the jury when it satisfies the technical requirements of the evidentiary rules. In other words, it's not evidence until it fits the evidentiary rules. And the court made the further statement, which clearly indicates the role that needs to be emphasized here between the jury and the court, it says, "The inquiry made by the court concerned with these matters is not whether the proponent of the evidence wins or loses the case but whether the evidentiary rules have been satisfied."

It goes on in the next paragraph to say -- and, again, this talks about preponderance of the evidence. I know some courts have said they have not used that term, but as the court in Bourjaily

announced, the preponderance standard ensures that before admitting evidence, the court will have found it more likely than not that the technical issues and policy concerns addressed by the Federal Rules of Evidence have been afforded due consideration.

And in Daubert then, which follows and cites to Bourjaily, Daubert noted that judges are not bound by the Rules of Evidence at 509 U.S. at 601 and, again, cited the specific language from Bourjaily, "preponderance of proof." So, if we're talking about a Rule 702 to follow the guidance of the Supreme Court on Daubert, it is preponderance of proof that the court was looking at.

This is also consistent with Rule 703, which clearly states that experts need not rely on facts or data that is admissible. So let me just then follow up with my concern about the practical problem here. It's a practical problem when you use terms inconsistently. Throughout, in both 703 and 104, it is not admissible evidence that is required. And in my view, let's do a balancing here. What is the upside of using evidence versus the downside of potential confusion of evidence versus information? There is no upside to using evidence. There is plenty of downside to using evidence. There is plenty of

upside to using information and no downside to using information. If we want to be practical and make it easier for judges to understand what they can or cannot use, then I strongly urge that we use the word information, not evidence.

I would also like to follow up a little bit on Mr. Hogan's practical concerns. In Montana and a number of the other places where I practice in state law by pro hac or otherwise, they do not include comments. So the clarification in the comment about information and not evidence, as Mr. Mickus said, we need to put these things in the rule, not necessarily in the comments. These comments are not necessarily going to be in state court if the state court adopts Rule 702. I think it's more important to put the word information in the rule rather than evidence.

Lastly, I wanted to make a brief comment about the LCJ's study of 1,059 cases, which numerous witnesses have used to support various unstated conclusions. The bottom line, as I say, there is widespread confusion, but if this were a report that was going to be relied on or used as an expert for expert opinion, it would not be admissible. It provides very little information about the methodology that was used, what databases were searched, what

search engines were used, how did they determine that these 1,059 cases were cases that were the only cases? What analytical or statistical methods were used and why? How did they use these methods to reach a conclusion?

The conclusion that I heard from I think it was Ms. Jackson was two-thirds of the courts failed to mention the preponderance standard. Does that mean that they didn't consider the preponderance standard? What does it mean at all? It means nothing except that two-thirds -- that one-third didn't use the preponderance standard doesn't prove anything. It's just, again, the concern I have that this is nothing more than anecdotal -- I guess I would use the word anecdotal information that has really no scientific or other basis.

And the final thought I have is this is a constitutional right to a right to a jury trial. The right to a jury trial is, at bottom, a part of this rule. The Seventh Amendment, with the addition of the preponderance of evidence standard, it will lead to decisions that usurp the ultimate fact-finding role of the jury. And, with that, I would like to thank you again for giving me the opportunity to speak.

CHAIR SCHILTZ: All right. Thank you, Mr.

Rossbach.

Are there any comments or questions by members of the Committee?

(No response.)

CHAIR SCHILTZ: Seeing none, we will move then to Mr. Thomas Sheehan. Mr. Sheehan?

MR. SHEEHAN: Can you see me and hear me?

CHAIR SCHILTZ: Yes, both.

MR. SHEEHAN: Excellent, excellent. As you stated, my name is Tom Sheehan. I am a lawyer and actually an epidemiologist as well that for decades has worked at what I like to call the intersection of law and science, often in connection with threshold questions of the admissibility of expert opinions.

I'd just like to thank the Committee for the opportunity to speak with you in support of the proposed amendments to Rule 702, and I'd also like to thank the Committee really for all the work that it's done to address what I consider to be a very important topic. The work has been noticed, obviously, by members of the bar, as is evidenced by all the notes that you've received and all the folks that are speaking here today, so appreciate all the work that you've done.

Now, as it has been mentioned several times

today, Rule 702 was last amended 22 years ago, in 2000, and since that time, there have been numerous Law Review articles, numerous commentaries published, and they've recognized that many courts have struggled to understand and apply the tenets that are embodied in Rule 702. And, in fact, as the current draft committee note recognizes, "Many courts have held that the critical questions of the sufficiency of an expert's basis and the application of the expert's methodology are questions of weight and not admissibility, and these rulings are an incorrect application of Rule 702 and Rule 104."

So the natural question then is, what leads judges to incorrectly apply Rule 702 on critical questions regarding the application of the rule and how it applies to the admissibility of expert testimony? And if we can answer that question, then, of course, we've got to consider, what can we do to help judges properly apply Rule 702?

Now regarding the first question, I know there's been some criticisms of submissions to the Committee, but I would submit that there is now a wealth of data and analysis that's been performed by Professor Capra, by Committee members, by academics, by front-line members of the bar, and I'm not going to

attempt to summarize all those data today or regurgitate it to you, but I've reviewed it, as I'm sure the Committee has, and what I take away from it is an illustration of a number of important issues and concepts.

I think it's recognized that there is a widespread problem with the application of Rule 702. Whether you want to say that's a significant minority of courts or how you want to actually quantify that is not as important to me. I think there is truly no dispute that there is widespread misunderstanding about what the rule requires, and I think that problem is driven by repeated misstatements in case law of what Rule 702 is about and what it mandates a judge to do, and I think that those misstatements evidence a fundamental misunderstanding of the role of judicial gate-keeping.

So somebody I think earlier said, hey, this is just basically sour grapes. One side doesn't like a decision, another side does, and it sort of goes both ways, so, therefore, don't amend the rule. I just want to be very clear that the research that has been done is not sour grapes. It's not cherry-picked examples where one side substantively disagrees with a well-reasoned Rule 702 decision.

In fact, I was a co-author of a note submitted to the Committee that analyzed all recent MDL decisions over a period of years. I submitted that to the Committee, and what we found really was what I would describe as a problem that goes from the root to the branches, and what I mean by that is MDL Rule 702 decisions have a ripple effect throughout the judiciary. They're decided by highly qualified jurists. And so, when an MDL judge articulates in a widely read decision, for example, that the factual basis for an expert's opinion is not a proper gate-keeping inquiry under Rule 702, that has a tendency to get some traction. It gets repeated again and again, and it gets ingrained in the case law.

And I think that highlights the misunderstanding about the reliability inquiry, that methodology is just an abstract concept that's only loosely connected to the underlying facts. And on the contrary, it is the gate-keeping role to ensure that all the steps of a purportedly reliable methodology have been reliably applied to the existing facts and data.

And this apparent misunderstanding about and subsequent misapplication of Rule 702 can have wide-ranging and potentially profound impacts on companies,

on doctors, on the practice of medicine, on the availability of therapeutic options for patients. So I just want to stress that this is not merely an academic discussion that we are having today. Rule 702 decisions truly have effects well beyond the courtroom.

So just getting back to my two questions, if there's a problem that involves a misunderstanding of Rule 702, which I would submit there clearly appears to be, what can the Committee do about it? And I would suggest that amendments can work. Amendments prompt judges and lawyers to refocus, re-energize, revisit what they thought they knew, as Mr. Lasker commented on earlier, and carefully consider what's the rationale for the underlying changes.

Now the proposed amendments, I think, can fairly be characterized as modest, but I also think it's fair to say that they will help judges. And, in fact, as some have suggested, I think it was Lee Mickus earlier, adding the language "if the court determines" back into the rule would provide unambiguous clarity to the steps required to be undertaken by judges and the judicial gate-keeping role.

And that's really the whole point, right, of

any rule change, is to provide clarity for judges, to underscore that the burden of proof lies with the proffering party and there is no liberal admission policy. I think it was Professor Capra that highlighted that tension before. I won't get into the distinction between evidence and information. I think the proposed changes make sense and I think, for the reasons that Professor Capra indicated, there is precedent for using the phraseology that has been submitted.

But I think that more importantly, adopting these changes and adopting an accompanying note that highlights the rationale for the proposed changes and, in fact, does highlight where courts have got it wrong in the past, where there has been that incorrect application on these critical questions will only serve to help the judiciary discharge their gate-keeping role and will help to ensure consistent and uniform application of Rule 702 across jurisdictions.

Thank you very much for your time today, and I'm happy to address any questions.

CHAIR SCHILTZ: All right. Thank you.

Are there any questions or comments?

(No response.)

CHAIR SCHILTZ: All right. We'll turn next

then to Mr. Smoger or Smoger.

MR. SMOGER: Smoger.

CHAIR SCHILTZ: Smoger. Mr. Smoger, welcome.

MR. SMOGER: I assume I can be seen and heard.

CHAIR SCHILTZ: Yes.

MR. SMOGER: Thank you. I practice at the law firm of Smoger & Associates, and I remember -- I go back too long, I remember Professor Gottesman arguing Daubert, which actually the plaintiffs won, which most people forget. I prepared amicus briefs in both the Kumho Tire and the Joiner cases. I've argued in different supreme courts the issues of 702, in state supreme courts, which is one of the things that I think we have to really consider, the fact that a large number of states take the 702 rule and adopt it without the notes or comment. They just take the rule. So the rule on its face has to say what we mean it to say in terms of state practice.

I myself have tried cases throughout the nation, probably in more than half the states, where I actually handled it in more than half the states. And this court has a difficult job of one size fits all and extraordinarily different cases to handle this.

And I would like to discuss the practice. The real practice is we start the case with these Daubert motions, which are a form of in limine motion. I think it was said by Mr. Mickus that, well, it's not going to happen unless they're broad.

I can tell you in the smallest case almost every expert has a motion to exclude. This, you know, goes down to small accident cases, all the way up to the MDL. It's uniform. There's always that motion. The motion doesn't end it if it happens. Now we're led to believe that every time the expert has been allowed it's been too broad. Every time that the expert has been struck it's been meticulously stated. But it's going to happen all the time and it's consistent. So what do we have? I will tell you we don't end at the Daubert motion proceeding and this is all about processing, where I'm going to finish.

We start with those motions. Every time we go to trial, there will be an in-trial motion to strike the expert again. As soon as we end the presentation of expert of the case, there will be a motion for a directed verdict, and that will include all the Daubert questions a third time. So it's an ongoing process and an expensive process. I don't bring -- almost never bring Daubert motions. And

you're seeing that this is often the defense side. Well, the reason for that is what I do, if I bring them and win, is I create an appellate issue and almost a guaranteed appellate issue.

So I'd be very, very careful if I'm ever going to do that. And I don't. So that's why we are seeing so many from one side, because the defense has the advantage. If they can win their motion, then the result is the case is over. There's a huge victory in winning the motions and the experts because then we can't meet our burden of proof. So they're broad. There's questions about why this is help for settlement. This should never be an issue for settlement. There's a need that cases that certain experts don't do things right, like they don't look at an entire MDL file. Well, they can't. It costs a fortune to give it. You try to do your best to give them what they will need.

I wanted to get to the three cases that have been talked about. One case is the Loudermill, Smith, and Viterbo cases. I don't want to really deal with them, except for the fact that they demonstrate how out of context and how unique. Let's look at -- if you look at the really facts of Smith, Smith was about the fact that -- and it's the only one of the three

that was reversed. Smith was about the fact that the expert should've been an automobile design expert and the plaintiffs used an electrical engineer and a mechanical engineer with 40 years' experience and they both worked for GM, one for 17 years and done accident reconstruction. And the court said, well, you're not a process design expert, you're a mechanical design expert.

The Loudermill case was DBCP and was a toxicologist, and the issue was whether the toxicologist could testify. Well, the toxicologist was chief for the regulated substance and sections of the Southwest Medical Center. He was on the staff in toxicology. And the only thing he hadn't done was just DBCP. It was a single injury, liver damage, and he had 20 years' experience, including consulting with the EPA on looking at the relationship.

So the third one, Viterbo, is just shocking to me. If you want to put a red flag on something, that's pesticide tort, okay? Well, the expert was struck in Viterbo. How do you put a red flag on that? So let me get to, you know, what I see the real issue and why we have an issue, and I understand where Professor Capra chose “evidence” from, but it's not to look at what happened, it's to question procedurally

what we think might happen. And what we think might happen is that we're going to get hearings that are asking courts, especially in state court without the comments, that they have to determine that it's evidence, that it's admissible evidence before that can go on to review, that they have to look at it in a sense.

So even though Professor Capra says admissible or nonadmissible evidence, we are fearful that courts looking at that will have evidentiary findings and there will be a separate evidentiary hearing, which is why we say information, because that says to the court you can look more broadly. So I understand why the words were chosen. My fear is the implication of how those words will be used.

That's the same thing with findings, which is my last point. You've been asked to do findings. Well, the findings were going to require courts to have their own sessions and analysis in terms of doing that, and they're going to be asked to hold hearings and have findings of fact to get that. So our question here is really how we envision this process, and that is the greatest issue of our concern about putting the word “findings” in and our concern about using the “evidence.” It's not where it came from.

It's the implications of how courts, particularly state courts, will use it. I thank you for your time.

CHAIR SCHILTZ: Thank you, Mr. Smoger.

Any questions or comments?

JUDGE SCHROEDER: I have one.

CHAIR SCHILTZ: Yes, Judge Schroeder?

JUDGE SCHROEDER: For Mr. Smoger, Rule 703 refers to facts or data that an expert can rely on that may not be admissible. Is there any information in your view that would not be facts or data that you're worried about with the use of the word evidence?

MR. SMOGER: I'm worried about -- that depends on putting them together, but evidence is inconsistent with facts and data, if you look at just the word evidence.

JUDGE SCHROEDER: But my question is a little more specific and that is Rule 703, the argument is made -- well, let me back up. The argument is made that if we use “evidence,” we're inconsistent with 703. So, if I look to 703, it uses the phrase “facts or data” for what can be relied upon and it need not be admissible. Given your concern that you've expressed that there might be some exclusion of something under the use of the phrase

evidence if “preponderance of evidence” is put into Rule 702, my question is, is there anything in the use of the phrase “information” that extends beyond facts or data, as contemplated by 703?

MR. SMOGER: We don't believe so. The question is if you're getting it down to one word and not repeating 703 within 702, then the search was to look for a word that would incorporate that. So that seemed to be the best single choice of the word. But we don't need to extend it beyond what 703 allows.

MR. CAPRA: May I interject that 702 and 703 are doing two different things? 703 is what an expert can rely upon; 702 is what the judge must find. And so you wouldn't refer to evidence in 703 at all. There's no reason. It's not an evidentiary determination they're making. They're coming up with an opinion, whereas a judge is looking at all the evidence, admissible and inadmissible evidence.

I guess I'd also say it's weird to say that the rule that's incorporating 104(a), which itself says the judge can consider inadmissible evidence, becomes somehow confusing. But I guess there's been a lot of that talk today, so it's something that we'll have to think about.

CHAIR SCHILTZ: Judge Schroeder, did you

have anything more?

MR. SMOGER: No, I thank you and I agree that if 703 is longer, that's what we're trying to say. And we're trying to get rid of not having inconsistency and we just -- I've been before too many courts that will say that if it's evidence, that I have to decide admissibility before I make the review. So I'm trying to avoid that in the rule.

CHAIR SCHILTZ: Thank you, Mr. Smoger.

Next is Navan Ward. Good morning, sir.

MR. WARD: Good morning. My name is Navan Ward --

CHAIR SCHILTZ: You can begin whenever you're ready.

MR. WARD: Okay. Thank you. Again, my name is Navan Ward, and I am a partner with the law firm of Beasley Allen, located in our Atlanta, Georgia, office. For over 20 years, I've had the honor of representing victims of product liability, trucking and nursing home claims, as well as defective pharmaceutical and medical device claims. I'm also the president of the American Association for Justice, otherwise known as AAJ, and I am here to speak today on behalf of AAJ and our members.

I do want to thank this Advisory Committee

for your time and attention to the matters that have been discussed today. Having the distinguished position of being second to last in the order today, I've had an opportunity to listen to all of the very insightful presentations throughout this day, and it's clear that all sides agree that the main issue that this Advisory Committee must resolve is how to eliminate or substantially reduce existing and future confusion or the need to make assumptions by courts, as well as providing predictability to parties as it relates to 702.

AAJ's recommendations are the most effective and efficient way to achieve that goal with our proposed clarifications that will give courts clear direction on what standards courts should apply. AAJ's first recommendation is in complete and consistent agreement with this Advisory Committee's decision from the spring 2021 meeting where the conclusion was to remove the language of the courts demonstrate or the courts find from sentences regarding preponderance. This Advisory Committee simply got it right the first time, and, therefore, we strongly oppose any suggestions to reinsert that language or similar language, such as "the court determines," back into the text of this rule for all

of the reasons discussed during the last meeting as it has the unintended potential for causing the court to view that the court and not the jury must weigh and decide the correctness of the scientific evidence, which is -- and will intrude and diminish the role of the jury.

AAJ's next recommendation relates to the language and text in Rule 702 which says or should say “preponderance of information” because that's exactly what the committee note indicates it should say. It was referenced earlier, but when we go to the very last paragraph of the committee note, it so clearly spells out the preponderance of information standard when it states in sum, "evidence does not mean evidence, but rather, in 702, evidence means information." It is extremely important that this clarification is stated in the actual text of the rule instead of using a contrary or incorrect phrase of “preponderance of evidence,” not to mention such explanation should potentially be moved to a more prominent place in the notes.

Now I'd like to highlight that this portion of the committee notes occurs after and takes into consideration Rule 104, the rulings in Bourjaily, other Supreme Court rulings, and still lands on making

the point that, again, evidence, as referenced in 702, is meant to use a preponderance of information standard.

Now this is an opportunity for this Advisory Committee to make the necessary clarifications on this issue, which has always been a core function and role of the Advisory Committee because a reader should simply not have to take multiple steps to explain this text by going to notes, other rules, common law, and other resources when, at the end of the day, the explanation can simply be written in the actual rule.

As a practical matter, this contradiction will certainly lead to and/or contribute to confusion by well-meaning courts, as well as parties. And we already know that there is pre-existing confusion and mistakes by courts regarding this rule as it's already a concern that's freely acknowledged within the committee notes. And by using the preponderance of evidence text, there will undoubtedly be additional confusion by courts because, when courts use incorrectly and interpret that they are required to decide the merits of expert testimony by a preponderance of evidence and are bound by the evidence standard, inconsistent rulings on this issue, split decisions between circuits, and increased

appellate review on the meaning of this rule is sure to follow.

Confusion will also occur when parties knowingly or unknowingly argue legally incorrect positions, particularly in states that adopt the Federal Rules of Evidence but not the notes or commentary which explain or clarify this particular rule, which by my calculation would apply to at least 15 states. Misinterpretation on this issue on the state level will be multiplied several times over if “preponderance of evidence” is allowed to be in the text.

In a nutshell, AAJ's recommendations provide this Committee a direct way to allow 702 to simply mean what it says by saying what it means in the actual text of the rule. Thousands of my plaintiff trial lawyer colleagues around the country also represent victims in a variety of other claims, and a common thread to each of our victims' cases is that we need experts to prove their claims, and uncertainty in Rule 702 could be devastating to a plaintiff when misapplied, resulting in the exclusion of our experts and, thus, exclusion of our claims, while the converse for the defense does not bring such an equivalent result. Therefore, it is extremely imperative that

any and all ambiguity is removed from the court's analysis in such an important rule by using the preponderance of information standard. Thank you. And I'd be happy to answer any questions.

CHAIR SCHILTZ: Thank you, Mr. Ward.

Are there any questions or comments from the Committee?

(No response.)

CHAIR SCHILTZ: All right. Thank you again.

And our last speaker today is Mr. Warshauer. Mr. Warshauer, welcome.

MR. WARSHAUER: Thank you. Good afternoon. My name is indeed Michael Warshauer. For 38 years, as a small firm lawyer, I've represented plaintiffs in individual product liability, motor vehicle and truck, and malpractice actions. My experience with 702 motions is extensive as I was lead counsel for the plaintiff in General Electric Company v. Joiner. I've briefed and argued motions relating to the admission of expert testimony hundreds of times in multiple states, in multiple federal courts and multiple circuits at both the trial and appellate levels.

Some of these cases have involved huge amounts of compensation at risk and damages to be paid by the defendant, whereas others were quite modest.

Dealing with Rule 702 standards is often the most expensive and time-consuming aspect of the entire litigation process. Indeed, virtually every expert is challenged, increasing the cost to the plaintiff and the burden on the trial court.

I will remind the committee that the goal of the Federal Rules of Evidence is not to reduce trial dockets or protect defendants from having to answer for their wrongful conduct, not at all. The goal should be to ensure that the promise of the Seventh Amendment is kept for all Americans and administered fairly to litigants in MDLs, as well as those involved in run-of-the-mill truck wrecks.

Not one of the proponents for amending Rule 702 in a manner that will encourage judges to encroach on the duty of juries has mentioned this sacred aspect of our Constitution, the Seventh Amendment, not one. Instead, they've talked about eliminating trials through motion practice and amending Rule 702 to have the trial judge become the finder of fact with respect to expert testimony. They want a fence instead of a gate.

So let me remind this Committee what our Seventh Amendment demands: in suits at common law, where the value in controversy shall exceed $20, the

right to trial by jury shall be preserved. Simply put, our Constitution requires that facts be decided by juries and not judges. Our Constitution presumes that a jury of citizens is better than a single judge at deciding facts.

Inclusion of the phrase "by a preponderance of the evidence" or anything that encourages judges to make findings of fact will likely remove the jury from the job of being the fact-finder by encouraging trial courts to do that job for them. While I don't think any change is needed, I think we're finally getting a body of jurisprudence and appellate decisions that are giving everybody guidance after 25 years. If there must be change, the preponderance of language should read “preponderance of the available information.”

It's an important distinction because the preponderance of the evidence is connected with fact-finding and a weighing of evidence, historically, a job for the jury. Its common connection in the vernacular to fact-finding cannot be overlooked or ignored. It also implies that Rule 703, as we've talked about in the last few speakers, that allows expert testimony to be based on information that is not admissible evidence shouldn't be considered. It's no longer valid, in fact. “Preponderance of the

available information" is a phrase that encourages the trial judge to be a gatekeeper, not a fact-finder.

Professor Capra, your distinction between 702 and 703 is fine from your role as an evidence professor, and I'm sure your students will get it right in their exams, but I recommend to you as members of this Committee that our run-of-the-mill trial judges and our run-of-the-mill practitioners will not see it that way. They will read 702, if it includes the phrase "preponderance of the evidence," exactly what that requires, the trial judge to do what that phrase means and make findings of fact and become the fact-finder, in violation of the Constitution and really in violation of the intent of what I believe the Committee is.

I also wanted to comment that the data upon which the proponents for change rely is hand-selected and misleading. First, it assumes that the admission of any evidence they disagree with is wrong. Every opinion they point to -- court of appeals' opinions, they were wrong. Well, that's not surprising. Every litigant is disappointed when a position they champion is not accepted, but that does not mean the opinion is wrong.

These proponents go so far as to claim that

when a trial court fails to mention the word “preponderance," they're presumably wrong. That makes no sense at all and, if true, many of the Rule 702 opinions altered by members of this Committee, because I checked last night, are automatically wrong because they didn't include the word “preponderance.” That's certainly not the case.

Other data they rely on shows a failure to note the failure rate of well under a half of a percentage. Well, that's pretty good. We're not going to change that failure rate by changing the words. The proponents have testified over and over today that they get to decide the standards upon which testimony offered against them should be measured.

Members of this Committee, foxes should not be allowed to set the standard for the counting of chickens, and corporate wrongdoers should not be allowed to set the standards by which they are held accountable either. Keep in mind that the admission of evidence -- and this is what we learned in Joiner -- it's a discretion. It's always going to be things that people don't agree with. The courts are always going to be exercising their discretion, and there will always be differences. And changings of the rules' language that might have unintended

consequences isn't going to change that. The defendants and plaintiffs are always going to be unhappy occasionally.

Second and most importantly, the data fails completely to consider all the judge cases that were ended by judges who misapplied or overly aggressively applied Rule 702 by improperly excluding expert testimony. That data is very hard to find. These cases are underrepresented and hard to count because, given the standard of review, abuse of discretion, we realize it's often a waste of time to appeal the decision, and appeals are, therefore, often not pursued.

Simply put, an exclusion ends a case with no realistic remedy for the plaintiff. The case is simply over. In contrast, when a court allows an expert to testify after performing its gate-keeping function, there are multiple opportunities for that decision to be revisited, multiple opportunities at the end of the expert's testimony, the end of plaintiff's case, at the end of the trial, at a motion for a new trial, and at multiple levels of appeal. So, to the extent the proposal I suggest, the preponderance of all of the available evidence, might occasionally allow for a jury trial that perhaps

should not have occurred, isn't it better to err on the side of the Constitution by allowing the jury to decide which expert is right, an action that has multiple opportunities to be corrected.

This idea that the judge is to consider all available information and not weigh evidence as a fact-finder cannot be hidden in the comments. As pointed out by multiple speakers, too many states, including my own, Georgia, do not adopt the notes when they adopt the Federal Rules of Evidence. So, if the phrase "preponderance of the evidence" is included, as opposed to the phrase "preponderance of the information," the result will be that these state court judges will read this rule as requiring them to do that which they should not, weigh competing expert testimony, choose a winner, and then grant summary judgment if the winner turns out to be the defendant.

This potential permission cannot be overlooked as an unintended consequence of the proposed change but can be minimized by using the phrase "preponderance of the available information." I thank you for the opportunity to present my thoughts to you today.

CHAIR SCHILTZ: Thank you, Mr. Warshauer.

Are there any comments or questions from the

Committee?

(No response.)

CHAIR SCHILTZ: All right. Thank you.

At this point, I think we have heard from all the scheduled speakers. I want to thank all of those who did testify today. We're a small committee. We're just a committee of nine people when we're at full strength, and, thus, we particularly value getting the insights of a broad range of practitioners. The Committee members will give careful consideration to all of the comments, written and oral, and, again, we thank you very much for taking the time to help us with our work today.

This hearing is adjourned.

(Whereupon, at 12:20 p.m., the public hearing in the above-entitled matter adjourned.)

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CERTIFICATE

DOCKET NO.: N/A

CASE TITLE: Public Hearing on Proposed Amendments to the Federal Rules of Evidence 106, 615, and 702

HEARING DATE: January 21, 2022

LOCATION: Washington, D.C.

I hereby certify that the proceedings and evidence are contained fully and accurately on the tapes and notes reported by me at the hearing in the above case before the Administrative Office of the U.S. Courts.

Date: January 21, 2022

David Jones
Official Reporter
Heritage Reporting Corporation
Suite 206
1220 L Street, N.W.
Washington, D.C. 20005-4018