PUBLIC HEARING ON

PROPOSED AMENDMENTS TO THE

FEDERAL RULES OF EVIDENCE

JUDICIAL CONFERENCE
ADVISORY COMMITTEE ON EVIDENCE RULES

Videoconference Hearing
January 21, 2022

List of Confirmed Witnesses for the
Public Hearing on Proposed Amendments to the
Federal Rules of Evidence
Judicial Conference Advisory Committee on Evidence Rules
Via Videoconference
January 21, 2022 – 9:30 A.M.

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TAB 1

Rebecca Bazan, Esq., representing Duane Morris LLP, has submitted a Comment concurrently herewith. Consistent with that Comment, she plans to offer testimony on the practical implications that the proposed changes to Federal Rule of Evidence 702 would have on litigation generally and on products liability cases specifically. She will cover real-world examples of flawed expert testimony that Duane Morris litigators have encountered in their practice, including in life sciences and toxic tort cases.

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FIRM and AFFILIATE OFFICES

REBECCA E. BAZAN
DIRECT DIAL: +1 202 776 5253
PERSONAL FAX: +1 202 330 5547
E-MAIL: REBazan@duanemorris.com

www.duanemorris.com

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January 14, 2022

Committee on Rule of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, D.C. 20544

Re: Proposed Change to Federal Rule of Evidence 702

To the Advisory Committee on Evidence Rules:

We write in support of the proposed changes to Federal Rule of Evidence 702 currently being considered by the Committee. As trial attorneys who frequently litigate cases requiring expert testimony, we see firsthand the perils of misapplying Rule 702 to permit speculative and unreliable expert testimony to reach a jury. Particularly in product liability cases involving the life sciences industry and toxic tort cases, expert testimony is crucial to proving a case. Yet too often, courts find that deeply flawed expert testimony must be exposed at cross-examination, rather than excluded before trial. In a litigation environment where cases nearly always settle before trial, this misapplication of the court's gatekeeping function incentivizes pursuit of the bare minimum in costs to survive pretrial motion practice and inflate settlement values. Adopting the proposed changes to Rule 702 should reduce the gamesmanship involved in expert witness proceedings and lead to more efficient case management by litigants and judges alike.

First, reaffirming the trial court's gatekeeping function for expert testimony will aid federal courts nationally in managing their dockets. In recent years, federal dockets have grown by an order of magnitude and heavily feature products liability and personal injury cases that require expert testimony. According to the Annual Report of the Director of Judicial Business of the United States Courts, there were 556,366 cases pending in federal courts during fiscal year

2020.[1] During 2020 alone, 239,980 product liability personal injury cases were filed.[2] Frequently such cases are consolidated into massive multidistrict litigation that, as of March 2019, represented 52% of the federal docket.[3] Many, if not the majority, of both individually-filed and consolidated products liability cases deal with exposures to toxic substances, medical devices and pharmaceuticals and require expert testimony to survive summary judgment. Under a regime of more robust scrutiny of expert testimony, it is likely that many products liability/personal injury cases will be dismissed before trial and likelier still that many weaker or more speculative cases will not be filed at all.

Second, refocusing the application of Rule 702 to re-emphasize the court's gatekeeping function will pay dividends to both litigants and the court system. For litigants, a more rigorous pretrial review of expert opinions and testimony will streamline trial issues and permit all parties to accurately assess the value of a case for settlement. Too often, courts view all but the most obvious flaws in an expert's opinions to be issues for the jury. As a result, litigants must contend with the flaws of an expert's written opinions (such as the failure to base the opinion on sufficient data or cherry picking only data that is favorable while ignoring controverting data) at trial in addition to proving their case on the merits. This can both distract and confuse the jury, and deemphasize substantive issues. Similarly, some litigants merely attempt to survive summary judgment by presenting passable expert testimony for the lowest cost in hopes of drastically increasing the settlement value of a case before trial (where pretrial workup costs following expert discovery can often dwarf even inflated settlement demands). Increased scrutiny on the basis of an expert's opinion before trial will therefore lead to more cost certainty and less gamesmanship in the pretrial process.

Finally, in addition to the general policy benefits of adopting the proposed rule changes, the changes will benefit the litigation process in individual cases by increasing the quality of expert testimony. Because courts frequently determine that most evidentiary issues go to weight of evidence instead of admissibility, nearly any factual dispute among experts is referred for trial, even where one expert's opinion rests on unreliable grounds. There are several frequently-occurring scenarios that, in our experience, lead to the admission of speculative expert testimony when Rule 702 is misapplied:

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[1] https://www.uscourts.gov/sites/default/files/data_tables/jff_4.1_0930.2020.pdf. Compared to fiscal year 1990, when 244,570 cases were pending, this is an increase of 311,796 more cases pending at any given time.

[2] https://www.uscourts.gov/sites/default/files/data_tables/jff_4.4_0930.2020.pdf

[3] http://www.lfcj.com/uploads/1/1/2/0/112061707/lcj_request_for_rulemaking_concerning_mdl_cases_8-10-17.pdf

Causation – courts will often permit expert testimony on causation to be interpreted by the trier of fact even in the absence of a sound scientific basis. Rather than exclude generic and thinly-researched scientific testimony, courts will permit jurors to choose between competing scientific theories on causation and often allow cases to proceed to trial where a more robust application of the rule would lead to summary dismissals. This often occurs when evidence of general causation is scant, yet the expert is permitted to leap to specific causation with a weak or non-existent general causation foundation.

Experts Testifying Outside of Their Fields – in an effort to save costs, litigants will frequently present expert testimony from a single witness in several different fields, including fields outside of the witness's true expertise. This occurs often when a single witness will testify concerning a "hard science" such as engineering and also opine on regulatory and warnings issues due to past exposure to a product in an engineering capacity. Courts routinely permit these witnesses to testify and leave their credibility as a matter for the trier of fact. However, juries are ill-equipped to determine an expert's credentials in a single field, let alone multiple, and the mere appearance of expertise in one field generally lends credibility to testimony in others. As a result, juries are exposed to prejudicial testimony by a witness with little actual expertise at all.

Experts Failing to Review Case Materials – when transmitting a case file to an expert witness, attorneys often select a subset of all discovery and may exclude crucial portions of the record that damage their case. An expert then will review an incomplete case file and opine on various issues without addressing adverse evidence or being able to consider a differential diagnosis. Typically, courts consider this a matter for cross examination, not exclusion under Rule 702, which permits litigants to proceed to trial and dramatically impact the value of a case that may have deep substantive flaws.

Non-Case-Specific Opinions – in another effort to save costs, counsel and experts alike will frequently re-use opinions from case to case with only minor adaptations to reflect new facts. In many instances, this recycled testimony omits crucial case-specific information that may significantly change the science involved and, thus, the reliability of the opinion. Courts will frequently find that an opinion's "fit" to the case is a matter for the jury to decide, which again significantly impacts settlement valuation.

By clarifying the court's gatekeeping function under Federal Rule of Evidence 702, the proposed changes will help to minimize jury exposure to speculative or unreliable expert testimony. Specifically, and as explained in the accompanying Committee Note, language forcing the expert's proponent to prove the testimony's admissibility by a preponderance of the

evidence will reemphasize the trial court's ability to declare unreliable expert testimony inadmissible before trial under Fed. R. Evid. 104(a), rather than send the testimony to the jury to determine its weight.

A greater emphasis on removing speculative and unreliable testimony from a case before trial will aid both litigants and jurors by allowing trials to focus on substantive case issues rather than the qualifications of an expert witness. This shifted emphasis will also help federal courts manage their growing dockets, particularly in multidistrict litigation and similar consolidated proceedings which often implicate expert testimony.

We appreciate the Committee's time and effort for proposing these amendments and thank the Committee in advance for considering our points in support.

Very truly yours,

/s/ Rebecca E. Bazan

Rebecca E. Bazan

REB

TAB 2

From: Duvall, Gardner M.
To: RulesCommittee Secretary
Cc: Douglas K. Burrell; Toyja Kelley; Kathy Guilfoyle; John R. Kouris; Jay Ludlam
Subject: Hearing on FRE 702 Amendment January 21, 2022
Date: Friday, January 14, 2022 10:27:35 AM

This is the witness statement for Douglas Burrell, Toyja Kelly, and Gardner Duvall. Kathy Guilfoyle is withdrawing as a witness.

Douglas Burrell: I am the President of DRI, Inc., and I will speak with reference to the Comment of DRI And The DRI Center For Law And Public Policy In Support Of Amendments To Federal Rule Of Evidence 702. I will speak generally in support of the Amendments, and with particular reference to Rule 702(d) expressly stating that the proponent must establish that the expert opinion reflects a reliable application of the principles and methods to the facts of the case, and the proposed addition to the Committee Note there is no presumption for or against the admission of expert evidence.

Toyja Kelley: I am a Past President of DRI, Inc., and I will speak with reference to the Comment of DRI And The DRI Center For Law And Public Policy In Support Of Amendments To Federal Rule Of Evidence 702. I will speak with particular reference to Rule 702 expressly stating that the court determines whether the proponent has demonstrated by a preponderance of the evidence that their evidence is admissible, and in support of the proposal to change the amendment to say "the proponent has demonstrated *to the court* by a preponderance of the evidence that:".

Gardner Duvall: I am Chair Legislation and Rules Committee of the DRI Center For Law And Public Policy, and I will speak with reference to the Comment of DRI And The DRI Center For Law And Public Policy In Support Of Amendments To Federal Rule Of Evidence 702. I will speak in rebuttal of the opposition to amending FRE 702, which asserts that the Rule is being applied as intended by the amendment of FRE 702 in 2000.

Gardner M. Duvall | *Partner*
7 St. Paul Street | Baltimore, MD | 21202-1636
t: 410.347.9417 | f: 410.223.4317
gduvall@wtplaw.com | www.wtplaw.com

COMMENT OF DRI AND THE DRI CENTER FOR LAW AND PUBLIC POLICY IN SUPPORT OF AMENDMENTS TO FEDERAL RULE OF EVIDENCE 702

The Center for Law and Public Policy ("The Center") is part of DRI, Inc. ("DRI"), the leading organization of civil defense attorneys and in-house counsel. Founded by DRI in 2012, The Center is the national policy arm of DRI. It acts as a think tank and serves as the public face of DRI. The Center's three primary committees—Amicus, Issues and Advocacy, and Legislation and Rules—are comprised of numerous task forces and working groups. These subgroups publish scholarly works on a variety of issues, and they undertake in-depth studies of a range of topics such as class actions, climate change litigation, data privacy, MSP, and changes to the Federal Rules of Civil Procedure and the Federal Rules of Evidence. Since its inception, The Center has been the voice of the civil defense bar on substantive issues of national importance.

Expert witnesses have long been a part of civil and criminal trials, and it has always been the responsibility of the trial judge to determine whether experts are qualified to give expert testimony and to determine the relevance and admissibility of their testimony. The original Federal Rule of Evidence 702 as amended over time defines those standards, and of course that rule has been applied innumerable times by all federal courts, including the Supreme Court. The task of properly applying Rule 702, however, remains a challenge, as any number of decisions deviate from the terms of the current rule and its Committee Note.

DRI applauds and supports this Committee's effort to improve the rule (the "FRE 702 Amendment") to achieve a necessary uniformity of application. It does so not by changing the intent or purpose of the rule, but by placing within the rule itself two clear statements. First, the amendment makes clear that the burden is upon the party calling the expert to demonstrate by the preponderance of the evidence that the witness and the testimony meet the requirements set forth in the subsections of Rule 702. This principle has been too often ignored, given the requirements of FRE 104. Placing that language in the rule itself provides necessary emphasis on a term that has too often been overlooked. Second, the amendment reminds the judge of the responsibility to make sure that the proponent of the expert's opinion testimony has satisfied the court that not only is the testimony the product of reliable principles and methods, but also that the expert's opinion reflects a reliable application of those principles and methods to the facts of the case. While these principles have always been true, this Committee has properly observed that some courts have failed in their duty to apply these two rules faithfully. With some regularity, courts elide both the preponderance standard and the reliability standard when ruling on proffered FRE 702 evidence**.**

NUMEROUS DECISIONS UNDERMINE 2000 FRE 702, WHICH JUSTIFIES THE FRE 702 AMENDMENT

Opponents of the proposed amendment to FRE 702 assert that the rule is being applied as intended, but an abundant number of decisions contradict that assertion. An example of ignoring the preponderance standard when admitting expert evidence is the MDL *In re C. R. Bard, Inc. Pelvic Repair System Products Liability Litigation*, 2018 WL 4220618 (S.D. W. Va. 2018). When considering pretrial motions on the admissibility of evidence, the district court stated that the "proponent of expert testimony does not have the burden to 'prove' anything." *Id.* at *2,

quoting Md. Cas. Com v. Therm-O-Disc, Inc., 137 F.3d 780, 783 (4th Cir. 1998). In addition to the pre-2000 FRE 702[1] *Therm-O-Disc* case, the district court also cited another case from that era for the proposition that admissibility considers the principles and methodology of the expert, but not "the conclusions reached." *Id.*, *quoting Westberry v. Gislaved Gummi AB*, 178 F.3 257, 261 (4th Cir. 1998).

Prior to 2000 FRE 702, *Therm-O-Disc* rejected the argument that "*Daubert* requires the party proffering the expert testimony to meet its [FRE] 104(a) burden by a preponderance of evidence." *Therm-O-Disc, Inc.*, 137 F.3d at 782–83, n. 9; *but see Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 A.S. 579, 592, n. 10 (1993) (imposing preponderance standard on FRE 702). The 2000 FRE 702 amendment spoke directly to and countered that appellate court's analysis. The Committee Note for 2000 FRE 702 states, in direct contradiction of *Therm-O-Disc*, "the admissibility of all expert testimony is governed by the principles of Rule 104(a). Under that Rule, the proponent has the burden of establishing that the pertinent admissibility requirements are met by a preponderance of the evidence. *See Bourjaily v. United States*, 483 U.S. 171 (1987)."

Another example is *Bluetooth SIG, Inc.*, 468 F. Supp. 1342 (W.D. Wash. 2020). *Bluetooth* confuses the factual sufficiency of an expert's opinion with the credibility of that opinion, saying that the "factual basis of an expert opinion goes to the credibility of the testimony, not the admissibility, and it is up to the opposing party to examine the factual basis for the opinion on cross-examination." *Id.* at 1349, *quoting In re Toyota Motor Corp Unintended Acceleration Mktg., Sales Practices, & Prod. Liab. Litig.*, 978 F. Supp.2d 1053, 1069 (C.D. Cal. 2013). The antecedent citations in *Toyota* lead back to a decision superseded by the 2000 FRE 702 Amendment. *See Hose v. Chicago Northwestern Transp. Co.*, 70 F.3d 968, 974 (8th Cir.1995). *Hose* states, "the factual basis of an expert opinion goes to the credibility of the testimony, not the admissibility, and it is up to the opposing party to examine the factual basis for the opinion in cross-examination. Only if the expert's opinion is so fundamentally unsupported that it can offer no assistance to the jury must such testimony be excluded." *Id.* In that iteration of pre-2000 FRE 702 decisions that passed down to *Bluetooth* in 2020, the proponent does not have to show that more likely than not that facts undergird an expert opinion. Instead, the opponent of that evidence has to convince the judge or jury that facts do not support the opinion. *Bresler v. Wilmington Trust*, 855 F.3d 178 (4th Cir. 2017) makes a similar misstatement of 2000 FRE 702, saying, "questions regarding the factual underpinnings of the expert witness' opinion affect the weight and credibility of the witness' assessment, not its admissibility." *Id.* at 195 (cleaned up).

Johnson v. Mead Johnson & Co., 754 F.3d 557 (8th Cir. 2014), illustrates the profound power of ignoring the preponderance standard articulated in the FRE 702 Amendment. The trial court had excluded certain expert opinions, **after reciting 2000 FRE 702 and applying Eighth**

[1] The amendments of FRE 702 in 2000 and 2011 are collectively referred to as "2000 FRE 702." In 2011 the language of Rule 702 was amended "as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only." Committee Note on Rules – 2011 Amendment, FRE 702.

Circuit precedent employing the preponderance standard to admit expert opinion evidence. *Johnson v. Mead Johnson & Co.*, 2013 WL 716816 (D. Minn. 2013). The district court noted Eighth Circuit precedent resolving doubts in favor of admissibility and the utility of cross-examination for discerning the truth, *id.* at *3, but it also noted the precedent that, "[t]he proponent of the proffered expert testimony must show by the preponderance of the evidence that the expert is qualified and the expert's proffered opinion is reliable." *Id.*, *citing Khoury v. Philips Med. Sys.*, 614 F.3d 888, 892 (8th Cir.2010). The trial court meticulously considered the probability that the proffered evidence fulfilled the requirements of 2000 FRE 702. *Id.* at *4–*8. That effort included reference to the preponderance admissibility standard. *Id.* at 7. After excluding plaintiff's causation experts because the burden of establishing admissibility was not fulfilled, summary judgment was granted to the defendant.

On appeal the exclusion of the evidence was reversed. *Johnson*, 754 F.3d 557. In articulating the standard for reviewing the admission of expert opinions, the appellate court cited its prior ruling in *Polski v. Quigley Corp.*, 5387 F.3d 836, 839 (8th Cir. 2008). *Polski* states that the proponent of expert evidence bears the burden of establishing admissibility by a preponderance. *Id.* at 841 (*citing Marmo v. Tyson Fresh Meats, Inc.*, 457 F.3d 748, 757–58 (8th Cir. 2006, *citing Daubert*, 509 U.S. at 580 (sic)). The *Johnson* appellate court neglected its own *Khoury* decision cited by the district court, which says the same thing. Without any regard for the preponderance standard in its own precedents, and without finding that the proponent had fulfilled the preponderance requirement, the appellate court reversed the exclusion of the experts. That decision occurred 14 years after the adoption of 2000 FRE 702, and more than 20 years after *Daubert* invoked the preponderance standard with specific reference to FRE 702.

Likewise, the Ninth Circuit reversed a trial court without ever considering the probability of admissibility of the contested evidence, in *City of Pomona v. SQM North Am. Corp.*, 750 F.3d 1036 (9th Cir. 2014). The appellate court ruled that the trial court abused its discretion when finding an inadequate methodology, testing of the opinion, and the adequacy of the data. *Id.* at 1044–49. The appellate court, however, never considered whether the proponent of the evidence had established by a preponderance that the expert evidence was admissible, as intended by 2000 FRE 702.

Opponents of amending FRE 702 also err if they mean to say that courts are routinely requiring that expert evidence reliably apply the expert's principles and methods to the facts of the case. *C. R. Bard, supra,* also exemplifies cases that rely on superseded law pre-dating 2000 FRE 702, when it focused on the reliability of the expert's principles and methodology, to the exclusion of the reliability of "the conclusions reached." *Id*., quoting *Westberry*, 178 F.3 at 261. The Committee Note for 2000 FRE 702 addressed the very reason that FRE 702(d) was added to the rule: "[t]he 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 R.R. Yard PCB Litig.*, 35 F.3d 717, 745 (3d 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.* '" (Emph. in *In re Paoli*).

The Procter & Gamble Co. v. Haugen, 2007 WL 709298 (D. Utah, N.D. 2007), follows the same pattern of ignoring 2000 FRE 702. That decision quoted a Tenth Circuit decision for

the framework of judging expert opinion testimony. *Id.* at *1, *quoting United States v. Rodriguez-Felix*, 450 F.3d 1117, 1122–23 (10th Cir. 2006). *Rodriguez-Felix* quotes—six years after the effective date of 2000 FRE 702—the 1975 version of FRE 702 to determine the legal standard and gatekeeping role! *Id.* at 1122–23. The appellate court recites precedent prior to 2000 FRE 702 to limit the judicial gatekeeping role, ignoring the Committee Note for 2000 FRE 702 concerning the preponderance of the evidence of standard for determining admissibility.

Oshana v. The Coca-Cola Co., 2005 WL 1661999 (N.D. Ill. 2005), is in the same vein. Its analysis of Rule 702 is limited to citations to the 1993 *Daubert* decision, in spite of 2000 FRE 702. This results in the district court citing *Daubert* when saying that cross-examination is *the* tool for addressing challenges to an expert's application of reliable methodology, 2005 WL 1661999 at *4, even though 2000 FRE 702(d) instructs the court to condition admission of expert evidence on the expert's reliable application of acceptable principles and methods to the facts of the case. The cross-examination dodge concerning reliable application of principles and methodology was also employed in *United States v. Adam Bros. Farming, Inc.*, 2005 WL 5957827, *5, *6 (C.D. Cal. 2005). That case also only cites to *Daubert* as precedent, without recognition of the terms of 2000 FRE 702(d).

The proposed the FRE 702 Amendment places these important requirements governing experts and their testimony in the rule itself, demonstrating their importance when deciding whether the expert is qualified and whether the testimony is admissible. Placing this language in the rule, illuminated by the Committee Note, emphasizes how to apply this rule properly. Two decades of experience illustrate the wisdom of writing into FRE 702 what the Committee Note said in 2000.

ADDITIONAL AMENDMENTS ARE WARRANTED

Several amendments to the FRE 702 Amendment would improve those proposals. A prior draft of the FRE 702 Amendment provided that, "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* the proponent has demonstrated by a preponderance of the evidence that. . . ." It should be plain that the Rules of Evidence are applied by the court to determine admissibility, but the history subsequent to 2000 FRE 702 is of many courts failing to do what that Rule and accompanying Committee Note states. So many decisions have confused the roles of judge and jury regarding FRE 702 that the text of the Rule should plainly state that the court has an obligation to determine whether a preponderance of evidence supports admission.

Lawyers for Civil Justice has soundly proposed an amendment to the Note for the FRE 702 Amendment, to address the many decisions that incorrectly have favored admission of expert evidence without fidelity to 2000 FRE 702. The current draft 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." The proposed Note should 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."

CONCLUSION

The members of DRI frequently represent clients who wish to admit expert testimony, and face opponents who also wish to use such testimony at trial. Experience has established the soundness and necessity of the FRE 702 Amendment. Without it, the standard for expert evidence is hazy, and different litigants get different justice regarding critical expert opinion evidence. DRI and the Center for Law and Public Policy believe these changes will help counsel properly present qualified experts and appropriately oppose witnesses when their qualifications or testimony do not meet the clear requirements contained in this amendment.

TAB 3

COMMENTS ON AMENDMENTS TO FEDERAL RULE OF EVIDENCE 702:

THE PROPOSED AMENDMENTS ARE UNNECESARY AND THEY WILL NOT SUBSTANTIVELY IMPROVE UPON THE ROLE OF TRIAL COURTS IN STUDYING THE VALUE OF EXPERT WITNESS TESTIMONY

Larry E. Coben
Anapol Weiss
Attorneys' Information Exchange Group
8700 E. Vista Bonita Drive
Scottsdale, AZ 85262
lcoben@anapolweiss.com
480.515. 4745

I submit the following comments to supplement my earlier submission and as a precursor to the testimony I will provide the Committee. This submission and my testimony will explain why the semantical modifications proposed to Rule 702 are both not necessary and in fact their additions may simply foment additional litigation on a "non-issue". Because it has been conceded by the comments to the Rule that these proposed changes do not provide any substantive revision to Rule 702's standards for admission of expert testimony, the rationale for adding these words is perplexing to say the least.

I provide this summary of my testimony in my capacity as a trial lawyer and also as Chief Counsel for the Attorneys Information Exchange Group (AIEG). AIEG is a non-profit organization of over Eight Hundred (800) civil litigators who work throughout the United States and, in their professional capacity we have in

the past and continue to represent thousands of Americans who pursue financial compensation from those who have caused them injury as the result of design or manufacturing flaws in consumer products. These lawsuits almost always require forensic analyses by competent experts in a host of scientific fields including medicine, engineering, bio-engineering, physics, and human factors. Thus, we are routinely required to assure ourselves and the courts in which we appear that our expert witnesses are providing reliable and competent expert opinion testimony. We do this with an understanding and 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 the suggested Rule change language seems based on criticism of how some trial courts have applied Rule 702. In our view this criticism is misplaced, and the accompanying conclusion that trial courts need more guidance on the strictures that apply to the admissibility of expert testimony is wrong. A review of recent decisions demonstrates that the judiciary understands it role per Rule 702. For example, in *Price v. GMC,* 2018 WL 8333415 (WD Okla.), Judge David Russell properly denied a motion to exclude a defense expert. In doing so, he succinctly and correctly summarized the litigant's task in defending this challenge and his role as the gatekeeper:

> "The proponent of the evidence has the burden of showing that expert evidence is admissible, by a preponderance of proof." *And, of course* "The trial court has 'wide latitude' in exercising its discretion to admit or exclude expert testimony." He then recounted that
>
> > The Federal Rules encourage the admission of expert testimony[,]" and there is a presumption under the Rules " 'that expert testimony is admissible.' " *McCluskey*, 954 F. Supp. 2d at 1238 (quoting 4 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Federal Evidence* § 702.02[1], at 702-5 (Joseph M. McLaughlin, ed., Matthew Bender 2d ed. 2012)).
>
> "Rather than excluding expert testimony, the Supreme Court in Daubert encouraged "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof" to attack "shaky but admissible evidence." *Daubert*, 509 U.S. at 596 (citation omitted)."

It's critical that this 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 are contrived, rather than real. As counsel to plaintiffs in trials involving product liability design and manufacturing defect claims, substantive state law requires that consumer victims proffer expert testimony related to the claimed defect, as well as proof of alternative safer designs and proximate causation. Invariably this burden of proof dictates the use of experts in related scientific fields. And, routinely, our colleagues in the defense bar challenge the expertise and/or methodology our witnesses proffer—despite the fact that defense have disclosed experts with similar qualifications and who have used similar methodology. In making these challenges, we often hear these arguments: (1) the plaintiff's expert is not qualified in the necessary field of expertise because he or she has never designed a similar product, and (2) that the expert has not employed the necessary methodology in reaching her opinions because she has not conducted repeatable tests to duplicate the injury event and prove that the defect caused the injury or that an alternatively designed product would have avoided the injury. When these arguments are presented in a *Daubert* motion, courts appropriately and correctly study this matter with these

principles in mind: [*Simmons v. Ford Motor Co.,* 2021 WL 6069455, at *2–3 (S.D. Fla. Dec. 22, 2021)]

> First, when expert testimony is introduced under Rule 702, "the party offering the expert testimony bears the burden of laying the proper foundation, and that party must demonstrate admissibility by a preponderance of the evidence." *City of S. Miami v. Desantis*, No. 19-22927, 2020 WL 7074644, at *3 (S.D. Fla. Dec. 3, 2020) (citing *Rink v. Cheminova, Inc.*, 400 F.3d 1286, 1291–92 (11th Cir. 2005)).
>
> Second, that there is a "presumption that qualified and relevant expert testimony is admissible, so that once a proponent has made the requisite threshold showing, further disputes go to weight, not admissibility." *Id.* (quoting *Little v. Wash. Metro. Area Transit Auth.*, 249 F. Supp. 3d 394, 408 (D.D.C. 2017)) (internal quotation marks omitted). Thus, "the rejection of expert testimony is the exception rather than the rule." *Moore v. Intuitive Surgical, Inc.*, 995 F.3d 839, 850 (11th Cir. 2021) (quoting Fed. R. Evid. 702 Advisory Committee's Note to 2000 Amendments).
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> * * *
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> For example, in design defect cases where "a proposed expert's opinion relies principally upon his experience and knowledge, the Court must satisfy itself that the witness has appropriately explained how his experience leads to the conclusion he reached, why that experience provides a sufficient basis for the opinion, and how that experience is reliably applied to the facts." *Clena Invs., Inc.*, 280 F.R.D. at 663 (citing *United States v. Brown*, 415 F.3d 1257, 1261 (11th Cir. 2005)).
>
> And, appropriately, in these engineering-grounded cases, courts appropriately note that "design experts, like experience-based experts generally, are not necessarily required to 'test' their opinions." *Anderson v. FCA U.S., LLC*, No. 16-558, 2019 WL 826479, at *4 (M.D. Ga. Feb. 21, 2019) (citing *Clena Invs., Inc.*, 280 F.R.D. at 663); *see also Pineda v. Ford Motor Co.*, 520 F.3d 237, 248–49 (3d Cir. 2008) ("Pineda proffered Clauser as an engineering expert who understood the stresses and forces that might cause glass to fail. Clauser's specialized, rather than generalized, experience in this area allowed him to recognize that exerting a force on one area of the rear liftgate glass before exerting a force on another area of the glass could lead to its shattering. Clauser did not have to develop or test alternative warnings to render an opinion ...."); *Schenone v. Zimmer Holdings, Inc.*, No. 12-1046-J-39MCR, 2014 WL 9879924, at *5–8 (M.D. Fla. July 30, 2014) ("In some cases, the expert's experience in conjunction with knowledge, skill, training or education alone may provide a sufficient basis to the reliability of the expert's opinion.").

To fulfill its "gatekeeping" role, a court faced with a proffer of expert testimony must determine at the outset whether the evidence "both rests on a reliable foundation and is relevant to the task at hand." *Daubert*, 509 U.S. at 597, 113 S.Ct. 2786. In every case, whether its done explicitly or implicitly, trial courts understand that "t]he proponent of the expert testimony must prove its admissibility by a preponderance of the evidence." *Lauzon v. Senco Prods., Inc.*, 270

F.3d 681, 686 (8th Cir. 2001). See, *Pitlyk v. Ethicon, Inc.,* 478 F. Supp. 3d 784, 786–87 (E.D. Mo. 2020).

The notion that trial courts need reminding that the proponent of expert testimony must show its propriety by a "preponderance of the evidence" is, we submit, a misplaced addition. We respectfully submit that the "opinion" that this phrase should be added—because lots of courts have ignored the inclusion of this criteria of proof in published opinions—is itself an opinion that does not meet the Rule 702 criteria. The predicate for the addition of this language is a finding that only 35% of the analyzed cases articulated this aspect of a proponent's burden of proof. But that predicate is **not** helpful. Why? Because trial judges typically apply this well-recognized requirement every day they are confronted with expert testimony and, its application, does not demand a restatement of this requirement in each published opinion. I challenge anyone to find an opinion on the admissibility of expert testimony in which the Court's reasoning allowed or disallowed testimony by ignoring the proponent's burden of proof. As one court recently stated [*Miravalle v. One World Techs., Inc.,* 2021 WL 5801860, at *5–6 (E.D. Mo. Dec. 7, 2021)]

> The party offering a witness under Rule 702 bears the burden to establish by preponderance of evidence: (a) the expert's specialized knowledge will assist the jury; (b) the expert's testimony is based on sufficient facts and data; (c) the expert's testimony is based on reliable principles and methods; and "(d) the expert has reliably applied the [acceptable] principles and methods to the facts of the case." Fed.R.Civ.P. 702(a)-(d). Lauzon v. Senco Prods. Co., Inc., 270 F.3d 681, 686 (8th Cir. 2001). The district court must make a "preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." Id. at 592-93.

The Unneeded Messages of These Proposed Changes To Rule 702

It should not come as a surprise to the Committee that the filed commentary has aligned the proponents and opponents to these proposed Rule changes along party lines. The commentary in support of these changes in verbiage come from attorneys and organizations associated with litigants who routinely file Daubert motions seeking to exclude expert testimony,

while those who oppose these changes are attorneys and organizations who routinely rely on expert testimony to meet their burden of proof in civil litigation. One has to wonder why we have this line-up of support and opposition to these changes if they are only meant to remind courts of the existing legal standard applied in gauging the propriety of allowing expert testimony. In truth, whenever changes in procedural/evidentiary rules are obtained, the word-smiting ensures an avalanche of new legal arguments which will undoubtedly precipitate more litigation. We submit this is just not necessary. Further, these additional phrases may have the untoward effect of causing some judges to think a change in substance has happened—which hasn't happened.

Here are some inappropriate reactions we anticipate as the result of these semantical additions/changes. (1) a trial court may construe the adding language to the introductory paragraph (POE) as requiring that a proponent of expert testimony convince the Court (not the jury) that her/his opinion is more likely correct than not; (2) a trial court may construe the POE clause as requiring proof in a *Daubert* hearing that each opinion is based upon reliable methodology that is more likely the correct methodology than the methodology chosen by a party's opponent; and, (3) a trial court may construe the POE clause as requiring proof that the facts or data considered in reaching an opinion is more likely than not. Each of these potential constructions of this semantical change would have the effect of hugely altering the proponents burden of proof and it would convert the trial judge into a 13th juror. Respectfully, that is not the Court's role.

Thank you for this opportunity to address the Committee.

Larry E. Coben

ANAPOLWEISS

8700 E. Vista Bonita Drive ~ Suite 268 ~ Scottsdale, Arizona 85255
Phone (480) 515-4745 ~ Fax (480) 515-4744

Larry E. Coben, Esquire*
lcoben@anapolweiss.com
*Managing Partner

Jo Ann Niemi, Esquire
jniemi@anapolweiss.com

December 21, 2021

Commentary Regarding Proposed Changes to Rule 702

As a Trial Lawyer for forty-years, and having addressed the admissibility of expert opinion testimony in hundreds of civil cases litigated in federal and state courts across the United States, I regularly present or answer challenges to expert testimony predicated upon Rule 702 of the Rules of Evidence. Admittedly, when this Rule was amended to address the *Daubert* criteria of admissibility, a "learning curve" arose. As with many areas of the law, it has taken attorneys and courts years to appreciate the "rules of the road" compelled by the objective boundaries of Rule 702, but in my view that has happened and, at least in the civil practice of law, there is virtually no abuse or misuse of these evidentiary principles of admissibility. Litigants have every opportunity to proffer expert opinions and/or object to their proffer and courts have the necessary tools to evaluate admissibility. Changing the verbiage of Rule 702 is unnecessary and in my opinion it will only

serve to confuse litigants and courts who have adjusted well to the perquisites for the admissibility of expert testimony.

I therefore provide these comments in my capacity as a trial lawyer and also as Chief Counsel for the Attorneys Information Exchange Group (AIEG). AIEG is a non-profit organization of over Eight Hundred (800) civil litigators who work throughout the United States and, in their professional capacity we have in the past and continue to represent thousands of Americans who pursue financial compensation from those who have caused them injury as the result of design and manufacturing flaws in consumer products. These lawsuits almost always require forensic analyses by competent experts in a host of scientific fields including medicine, engineering, bio-engineering, physics, and human factors. Thus, we are routinely required to assure ourselves and the courts in which we appear that our expert witnesses are providing reliable and competent expert opinion testimony. We do this with an understanding and 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.

Comments Regarding Proposed Changes to Rule 702

The adage "if its not broken don't fix it" resonates here. Adding to the introductory sentence "the proponent has demonstrated by a preponderance of the information" is "superfluous to the existing Rule.

> " . . . proponents of expert testimony bear the burden of establishing its admissibility but do not have to demonstrate to the judge by a preponderance of the evidence that the assessments of their experts are *correct*, **they only have to demonstrate by a preponderance of evidence that their opinions are *reliable*** [because] evidentiary requirement of reliability is lower than the merits standard of correctness. *U.S. Magnesium, LLC v. ATI Titanium, LLC*, 2021 WL 615412, at *2 (D. Utah Feb. 17, 2021).

E.g., Nelson v. Tenn. Gas Pipeline Co., 243 F.3d 244, 251 (6th Cir. 2001); *In re Mirena IUD Prod. Liab. Litig.,* 169 F. Supp. 3d 396, 411–12 (S.D.N.Y. 2016).

Amending Rule 702 (d) by adding/changing the verbiage of this sub-part again alters the words but not the meaning of this evidentiary prerequisite. Demonstrating that an expert's opinions are based upon a reliable application of reliable principles and methods to the facts remains a prerequisite without a reasoned change in the language of this sub-part. Courts have appropriately applied the language and intent of this sub-part, recognizing that Rule 702 ". . . is not intended to authorize a trial court to exclude an expert's testimony on the ground that the court believes one version of the facts and not the other." *Vox Mktg. Grp., LLC v. Prodigy Promos L.C.,* 521 F. Supp. 3d 1135, 1142–43 (D. Utah 2021).

The primary concern about elevating to the introduction of Rule 702 the "preponderance of the information" is that trial courts may now believe that their gatekeeper role has changed. And, while the commentary makes it clear that this inference is unintended, it then begs the question why make the change. Certainly, the proposed changes are not meant to create a "13th juror", allowing the Court to

decide—not the jury—which expert's opinions convince the Court that their analysis is right and the other expert's assessment is wrong. If this feared inference were the end result of these semantical changes, it could effectively and radically alter the very purpose of Rule 702. The gatekeeper role was never intended to supplant the adversary system or the role of the jury. *In re Scrap Metal Antitrust Litig.*, 527 F.3d 517, 531–32 (6th Cir. 2008). Arguments regarding the weight to be given any testimony or opinions of an expert witness are properly left to the jury. *Id.* "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Id.*

Rule 702 represents a liberal standard of admissibility for expert opinions, as compared to the previous and more restrictive standard set out in *Frye v. United States,* 293 F. 1013, 1014 (D.C.Cir.1923). *See, e.g., Daubert v. Merrell Dow Pharm., Inc.,* 509 U.S. 579, 588–89, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993) (*Frye* test of general acceptance in the scientific community superseded by the Federal Rules; "a rigid 'general acceptance' requirement would be at odds with the 'liberal thrust' of the Federal Rules and their 'general approach of relaxing the traditional barriers to "opinion" testimony' ") . . . *In re Mirena IUD Prod. Liab. Litig.,* 169 F. Supp. 3d 396, 411–12 (S.D.N.Y. 2016).

To aid the committee in appreciating the procedural trap that may lie ahead for litigants if these proposed changes are adopted, we provide examples of expert analyses (accepted in reported cases) that would seem threatened now:

- Ford Pinto fuel-fed fire cases
- IUD design cases
- Tobacco cases
- Breast implant cases

- Asbestos cases
- Hip replacement devices
- Toyota runaway cases
- Pelvic mesh devices

In the arena of civil litigation, the Rule 702 prerequisites have worked well. Counsel and the parties are well informed of the necessity to provide well credential experts whose analyses are based upon reliably principled opinions and these proposed changes are unnecessary.

Respectfully submitted,

Larry E. Coben

TAB 4

January 14, 2022

Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, D.C. 20544

Re: Testimony for Advisory Committee on Evidence Hearing on January 14, 2022

Dear Committee Members:

I look forward to testifying before the Advisory Committee on Evidence Rules at the January 21, 2022, hearing. I plan to address the Committee's proposed amendment to Rule 702.

My testimony, on behalf of Lawyers for Civil Justice (LCJ), will reflect the points articulated in LCJ's comment dated September 1, 2021 (attached). Specifically, I will address (1) the need for an amendment to remedy the widespread misunderstandings about Rule 702's requirements governing the court's role as the "gatekeeper" of expert evidence; (2) LCJ's support for the Committee's proposal to clarify Rule 702; (3) the importance of re-inserting language to the effect of "if the court determines" back into the text of the rule amendment; and (4) the reasons why the success or failure of the proposed amendment will turn on the clarity with which the amendment and accompanying note provide guidance to courts and parties trying to navigate the difference between the rule and the caselaw.

On this last point, I will express my strong agreement with those who, at the recent Standing Committee meeting, recoiled from the idea of using the Note to "scold" judges who have misunderstood the rule in the past. Scolding would indeed be an inappropriate use of the Note. Rather, as LCJ's Comment states, "the Note should be written for people who are looking to 'get it right' by providing the information they need to do so." Unfortunately, misunderstandings about Rule 702 are deeply entrenched in caselaw and our legal culture, as reflected both by the infrequency with which reported decisions on expert admissibility cite to Rule 702 as well as the common use of the words "*Daubert* motions" and "*Daubert* hearings" as euphemisms for expert admissibility that distract attention from Rule 702. The purpose of the amendment cannot be expected to jump off the page for those who, in the future, will turn to the rule and note for guidance in navigating the differences between the rule and the established caselaw. Only the clearest and most plainspoken text will change the deep-rooted misunderstandings that will otherwise live on to hinder the amendment's success.

Sincerely,

Alex Dahl
General Counsel
Lawyers for Civil Justice

COMMENT
to the
ADVISORY COMMITTEE ON EVIDENCE RULES

September 1, 2021

CLARITY AND EMPHASIS: THE COMMITTEE'S PROPOSED RULE 702 AMENDMENT WOULD PROVIDE MUCH-NEEDED GUIDANCE ABOUT THE PROPER STANDARDS FOR ADMISSIBILITY OF EXPERT EVIDENCE AND THE RELIABLE APPLICATION OF AN EXPERT'S BASIS AND METHODOLOGY

Lawyers for Civil Justice ("LCJ")[1] respectfully submits this Comment to the Advisory Committee on Evidence Rules ("Committee") in response to the Request for Comment[2] on the Committee's proposed amendment to Federal Rule of Evidence 702 ("Proposed Amendment").

INTRODUCTION

The Committee has accurately defined the fundamental problem with current expert admissibility jurisprudence: "[M]any 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 "[t]hese rulings are an incorrect application of Rules 702 and 104(a)."[3] The misunderstanding that underlies these rulings persists because Rule 702 assumes, but does not explicitly state, that the court should apply Rule 104(a)'s preponderance standard to the question of whether proffered evidence is admissible before allowing the jury to determine what weight to give that evidence. The caselaw is replete with decisions based on this misunderstanding that result in courts' failure to exercise their "gatekeeping" responsibility. The Proposed Amendment, which would clarify that the proponent of expert opinion testimony must demonstrate the admissibility requirements "by a preponderance of the evidence," is a much-needed and appropriate solution for this serious and widespread confusion. Even greater clarity would result from adding a direct reference to "the court" in the Rule's text and identifying in the

[1] Lawyers for Civil Justice ("LCJ") is a national coalition of corporations, law firms, and defense trial lawyer organizations that promotes excellence and fairness in the civil justice system to secure the just, speedy, and inexpensive determination of civil cases. For over 30 years, LCJ has been closely engaged in reforming federal procedural rules in order to: (1) promote balance and fairness in the civil justice system; (2) reduce costs and burdens associated with litigation; and (3) advance predictability and efficiency in litigation.
[2] Request For Comment, Preliminary Draft, Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure, and the Federal Rules of Evidence (hereinafter "Preliminary Draft"), available at https://www.uscourts.gov/sites/default/files/preliminary_draft_of_proposed_amendments_2021_0.pdf.
[3] Proposed Committee Note, Preliminary Draft at 309.

Note the three rulings that are the wellsprings of the problem, as these changes would help courts fulfill the purpose of the Rule. The Proposed Amendment also includes an important emphasis on the trial judge's ongoing gatekeeping duty to ensure that "[a] testifying expert's opinion must stay within the bounds of what can be concluded by a reliable application of the expert's basis and methodology."[4] Although this change to 702(d) is more pertinent to criminal cases than civil matters, it is nonetheless an appropriate reminder that the court's gatekeeping responsibility has not ended when the initial admissibility ruling is made.

In concert with giving air to the textual changes in the Proposed Amendment, the public comment process also serves the Committee with an important opportunity to encourage proper focus on Rule 702 by nudging the bench and bar to abandon the colloquial use of the case name "*Daubert*" as slang for expert admissibility standards. This is not a merely semantic point; the misleading jargon is undoubtedly part of the very problem that the Committee has drafted the Proposed Amendment to address.

I. The Proposed Amendment Is Needed Because There Is Widespread Misunderstanding of Rule 702

Hundreds of published opinions from courts in every federal circuit demonstrate a widespread misunderstanding of Rule 702's requirements.[5] In fact, between January 1, 2015, and August 1, 2021:

- 179 federal cases recited variations of the following statement: "As a general rule, the factual basis of an expert opinion goes to the credibility of the testimony, not the admissibility, and it is up to the opposing party to examine the factual basis for the opinion in cross-examination."[6]

- 300 federal cases reiterated a form of this statement: "[Q]uestions relating to the bases and sources of an expert's opinion affect the weight to be assigned that opinion rather than its admissibility."[7]

- 90 federal cases incorporated a statement similar to the following: "Soundness of the factual underpinnings of the expert's analysis and the correctness of the expert's

[4] Proposed Committee Note, Preliminary Draft at 310.
[5] Lawyers for Civil Justice, *Why* Loudermill *Speaks Louder Than The Rule: A "Dna" Analysis Of Rule 702 Case Law Shows That Courts Continue To Rely On Pre*-Daubert *Standards Without Understanding That The 2000 Amendment Changed The Law*, Oct. 20, 2020, available at https://www.uscourts.gov/sites/default/files/20-ev-y_suggestion_from_lawyers_for_civil_justice_-_rule_702_0.pdf.
[6] *E.g.*, *NuTech Orchard Removal, LLC, v. DuraTech Indus. Int'l, Inc.*, No. 3:18-CV-00256, 2020 WL 6994246, at *5 (D.N.D. Oct. 14, 2020) ("It is well settled that 'the factual basis of an expert opinion goes to the credibility of the testimony, not the admissibility.' In the Court's view, the differences between the 5064T and 5064 models can be adequately addressed during cross-examination and are not a basis for excluding [the expert's] opinions.").
[7] *See*, *e.g.*, *Joseph v. Doe*, No. CV 17-5051, 2021 WL 2313474, at *5 (E.D. La. June 7, 2021) ("Any questions relating to the bases and sources of [the expert's] opinion affect the weight of the evidence rather than its admissibility and should be left for the finder of fact. The Court is confident that vigorous cross-examination will assist the jury in evaluating his testimony.").

conclusions based on that analysis are factual matters to be determined by the trier of fact[.]"[8]

Why do courts repeat these mistaken statements? An examination by Lawyers for Civil Justice into the "DNA" of these cases reveals that many misunderstandings are recycled statements traceable to pre-2000 case law that Rule 702 rejected.[9] For example, in *In re: Bair Hugger Forced Air Warming Devices Prods. Liab. Litig.*,[10] the court relied on a hand-me-down statement that an expert's factual basis is a matter of weight and not admissibility pulled from *United States v. Coutentos*,[11] which cribbed the same passage from *Hartley v. Dillard's, Inc..,*[12] which had taken the statement from *Hose v. Chicago Northwestern Transp. Co.*,[13] which was in turn copied from *Loudermill v. Dow Chem. Co.*,[14] which was written in 1988—twelve years before Rule 702 established the current standard. Reliance on this outdated articulation led the Eighth Circuit to overturn the district court's admissibility ruling as a violation of the "'general rule' that deficiencies in an expert's factual basis go to the weight and not admissibility[.]"[15]

Of course, not all courts are making this mistake; many courts read and apply Rule 702 as intended.[16] But the inconsistency—not only between Circuits, but also within them—is, by itself, a compelling reason for a clarifying amendment. The Bayer Corporation has written to the

[8] *See*, *e.g.*, *Immanuel Baptist Church v. City of Chicago*, No. 17-CV-0932, 2021 WL 1722791, at *4 (N.D. Ill. Apr. 30, 2021) ("The City might be right that Rev. Rich could have evaluated more factors discussed in the articles, accounted for the Church's demographics, or could have used a larger or different sample size of comparable churches. But '[t]he soundness of the factual underpinnings of the expert's analysis and the correctness of the expert's conclusions based on that analysis are factual matters to be determined by the trier of fact, or, where appropriate, on summary judgment.' *Smith* [*v. Ford Motor Co.*], 215 F.3d [713,] 718 [(7th Cir. 2000)]."); *Jarrett v. Wright Med. Tech., Inc.*, No. 112CV00064SEBDML, 2021 WL 1165178, at *4 (S.D. Ind. Mar. 26, 2021) ("Although Wright Medical points out several causes Dr. Waldrop failed to consider or failed to provide reasons for discounting, an expert need not eliminate all potential alternative causes for his differential diagnosis. Any such perceived insufficiencies in Dr. Waldrop's testimony can be addressed through vigorous cross-examination as it is well-established that the 'soundness of the factual underpinnings of the expert's analysis and the correctness of the expert's conclusions based on that analysis are factual matters to be determined by the trier of fact[.]'") (quoting *Smith*, 215 F.3d at 718.).

[9] *See* Hon. Fern M. Smith, Report of the Advisory Committee on Evidence Rules (May 1, 1999) at 7, in Advisory Committee On Evidence Rules October 1999 Agenda Book (1999) at 52, available at https://www.uscourts.gov/rules-policies/archives/agenda-books/advisory-committee-rules-evidence-october-1999 ("The proposed amendment and the Committee Note clearly envision a more rigorous and structured approach than some courts are currently employing.").

[10] ___ F.4th ___, No. 19-2899, 2021 WL 3612753, at *5 (8th Cir. Aug. 16, 2021).

[11] 651 F.3d 809, 820 (8th Cir. 2011).

[12] 310 F.3d 1054, 1061 (8th Cir. 2002).

[13] 70 F.3d 968, 974 (8th Cir. 1995).

[14] 863 F.2d 566, 570 (8th Cir. 1988).

[15] *In re: Bair Hugger Forced Air Warming Devices Prods. Liab. Litig.,* 2021 WL 3612753, at *11.

[16] *See*, *e.g.*, *Sardis v. Overhead Door Corp*., ___ F.4th ___, No 20-1411, 2021 WL 3699753, at *7 - *8 (4th Cir. Aug. 20, 2021) (reversing district court's admission of opinion testimony that identified reliability challenges "as only going to weight, not admissibility," and acknowledging Advisory Committee on Evidence Rules' proposed amendment); *In re: Mirena IUS Levonorgestrel-related Prods. Liab. Litig*., 982 F.3d 113, 123 (2d Cir. 2020) ("not only was it appropriate for the district court to take a hard look at plaintiffs' experts' reports, the court was required to do so to ensure reliability.").

Committee that it "has observed great inconsistency in how courts assess proposed opinion testimony."[17] Bayer explains:

> [A] national evidence rule should not give rise to such widely differing understandings of the admissibility standard. The divergent approaches that courts currently take on challenges to the sufficiency of an expert's factual basis and the reliability of the expert's methodological application demonstrate a failure in Rule 702 and the need to clarify proper gatekeeping practices.[18]

The lack of uniformity is "particularly troubling in the MDL context," where "[v]ariations in the application of Rule 702 impact the broader contours of the law, in addition to the outcomes of particular cases."[19] The existence of "divergent approaches" can undermine the rationale for consolidation because "[a] core purpose of the MDL process is to promote uniformity,"[20] and "structural features of MDLs make it more difficult for appellate review to serve as a meaningful tool to address conflicting decisions."[21] The fact that MDL courts "have not been able to reach a consensus on some common questions" under Rule 702 means that "we see the same issues arise again and again."[22]

The Proposed Amendment directly addresses the key difference between Rule 702 and the caselaw it superseded by explicitly requiring the proponent of expert testimony to establish the listed requirements—including that the testimony must be the product of a sufficient factual foundation and reliable principles and methods that are reliably applied to the facts of the case—by a preponderance of the evidence. This solution is broadly supported by lawyers with frequent first-hand experience litigating expert evidence issues all around the country, including the chief legal officers of 50 companies,[23] the U.S. Chamber Institute for Legal Reform,[24] the Federation of Defense & Corporate Counsel,[25] and the International Association of Defense Counsel.[26]

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[17] Letter from Scott S. Partridge, General Counsel, Bayer U.S., to Rebecca A. Womeldorf (Sept. 30, 2020) available at https://www.uscourts.gov/sites/default/files/20-ev-o_suggestion_from_bayer_-_rule_702_1_0.pdf.
[18] *Id*.
[19] Letter from Thomas J. Sheehan, Eva Canaan, and Joshua Glasgow to Rebecca Womeldorf (June 9, 2020) (hereinafter "Sheehan letter") at 18, available at https://www.uscourts.gov/sites/default/files/20-ev-e_suggestion_from_thomas_sheenan_-_rule_702_0.pdf.
[20] *Id*. at 21.
[21] *Id*.
[22] *Id*.
[23] Letter from 50 companies to Rebecca A. Womeldorf, Secretary, Committee on Rules of Practice and Procedure, March 2, 2020, available at https://www.uscourts.gov/sites/default/files/20-ev-b_suggestion_from_50_companies_-_rule_702_0.pdf.
[24] Letter from Harold Kim, President, U.S. Chamber Institute for Legal Reform, to Rebecca A. Womeldorf, Secretary, Committee on Rules of Practice and Procedure, November 9, 2020, available at: https://www.uscourts.gov/sites/default/files/20-ev-cc_suggestion_from_u.s._chamber_institute_for_legal_reform_-_rule_702_0.pdf.
[25] Letter from Elizabeth Lorell, President, Federation of Defense & Corporate Counsel, to the Committee on Rules of Practice and Procedure, June 30, 2020, available at https://www.uscourts.gov/sites/default/files/20-ev-f_suggestion_from_federation_of_defense_and_corporate_counsel_-_rule_702.pdf.
[26] International Association of Defense Counsel, *Comment to the Advisory Committee on Evidence Rules and its Rule 702 Subcommittee In Support of Amending Rule 702 and Its Comments to Achieve More Robust and Consistent Gatekeeping*, July 31, 2020, available at https://www.uscourts.gov/sites/default/files/20-ev-h_suggestion_from_international_association_of_defense_counsel_-_rule_702_0.pdf.

But the Proposed Amendment would be even more effective if it expressly stated that "the court" must determine admissibility—a clarification that would directly address the caselaw's core confusion about the Rule's allocation of responsibility between the judge and the jury. Unfortunately, at its April 30, 2021, meeting, the Committee removed the phrase "[if] the court finds" from its draft amendment.[27] That change rendered the Proposed Amendment less clear. The concerns that led to that deletion were that the language was surplusage or might be interpreted to require findings even in the absence of an objection.[28] But stating that "the court" decides admissibility is far from redundant to the Committee's objective of clarifying and emphasizing that it is the court's responsibility, not the jury's, to weigh the Rule's admissibility factors. And as the Reporter pointed out, "none of the admissibility requirements in the Evidence Rules are triggered without objection,"[29] so there no reason to fear that judges will undertake unnecessary findings when admissibility is stipulated or uncontested. Reinserting the words "[if] the court finds" into the Rule's text is the most straightforward way to state what the Proposed Amendment requires.

II. The Proposed Amendment is Needed to Correct Inaccurate Judicial Misstatements About Rule 702's Policy Purpose

Related to, but separate from, the need to clarify Rule 702's explicit standards, the Proposed Amendment is also necessary to correct commonly repeated judicial mischaracterizations of the Rule's intended policy purpose. The Rules Enabling Act gives the power to make procedural rules—along with the responsibility to explain changes to those rules[30]—to the Supreme Court[31] and the Judicial Conference committees.[32] Frequently, however, individual courts venture into the Committee's prerogative by purporting to imbue the 2000 amendment to Rule 702 with a particular public policy purpose—one that misstates the Rule and the Committee Note. Specifically, courts frequently opine that Rule 702 reflects a policy choice in favor of permissive admission of opinion testimony. Examples are rampant, including:

- "The standards governing admissibility under Rule 702 have been described as 'liberal and flexible,' embracing a general presumption of admissibility, pursuant to which rejection of expert testimony is the exception rather than the rule[.]"[33]

- "Rule 702 should be applied with a 'liberal thrust' favoring admission[.]"[34]

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[27] Advisory Committee on Evidence Rules, Minutes of the Meeting of April 30, 2021, (hereinafter "Draft Minutes"), Standing Committee Agenda Book at 844.
[28] *Id*.
[29] *Id*.
[30] The Rules Enabling Act requires that a rule proposed by a Judicial Conference committee be accompanied by "an explanatory note on the rule, and a written report on the body's action." 28 U.S.C. § 2073(d).
[31] 28 U.S.C. § 2072(a).
[32] 28 U.S.C. § 2073(a) and (b).
[33] *Zsa Zsa Jewels, Inc. v. BMW of N. Am., LLC*, 419 F. Supp. 3d 490, 511-12 (E.D.N.Y. 2019) (quotations and citations omitted).
[34] *Wendell v. GlaxoSmithKline LLC*, 858 F.3d 1227, 1232 (9th Cir. 2017) (quoting *Messick v. Novartis Pharm. Corp.*, 747 F.3d 1193, 1196 (9th Cir. 2014)); *Parks v. Ethicon, Inc.*, No. 20-CV-989 TWR (RBB), 2020 WL 6118774, at *2 (S.D. Cal. Oct. 16, 2020) (quoting *Wendall*); *McMorrow v. Mondelez Int'l, Inc.*, No. 17-CV-2327-BAS-JLB, 2020 WL 1237150, at *4 (S.D. Cal. Mar. 13, 2020) (quoting *Messick*). *See also Fed. Energy Regulatory*

- Courts should exclude opinion testimony "only if it is so fundamentally unsupported that it can offer no assistance to the jury."[35]

- "There is a presumption that expert testimony is admissible, and the rejection of such testimony is the exception rather than the rule."[36]

- "Rule 702 is a rule of admissibility rather than exclusion."[37]

Perhaps the most extreme version of this court-as-rule-policy-setter phenomenon is reflected in a recent ruling observing that, in the Ninth Circuit, district courts "must account for the fact that a wider range of expert opinions (arguably much wider) will be admissible in this circuit."[38] This is not merely a judicial interpretation of Rule 702's text; rather, it reflects a public policy decision that Rule 702's meaning in the Ninth Circuit differs not only from the other circuits, but is also intentionally at odds with the meaning that the Committee, the Supreme Court, and Congress have established pursuant to the Rules Enabling Act.

The Committee should confront the policy dicta problem directly and declare that the preponderance test displaces any other conception of the burden of production—just as it proposes doing with the other-side-of-the-coin situation of some courts' purporting to infuse a higher hurdle to admissibility than the Rule provides. The Proposed Note says: "Unfortunately,

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Comm'n v. Silkman, No. 1:16-CV-00205-JAW, 2019 WL 6467811, at *5 (D. Me. Dec. 2, 2019) (When the "adequacy of the foundation for the expert testimony is at issue, the law favors vigorous cross-examination over exclusion.") (citation omitted); *Hogland v. Town & Country Grocer of Fredericktown Missouri, Inc*., No. 3:14CV00273 JTR, 2015 WL 3843674, at *1 n.4 (E.D. Ark. June 22, 2015) ("Rule 702 favors admissibility if the testimony will assist the trier of fact, and doubts regarding whether an expert's testimony will be useful should generally be resolved in favor of admissibility.") (citation omitted).

[35] *See*, *e.g*., *MPAY Inc. v. Erie Custom Computer Apps., Inc*., No. 19-704, 2021 WL 3661507, at *1 (D. Minn. Aug. 18, 2021) (quoting *Bonner v. ISP Techs., Inc*., 259 F.3d 924, (29-30 (8th Cir. 2001)); *Owen*, 2020 WL 6684504, at *4 -*5 (quoting *Loudermill*, 863 F.2d at 570);; *Coffin*, 2020 WL 5552113, at *2 (quoting *Brown v. Wal–Mart Stores, Inc.*, 402 F. Supp. 2d 303, 309 (D. Me. 2005)); *Cent. Transp., LLC v. Thermofluid Techs., Inc.*, No. 3:18-CV-80-TWP-DCP, 2020 WL 50393, at *8 (E.D. Tenn. Jan. 3, 2020) (quoting *Hartley v. Dillard's, Inc.*, 310 F.3d 1054, 1061 (8th Cir. 2002)); *Beebe v. Colorado*, No. 18-CV-01357-CMA-KMT, 2019 WL 6044742, at *6 (D. Colo. Nov. 15, 2019) (quoting with emphasis *First Union Nat. Bank v. Benham*, 423 F.3d 855, 862 (8th Cir. 2005)).

[36] *Cates v. Trustees of Columbia Univ.*, 16 Civ. 6524 (GBD)(SDA), 2020 WL 1528124, at *6 (S.D.N.Y. Mar. 30, 2020) (citing *Borawick v. Shay*, 68 F.3d 597, 610 (2d Cir. 1995)). *See also Rella v. Westchester BMW, Inc.*, No. 7:16-CV-916 (JCH), 2019 WL 10270223, at *5 (D. Conn. Sept. 30, 2019) ("This gatekeeping function 'is tempered by the liberal thrust of the Federal Rules of Evidence and the 'presumption of admissibility.'") (quoting *Bunt v. Altec Indus., Inc.*, 962 F. Supp. 313, 317 (N.D.N.Y. 1997) and *Borawick*, 68 F.3d at 610); *Price v. General Motors, LLC*, No. CIV-17-156-R, 2018 WL 8333415, at *1 (W.D. Okla. Oct. 3, 2018) ("[T]here is a presumption under the Rules that expert testimony is admissible.") (quotation omitted); *Chapman v. Tristar Prods., Inc*., No. 1:16-CV-1114, 2017 WL 1718423, at *1 (N.D. Ohio Apr. 28, 2017) ("Under this liberal approach, expert testimony is presumptively admissible."); *Advanced Fiber Techs. Tr. v. J & L Fiber Servs., Inc.*, No. 1:07-CV-1191 LEK/DEP, 2015 WL 1472015, at *20 (N.D.N.Y. Mar. 31, 2015) ("In assuming this [gatekeeper] role, the Court applies a 'presumption of admissibility.'") (quoting *Borawick*, 68 F.3d at 610); *Martinez v. Porta*, 598 F. Supp. 2d 807, 812 (N.D. Tex. 2009) ("Expert testimony is presumed admissible").

[37] *Lampton v. C. R. Bard, Inc.*, No. 4:19-CV-00734-NKL, 2020 WL 7081107, at *2 (W.D. Mo. Dec. 3, 2020) (quoting *Lauzon v. Senco Prods., Inc.*, 270 F.3d 681, 686 (8th Cir. 2001)); *Metro Sales, Inc. v. Core Consulting Grp., LLC*, 275 F. Supp. 3d 1023, 1062 (D. Minn. 2017) (same).

[38] *In re Roundup Products Liability Litigation*, 358 F. Supp. 2d 956, 960 (N.D. Cal. 2019).

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." If the Note is going to address the (relatively rare) issue of courts' putting too strict of a gloss on the Rule, it is equally, if not even more, important for the Note to correct the much more pervasive problem of courts' spinning the Rule's policy balance to favor overly permissive admission. This is fundamental to the Committee's intended effect of the Proposed Amendment, which will not be achieved if courts continue to opine that Rule 702 reflects a policy judgment favoring admissibility.

III. A Plainspoken Committee Note Is Necessary to Help Readers "Get it Right"—And That Means Identifying the Three Wellsprings of Inaccurate Rule 702 Application

The Rules Enabling Act requires the Committee to provide "an explanatory note on the rule" whenever it recommends a rule change.[39] Explaining amendments in plainspoken language, of course, helps courts, practitioners, and parties understand and follow the rules. But there is a particularly compelling reason why the Note accompanying the Proposed Amendment should be precise: clarification is the purpose of the Proposed Amendment, and the need for clarification comes from the very fact that the current Rule and Note have proven too complicated. As the Reporter described to the Committee in November 2020, readers of the current Note become lost by the need consult several sources to piece together the Rule's meaning:

> Litigants and judges need to look to a footnote in *Daubert* providing that FRE 104(a) governs Rule 702 determinations and then to FRE 104(a) (which does not actually explicitly set out a preponderance of the evidence standard) and then to the Supreme Court's decision in *Bourjaily* (which interprets Rule 104(a) as requiring a preponderance) to learn that such findings are to be made by the trial judge by a preponderance of the evidence. The Reporter explained that this circuitous route to the preponderance standard is a subtle one that has been missed by many courts and that an amendment to Rule 702 could improve decision making by expressly stating the applicable standard of proof.[40]

Although the Proposed Amendment and Note are certainly an improvement over the status quo, readers will still have to travel a "circuitous route" to find the Rule's meaning unless the Note plainly states that the Proposed Amendment rejects the caselaw that led the Committee to amend the Rule. If the Committee intends the Proposed Amendment to reject that caselaw – and it does[41] – then it should say so straightforwardly in the Note, and include citations to the three most common sources of that caselaw: *Loudermill v. Dow Chem. Co*.,[42] *Viterbo v. Dow Chem. Co.*,[43] and *Smith v. Ford Motor Co*.[44] Doing so would place the Proposed Amendment's meaning in one place and where it belongs: the Note. Without this honesty, the Note will fail to serve those who turn to it for understanding—and may not resolve the problem that is so

[39] 28 U.S.C. § 2073(d).
[40] Advisory Committee on Evidence Rules, Minutes of the Meeting of November 13, 2020, April 30, 2021 Agenda Book at 18.
[41] Draft Minutes, Standing Committee Agenda Book at 845 ("It was those incorrect applications that led to a draft amendment emphasizing the Rule 104(a) standard that already governed the Rule.").
[42] 863 F.2d 566 (8th Cir. 1988).
[43] 826 F.2d 420 (5th Cir. 1987).
[44] 215 F.3d 713 (7th Cir. 2000).

pervasive that courts in every federal circuit have failed to comprehend it.[45] As recently as August 16, 2021—weeks after the Proposed Amendment was made public—the Eighth Circuit relied squarely on the archaic and inaccurate *Loudermill* opinion to reverse a district court's determination that proffered expert testimony failed to meet Rule 702's standards.[46]

The Note should not sacrifice accuracy for the sake of preventing unintentional slights. When the Committee removed draft rule language clarifying that incorrect rulings "are rejected by this amendment," it did so not for the sake of clarity, but rather out of a sentiment not to "come down

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[45] First Circuit: *See*, *e.g.*, *Milward v. Acuity Specialty Prods. Grp., Inc.*, 639 F.3d 11, 22 (1st Cir. 2011) (quoting *Smith*); *Coffin v. AMETEK, Inc.*, No. 2:18-CV-472-NT, 2020 WL 5552113, at *2 (D. Me. Sept. 16, 2020) (reiterating *Loudermill* language); *Irish v. Fowler*, No. 1:15-CV-00503-JAW, 2019 WL 1179392, at *8 (D. Me. Mar. 13, 2019) (same). Second Circuit: *See*, *e.g.*, *Feliciano v. CoreLogic Saferent, LLC*, No. 17 CIV. 5507 (AKH), 2020 WL 6205689, at *3 (S.D.N.Y. June 11, 2020) (referencing *Loudermill* pronouncement); *Chill v. Calamos Advisors LLC*, 417 F. Supp. 3d 208, 246 (S.D.N.Y. 2019) (same); *Clark v. Travelers Companies, Inc.*, No. 216CV02503ADSSIL, 2020 WL 473616, at *5 (E.D.N.Y. Jan. 29, 2020) (same). Third Circuit: *See*, *e.g.*, *First Union Nat. Bank v. Benham*, 423 F.3d 855, 862 (8th Cir. 2005) (quoting language that originated in *Loudermill*); *United States v. Kraynak*, No. 4:17-CR-00403, 2020 WL 6561897, at *7 (M.D. Pa. Nov. 9, 2020) (same); *UPMC v. CBIZ, Inc.*, No. 3:16-CV-204, 2020 WL 2736691, at *5 (W.D. Pa. May 26, 2020) (paraphrasing *Loudermill* statement). Fourth Circuit: *See*, *e.g.*, *Patenaude v. Dick's Sporting Goods, Inc.*, Case No. 9:18-CV-3151-RMG, 2019 WL 5288077, at *2 (D.S.C. Oct. 18, 2019) (referencing language that originated in *Loudermill*); *Ward v. Autozoners*, LLC, Case No. 7:15-CV-164-FL, 2018 WL 10322906, at *3 (E.D. N.C. Apr. 16, 2018) (*Viterbo* statement); *Krakauer v. Dish Network, L.L.C.*, No. 1:14-CV-333, 2015 WL 5227693, at *11 (M.D.N.C. Sept. 8, 2015) (quoting *Smith*). Fifth Circuit: *See*, *e.g.*, *Hale v. Denton Cty.*, No. 4:19-CV-00337, 2020 WL 4431860, at 4 (E.D. Tex. July 31, 2020) (quoting *Viterbo*); *Trevelyn Enterprises, L.L.C. v. SeaBrook Marine, L.L.C.*, No. CV 18-11375, 2020 WL 6822555, at *2 (E.D. La. Nov. 20, 2020) (quoting statement that originated in *Viterbo*); *Fogleman v. O'Daniels*, No. 1:16-CV-210-JCG, 2017 WL 11319287, at *2 (S.D. Miss. Dec. 5, 2017) (quoting *Viterbo*). Sixth Circuit: *See*, *e.g.*, *Cent. Transp., LLC v. Thermofluid Techs., Inc.*, No. 3:18-CV-80-TWP-DCP, 2020 WL 50393, at *8 (E.D. Tenn. Jan. 3, 2020) (referencing statement that originated in *Loudermill*); *Wischermann Partners, Inc. v. Nashville Hosp. Capital LLC*, No. 3:17-CV-00849, 2019 WL 3802121, at *1, *3 (M.D. Tenn. Aug. 13, 2019) (quoting language that originated in *Loudermill*). Seventh Circuit: *See*, *e.g.*, *Hostetler v. Johnson Controls, Inc.*, No. 3:15-CV-226 JD, 2020 WL 5959811, at *4 (N.D. Ind. Oct. 8, 2020) (quoting *Smith*); *Stapleton v. Union Pac. R.R. Co.*, No. 16-CV-00889, 2020 WL 2796707, at *6 (N.D. Ill. May 29, 2020) (same); *Bakov v. Consol. World Travel, Inc.*, No. 15 C 2980, 2019 WL 1294659, at *12 (N.D. Ill. Mar. 21, 2019) (same). Eighth Circuit: *See*, *e.g.*, *David E. Watson, P.C. v. United States*, 668 F.3d 1008, 1014 (8th Cir. 2012) (quoting statement that originated in *Loudermill*); *Nebraska Plastics, Inc. v. Holland Colors Am., Inc.,* 408 F.3d 410, 416 (8th Cir.2005) (same); *Owen v. Union Pac. R.R. Co.*, No. 8:19CV462, 2020 WL 6684504, at *4 (D. Neb. Nov. 12, 2020) (quoting *Loudermill*); *Jayne v. City of Sioux Falls*, No. 4:18-CV-04088-KES, 2020 WL 2129599, at *7 (D.S.D. May 5, 2020) (same). Ninth Circuit: *See*, *e.g.*, *Hangarter v. Provident Life & Acc. Ins. Co.*, 373 F.3d 998, 1017 at n.14 (9th Cir. 2004) (referencing statement that originated in *Loudermill*); *A.B. v. Cty. of San Diego*, Case No.: 18cv1541-MMA-LL, 2020 WL 4431982, at *9 (S.D. Cal. July 31, 2020) (same); *In re Crash of Aircraft N93PC on July 7, 2013 at Soldotna, Alaska*, No. 3:15-cv-0112-HRH, 2020 WL 1956823, at *6 (D. Alaska Apr. 22, 2020) (same). Tenth Circuit: *See*, *e.g.*, *Beebe v. Colorado*, No. 18-CV-01357-CMA-KMT, 2019 WL 6044742, at *6 (D. Colo. Nov. 15, 2019) (quoting statement that originated in *Loudermill*); *Thompson v. APS of Oklahoma, LLC*, No. CIV-16-1257-R, 2018 WL 4608505, at *5 n.15 (W.D. Okla. Sept. 25, 2018) (same). Eleventh Circuit: *See*, *e.g.*, *Ocasio v. C.R. Bard, Inc.*, No. 8:13-CV-1962-T-36AEP, 2020 WL 7586930, at *7 (M.D. Fla. Dec. 22, 2020) (referencing statement that originated in *Loudermill*); *Banks v. McIntosh Cty.*, No. 2:16-CV-53, 2020 WL 6873607, at *6 (S.D. Ga. Nov. 23, 2020) (quoting *Viterbo*); *Garcia v. Scottsdale Ins. Co.*, No. CV 18-20509-CIV, 2019 WL 1318090, at *2 (S.D. Fla. Mar. 22, 2019) (same); *Ward v. Carnival Corp.*, No. 17-24628-CV, 2019 WL 1228063, at *11 (S.D. Fla. Mar. 14, 2019) (quoting *Smith*). D.C. Circuit: *See*, *e.g.*, *Sherrod v. McHugh*, 334 F. Supp. 3d 219, 261 (D.D.C. 2018) (quoting *Viterbo*). Federal Circuit: *Apple Inc. v. Motorola, Inc.*, 757 F.3d 1286, 1320 (Fed. Cir. 2014), *overruled on other grounds by Williamson v. Citrix Online, LLC*, 792 F.3d 1339 (Fed. Cir. 2015) (quoting *Smith*).

[46] *See In re: Bair Hugger Forced Air Warming Devices Prods. Liab. Litig.*, ___ F.4th ___, No. 19-2899, 2021 WL 3612753, at *5, *11 (8th. Cir. Aug. 16, 2021).

too hard on federal judges" or to "treat federal judges too harshly in connection with their application of Rule 702."[47] The Committee also declined the suggestion[48] to specify the three wellsprings of errant caselaw by name "for that very reason."[49] There are three very compelling reasons to revisit that decision. First, it is simply accurate, not harsh, to state that the Proposed Amendment rejects those cases. Second, it is axiomatic in law that identifying errors is not only necessary to avoiding them, but is the way to avoid them.[50] Third, the Note should be written for people who are looking to "get it right" by providing the information they need to do so. Specifying the three viral sources of incorrect Rule 702 application serves the future-facing purpose of alerting readers how to avoid perpetuating error, not any rearward-looking notion of placing blame. There is nothing new about citing cases in committee notes; it is a proven, effective practice.[51] The Note has only one (congressionally required) purpose—to explain the intent of the Proposed Amendment—and the Committee should honor and fulfill that purpose without making unnecessary compromises for the sake of optics. Leaving unstated that following *Loudermill*, *Viterbo* or *Smith* is error would compromise the readers' understanding of the Proposed Amendment.

IV. The Proposed Amendment Is the Appropriate Way to Address "Overstatement"

Although the proposed change to 702(d) is "slight,"[52] and applies mostly to the subset of experts known as forensic experts,[53] it is nevertheless a worthwhile and appropriate reminder that the court's gatekeeping function does not cease once an initial admissibility ruling is made. The Proposed Note explains the rule change by clarifying and emphasizing the current standard that: "a trial judge must exercise gatekeeping authority with respect to the opinion ultimately expressed by a testifying expert. A testifying expert's opinion must stay within the bounds of what can be concluded by a reliable application of the expert's basis and methodology."[54] This is a clear statement of current law that, together with the modest textual changes to the Rule, will be helpful to courts and counsel alike.

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[47] Draft Minutes, Standing Committee Agenda Book at 845, 846-67.

[48] Lawyers for Civil Justice, *A Note About The Note: Specific Rejection Of Errant Case Law Is Necessary For The Success Of An Amendment Clarifying Rule 702's Admissibility Requirements*, available at https://www.uscourts.gov/sites/default/files/21-ev-a_suggestion_from_lcj_-_rule_702_0.pdf.

[49] Draft Minutes, Standing Committee Agenda Book at 845.

[50] The legal aphorism, "*Errores ad sua principia referre, est refellere*" means "To refer errors to their sources is to refute them" or "To bring errors to their beginning is to see their last." Black's Law Dictionary.

[51] *See*, *e.g.*, Fed. R. Civ. P. 37, Notes of Advisory Committee on 2015 Amendment:

> Subdivision (e)(2). This subdivision … is designed to provide a uniform standard in federal court for use of these serious measures when addressing failure to preserve electronically stored information. It rejects cases such as *Residential Funding Corp. v. DeGeorge Financial Corp.*, 306 F.3d 99 (2d Cir. 2002), that authorize the giving of adverse-inference instructions on a finding of negligence or gross negligence. (emphasis added)

[52] Memo from the Honorable Patrick J. Schiltz, Chair, Advisory Committee on Evidence Rules, to the Honorable John D. Bates, Chair, Committee on Rules of Practice and Procedure, May 15, 2021, Preliminary Draft at 297.

[53] Proposed Note, Preliminary Draft at 311.

[54] *Id*.

V. In Keeping with the Committee's Educational Function, It Should Nudge the Bench and Bar to Abandon the Jargon of "*Daubert*" in Favor of Referring to "Rule 702"

The nearly ubiquitous use of the case name "*Daubert*" as slang for expert evidence standards is undoubtedly part of the problem that the Committee's Proposed Amendment is designed to address. Words matter, and the inaccurate nomenclature of "*Daubert* motions" and "*Daubert* hearings" misdirects judges and lawyers alike from the actual source of those standards: Rule 702.[55] Although the Committee (alas!) has no dominion over legal slang, it nevertheless has an important opportunity consistent with its educational mission to improve the understanding of, and adherence to, the Rule by urging stakeholders to make reference to "Rule 702" rather than "*Daubert*" in the appropriate context. As the amendment process proceeds, discussions about expert evidence are taking place in courts, law firms, bar meetings, and virtual classrooms all around the country. People are noticing the vernacular of expert evidence and some of them are changing their phrasing.[56] In a profession known for its precise use of words, our language should reflect that Rule 702, not a single case or even case law generally, sets the standards for admissibility of expert evidence. The Committee explained in 2000 that Rule 702 is not simply a "codification" of *Daubert,* but in fact was drafted to remedy the widely differing approaches courts were taking under *Daubert* and its progeny.[57] The public comment process and (presumably) subsequent adoption of an amendment provide the Committee an important opportunity to encourage proper understanding of the Rule by nudging the bench and bar to say "Rule 702" rather than "*Daubert*" to reference expert admissibility standards.

CONCLUSION

The Committee has correctly concluded that "emphasizing the preponderance standard in Rule 702 specifically was made necessary by the courts that have failed to apply correctly the reliability requirements of that Rule."[58] The Committee's Proposed Amendment is a much-needed clarification that will help courts and counsel alike to understand and adhere to the Rule's standards, particularly in jurisdictions where courts have erroneously characterized Rule 702 as reflecting a policy choice favoring a "presumption of admissibility." Although the Proposed Amendment as written would effect a substantial improvement, the Committee should improve it by expressly stating that "the court" makes the admissibility determination and clarifying in the Note that the amendment rejects contrary case law, specifically including the three wellspring cases that underly most of the recent rulings that are inconsistent with the Rule. In the meantime, the Committee should take advantage of the attention garnered by the amendment process to educate the bench and bar how abandoning the slang use of "*Daubert*" would help everyone focus on, and understand, Rule 702.

[55] Alex R. Dahl, *Amend Rule 702 To Clarify Expert Witness Standards*, Law360 (July 12, 2012), available at https://www.law360.com/articles/1401793.
[56] *See*, *e.g.*, Bexis, *Don't Say Daubert*, Drug and Device Blog, Aug. 16, 2021, available at https://www.druganddevicelawblog.com/2021/08/dont-say-daubert.html.
[57] Fed. R. Evid. 702 Committee Note.
[58] Proposed Note, Standing Committee Agenda Book at 837.

TAB 5

JANUARY 21, 2002 HEARING ON PROPOSED AMENDMENT TO EVIDENCE RULE 702

Written Testimony of Ronni Fuchs, Esq.

Members of the Advisory Committee, thank you for the opportunity to speak with you in support of the proposed amendment to Rule 702. My name is Ronni Fuchs I am a partner at Troutman Pepper, a national firm. I have almost 30 years of experience defending product liability actions with a focus on science and expert witnesses. I have significant experience with Rule 702 challenges to experts. I have observed first-hand the misunderstanding of the Rule that leads to disparate decisions and the effects on not only litigation, but also on client decision-making.

I expect others spoken as to the direct effect of the misunderstanding of the Rule that leads courts to reject challenges to experts on the basis that there is a "policy favoring admission" or that exclusion must be "the exception rather than the rule." And others have provided background on the inconsistency in the federal courts, even within the same circuit. I would like to address these issues from a slightly different perspective, which is that of an attorney advising clients on litigation involving expert admissibility.

Though I have spent my career at large firms, I have counseled and litigated on behalf of both large and small companies. In my experience, as clients face litigation, they are looking for predictability. The framework of the Rules permits some measure of that.

In my world, where all cases turn on scientific evidence, the expert phase of litigation is pivotal. My clients are usually facing novel claims based on complex scientific analyses. For that reason, whether there is a common understanding of the burden of proof for the party putting forward expert opinion is critical as parties evaluate litigation. The process of analyzing the scientific support proffered by those making these novel claims is both lengthy and costly. I suspect many have seen the fruit of this work – which can be briefing, but also can involve hearings with testimony from expert witnesses. What you may not see is the work – sometimes years of work – that goes into preparing for what is ultimately presented to the courts.

Litigants faced with new claims must decide whether to invest in experts of their own to challenge unreliable methodologies or applications of methods, and whether to do the work to present these arguments to the courts. As clients consider this process, they ask what standard will apply to the experts. As it stands today, federal judges do not apply the Rule using the same standard. And I have to counsel clients that there is a risk that no matter that the experts proffered against them would not be admissible if the court held the proffering party to the standard of Rule 702 – that its expert's opinion is the product of reliable principles and methods and that the expert has reliably applied the principles and methods to the facts of the case – some federal courts nonetheless misapply the Rule. They do so by citing case law to the effect that the standard for expert testimony is a liberal one, suggesting this embodies a presumption against exclusion. This "presumption" – which is not found in the Rule – operates to blunt the consideration of the exclusion of unreliable evidence. And/or they do so by finding that failures

of reliability go to the credibility, rather than the admissibility of the expert's testimony – again failing to exclude unreliable evidence.

For clients, this failure of uniform understanding of the admissibility standard frustrates the goal of rational decision-making. For litigants facing these decisions, having clarification of the Rule that corrects any misunderstanding of the court's role is critical. The proposed amendments to Rule 702 and the Advisory Committee Notes are essential to clear up the misunderstanding of what the Rule requires of federal judges and to state unambiguously their obligation to scrutinize the scientific methodology and reliability of expert opinion, not presume its admissibility or permit its presentation to jurors.

TAB 6

HAUSFELD

James Gotz
Partner

One Marina Park Drive
Suite 1410
Boston, MA 02210

T: (617) 207-0600
F: (617) 830-8312

E: jgotz@hausfeld.com

January 14, 2022

To: Advisory Committee on Evidence Rules

From: James D. Gotz, Esq., Hausfeld LLP

Re: JANUARY 21, 2022 HEARING ON PROPOSED AMENDMENTS TO EVIDENCE RULES

Date: January 14, 2022

Dear Advisory Committee members:

My name is James Gotz. Based in Boston, Massachusetts, I'm a partner with the firm Hausfeld LLP, which represents plaintiffs in product liability, environmental, consumer protection and antitrust civil litigation. Since approximately the time of the amendment to Federal Rule of Evidence ("FRE") 702 in 2000, I have litigated and argued in opposition to -- or sometimes in support of affirmative -- *Daubert* motions on behalf of plaintiffs in pharmaceutical Multi-District Litigation across the country, as well as other complex civil matters in my home federal jurisdiction in Boston.

I write to share comments concerning the Committee's proposal to clarify FRE 702, and in particular, to offer two pragmatic-driven sentences to add to the proposed Committee Note.

During the past 20-plus years, I've followed the evolution of *Daubert* case law, while also observing how the federal bench has worked to understand, consider and judicially manage as best as possible the scientific and legal issues presented at this often game-changing stage of cases like mine. The following is based upon my experience and observations from the *Daubert* trenches, motivated by a desire to see published the clearest and most useful Committee Note to best guide the bench and bar's practice under this rule.

For pharmaceutical product liability cases, *Daubert* motions involve: complex scientific subjects; stacks of technical articles, studies and data; highly qualified dueling experts on both sides (often with polar opposite views); and highly sophisticated teams of "science" lawyers who, in many cases, have dedicated their careers to *Daubert* litigation practice. It is not unusual for the Article III judge to be the one in the courtroom feeling like the least experienced and knowledgeable participant about the scientific substance at issue during these hearings, whether as a newer member of the bench or due to limited experience with these motions and/or subject matter. In many of my own cases, the presiding judge has openly expressed this truth. And even the most *Daubert*-experienced judges are regularly exposed anew to case-specific nuances and details concerning scientific concepts they may have previously encountered.

In short, understanding the technical and legal issues presented in *Daubert* motions, so to properly resolve them in accordance with FRE 702, is a high challenge for most Federal judges. Just as it is that an expert's ultimate scientific opinion is necessarily a judgment made after weighing scientific evidence through a reliable application of applicable scientific method[i], so too the judge's approach to ruling on a *Daubert* motion is necessarily a matter of judgment, after proper consideration of the parties' competing presentations of the science.

I am sympathetic with a judge's task in these matters, and, given the above, it would not surprise me that, despite best efforts and intentions, some judges, from time to time, may be "getting it wrong". So this Committee's effort to clarify the rule should be, and from my review of the proceedings to date, has been animated by a desire to help best guide the Federal bench -- and litigants -- to ensure that first principles are met here: "first, do no harm" to the existing Rule and *Daubert* practice, while improving the overall success of the Federal bench in getting it right when resolving these motions.

Since my initial exposure to *Daubert* motion practice, I've looked for guidance more to the 2000 Committee Note than to any other single source material, and I suspect that many other litigants and members of the bench have done and continue to do likewise. I predict that the Committee Note to the proposed clarifications to FRE 702 will be just as important over time as the Rule itself. This comment therefore focuses on the proposed Note to accompany the clarified Rule. I propose two additional sentences, to further guide the bench and bar on how to understand and best implement the clarified Rule.

Proposal No. 1: Additional Guidance for Assessing "Weight v. Admissibility"

I have followed with interest the Committee's discussion and consideration of how best to offer guidance in the Note for assessing when supporting information presented by the proponent properly goes to the weight to be considered by the jury, versus when it more properly presents a question of admissibility (which again, is necessarily a judgment for the Court to make). Currently the draft Note offers one example: "*For example, if the court finds by a preponderance of the evidence that an expert has a sufficient basis to support an opinion, the fact that the expert has not read every single study that exists will raise a question of weight and not admissibility*."

I'm aware that the Committee has asked litigants for additional or better examples. My concern is that any example that finds its way into the final version of the Note is probably limited in its utility, depending on the context of the litigants' case. And that is because every case is, of course, different in myriad ways: the science is different; the type and nature of the science that may (or may not) matter at the end of the day is different; and the nature of the litigant's challenge is different. Whether it's a court newer to *Daubert* motion practice, a *Daubert*-seasoned judge, or a sophisticated litigant looking to create mischief, an example or two in the Note may have the unintended consequence of becoming not just an example, but instead understood/argued to represent a definitive "if/then" rule, without more guidance.

The guidance I believe is missing and warranted, is perhaps obvious to the seasoned court and practitioner but possibly not others: when deciding between weight and admissibility, context always matters. Just to make the point, using the Committee's current example, if the expert failed to read the most relevant, best-designed, largest study with the most robust results, might a judge be justified in finding that failure goes beyond "weight"? This is admittedly intended to be an extreme example, only to emphasize that there likely is no one example that will work for all cases to show when something goes to weight versus admissibility.

And that is why, I respectfully suggest, whether one or more examples are ultimately deemed useful for inclusion in the Note, a sentence consistent with the below should immediately follow them:

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

Proposal No. 2: Reference to the 2000 Committee Note as Relevant and Continuing Guidance

My second proposed addition to the Committee Note would underscore the continued relevance of the 2000 Committee Note. The current draft Note appropriately makes clear that the **proposed Rule language does not add or create a new or changed Rule** but, rather, acts to "clarify" and "emphasize" certain aspects of the existing Rule. That is how the Rule language should be received by the bench and bar. However, I've read and heard statements from members of the defense bar in recent months, to the effect that: (a) the Committee is in fact creating a "new rule"; and (b) motions should not be referred to any longer as a "*Daubert* motion" but rather, a "702 motion" given the Committee's proposed "changes" to the Rule. One can predict that, if such an argument is permitted to be advanced in motion practice, the unintended and potentially dire consequence could be for a Court to be led to believe it would be inappropriate, or worse, contrary to Rule 702 as amended, to continue to be guided by the detailed, helpful and continued relevance of the 2000 Committee Note. By its express terms, the 2000 Note explains how the amendment to FRE 702 in 2000 was made to conform the Rule to the Supreme Court's decision in *Daubert* and its progeny.[ii] The decisions and commentary in the 2000 Note remain centrally guiding to motion practice under the proposed clarifications to the Rule, and, therefore, the 2000 Note should remain available to the bench and litigants as a relevant and available source of guidance. A sentence to make this important point could be added to the final paragraph of the new Note, perhaps as follows:

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.

Thank you for the Committee's efforts to date, and your consideration of these comments.

Sincerely,

James D. Gotz, Esq.

[i] See, e.g., Federal Judicial Center, *Reference Manual on Scientific Evidence*, 3rd Ed. (2011), pp. xiv, 20, 21, 222, 553,565,591,598,599 and 600.

[ii] "Rule 702 has been amended in response to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and to the many cases applying *Daubert*, including *Kumho Tire Co. v. Carmichael*, 119 S.Ct. 1167 (1999)."

TAB 7

James T. Terrell*
Wayne Hogan*
T. Edward McClamma #
Evan J. Yegelwel*^
Christopher G. Burns
Anita L. Clark •
Alan M. Pickert ^
Leslie A. Goller
Angelo M. Patacca, Jr.*
Christopher Shakib *
Bruce A. Maxwell #
Matthew W. Sowell †
Leslie Scott Jean-Bart #
Fadi M. Chakour ✠
Bradley Bodiford

TERRELL • HOGAN

To: Advisory Committee on Evidence Rules

From: Wayne Hogan, Terrell Hogan Yegelwel, P.A.

Re: JANUARY 21, 2022 HEARING ON PROPOSED AMENDMENTS TO EVIDENCE RULES

Date: January 14, 2022

As background, I presented The Florida Bar Code and Rules of Evidence Committee's views on the rules governing expert opinion testimony to the Supreme Court of Florida when adoption of the federal approach was under consideration; whether and how Rule 702 might change will have effects in many more trials than those that will occur in the federal district courts.

As requested, I have set out below the basics of my brief testimony:

- If the text of Rule 702 needs to be amended, the resulting text should be correct.
- An amended Rule 702 should not have to be corrected by a Committee Note
- One should not have to read to the end of a Committee Note to learn that the Advisory Committee on Evidence Rules did not mean "evidence" when it used the phrase "preponderance of the evidence" in amended Rule 702 but, in reality, meant "information."
- Many states model their evidence rules on the Federal Rules, and many do so by statute. State evidence statutes set out rules, not commentary.
- The Advisory Committee must have an eye on posterity; a rule proposed by the Committee should need neither a clarifying explanation nor reference to "legislative history."

TERRELL HOGAN YEGELWEL, P.A.
Attorneys at Law
Phone-904-632-2424
Fax-904-632-2027
233 East Bay Street
Blackstone Building, 8th Floor
Jacksonville, FL 32202
www.terrellhogan.com
* Board Certified Civil Trial Lawyer
† Also Admitted in Alabama
# Also Admitted In Georgia
• Also a Registered Nurse
^ Also Admitted In Washington, DC
✠ Also a Medical Doctor

TAB 8

January 14, 2022

Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, D.C. 20544

Re: Testimony on the Proposed Amendments to Federal Rule of Evidence 702, January 21, 2022

Dear Committee Members:

Lawyers for Civil Justice (LCJ) conducted a comprehensive research study examining over 1,000 federal cases decided in 2020 that addressed the admissibility of expert testimony under Federal Rule of Evidence 702. This research was compiled into a comment and was filed with this Committee during the public comment period. *See* Kateland R. Jackson & Andrew J. Trask, "Federal Rule of Evidence 702: A One-Year Review and Study of Decisions in 2020," Lawyers for Civil Justice (filed September 30, 2021) (attached).

As a Fellow with LCJ, I plan to discuss the filed comment and the results of this research with the Committee during the public hearing on January 21, 2022. As noted in the filed comment, the research results demonstrate that federal courts inconsistently apply the proponent's burden of proof when admitting expert evidence under Rule 702. In the majority of cases reviewed, the court did not explicitly require the proponent of expert testimony to satisfy a burden of proof prior to admitting evidence. Many courts instead described a presumption favoring admissibility of expert evidence, in direct conflict with the intent of Rule 702. Perhaps most strikingly, the research demonstrates that some federal courts approach questions of expert admissibility by applying conflicting standards of proof.

I look forward to discussing the impact of this research further with the Committee.

Thank you,

Kateland Jackson

FEDERAL RULE OF EVIDENCE 702: A ONE-YEAR REVIEW AND STUDY OF DECISIONS IN 2020

September 30, 2021

Kateland R. Jackson – Fellow, Lawyers for Civil Justice[1]
Associate, Shook Hardy & Bacon L.L.P. (Washington, DC)

Andrew J. Trask
Of Counsel, Shook Hardy & Bacon L.L.P. (Los Angeles)

[1] Lawyers for Civil Justice ("LCJ") is a national coalition of corporations, law firms, and defense trial lawyer organizations that promotes excellence and fairness in the civil justice system to secure the just, speedy, and inexpensive determination of civil cases. LCJ Fellows are selected by LCJ's Diversity and Young Lawyers Committee from LCJ's corporate and law firm members as future leaders who offer diverse, unique, and fresh perspectives, and have a demonstrated interest in civil justice reform. Each LCJ Fellow serves a three-year term.

Executive Summary

Lawyers for Civil Justice ("LCJ") conducted a comprehensive research study examining all federal cases decided in 2020 that addressed the admissibility of expert testimony under Federal Rule of Evidence 702. The research focused on various objective factors, including:

- whether the court articulated a standard requiring the proponent of proffered expert evidence to show proof of admissibility by a "preponderance of the evidence";
- whether the court held a hearing to determine admissibility;
- whether the court noted that a determination based on "weight" or "credibility" was distinct from the admissibility;
- whether the court indicated having doubts that the evidence was admissible;
- whether the proffered expert evidence was admitted, partially admitted, or denied; and
- whether the court decided multiple motions to exclude experts at the same time.

The research yielded the following results, among other findings:

- 1,059 federal opinions in 2020 addressed expert admissibility under Rule 702.
  - 35% (373) mention that the proponent bears the burden of proving admissibility by a preponderance of the evidence.
  - 65% (686) do not mention the proponent's burden of proof or preponderance standard.
  - 13% (135) use language indicating a presumption of admissibility (e.g., Rule 702 has a "liberal thrust" favoring admission).
  - 6% (61) required a showing of admissibility by a preponderance of the evidence *and* stated a presumption favoring admissibility ("liberal thrust" standard).
- In 61% of federal judicial districts (57 of 93), courts split over whether to apply the preponderance standard when assessing admissibility. District splits exist in every federal appellate circuit. In one judicial district, conflict even arose between two judges assigned to the same case—one judge articulated the preponderance standard in deciding expert motions while the other did not.
- The evidence demonstrates the need for an amendment clarifying that the court must find Rule 702's admissibility requirements to be established by a preponderance of the evidence prior to admitting expert evidence. This change would improve practice by reducing confusion and inconsistency in the federal courts.

FEDERAL RULE OF EVIDENCE 702: A ONE-YEAR REVIEW AND STUDY OF CASE DECISIONS IN 2020

September 30, 2021

Introduction: LCJ examined and analyzed one year of federal court rulings on the admissibility of expert testimony to determine how courts are applying Rule 702.

Methodology: LCJ researchers identified more than 1,000 cases decided in 2020 on the issue of expert evidence admissibility. The researchers focused on cases in which the trial judge admitted, partially admitted, or denied expert testimony using an analysis under Federal Rule of Evidence 702, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), or both. The researchers eliminated cases in which the court did not make a decision on expert admission (i.e., cases only briefly mentioning Rule 702 or *Daubert*, or setting a hearing but not actually deciding admissibility). The researchers reviewed every remaining opinion, noting the following specific factors as individual data points:

- whether the court held a hearing to review the evidence;
- whether the court articulated a standard requiring the proponent of proffered expert evidence to show proof of admissibility by a "preponderance of the evidence";
- whether the court noted that a determination based on "weight" or "credibility" was distinct from the admissibility;
- whether the court indicated having doubts that the evidence was admissible;
- whether the court noted that Rule 702 has a presumption or "liberal thrust" favoring admission of expert evidence;
- whether the proffered evidence was admitted, partially admitted, or denied; and
- whether the court decided multiple motions for exclusion at the same time.

Results: In 2020, there were 1,059 federal cases in which the trial judge admitted, partially admitted, or denied expert testimony. In approximately 35% of the cases (373), the trial judge required the proponent to prove the admissibility of the expert evidence by a preponderance of the evidence. *In almost two-thirds of the cases—65% (686 of 1059)—the trial judge did not mention the preponderance standard at all.* About 13% of the time (135 cases), the judge described the analysis under Rule 702 or *Daubert* as having a "liberal thrust," employed a "liberal policy favoring admissibility," or stated that "exclusion is the exception rather than the rule"— contrary

to the requirement of Rules 702 and 104(a) that the proponent must prove the admissibility of the proffered expert testimony by a preponderance of the evidence.

Courts were split over whether to mention the preponderance standard in at least 57 federal judicial districts, a number of which had the nation's busiest dockets in 2020.[2] These intra-district splits occurred in federal appellate circuit. For example, the Western District of Texas applied the preponderance standard in nine cases, but either adopted a liberal admissibility standard or otherwise did not mention the preponderance standard in eight others. Similarly, the Southern District of New York applied the preponderance standard in twelve cases, failed to mention it in twenty-five cases, and followed a "liberal thrust" in thirteen cases. Even in the same case, two judges for the Southern District of New York articulated different standards when deciding the parties' expert motions.[3] The Central District of California yielded similar results—six cases applying preponderance, twenty-seven cases not mentioning preponderance, and four following a "liberal thrust" approach.[4]

These results indicate that the most active federal courts disagree internally over the correct interpretation of Rule 702. Further, there can be dissimilar outcomes in substantially similar cases since testimony that is excluded by one court applying the preponderance standard of Rules 702 and 104(a) may be admitted by another applying a "liberal thrust" approach.[5]

Approximately 6% of decisions cite both the preponderance standard *and* a presumption favoring admissibility (a "liberal thrust" approach).[6] This is a remarkable finding given that these standards are inconsistent with each other. The preponderance standard establishes a minimum threshold the party putting forth expert evidence must meet. If the proponent fails to meet this threshold, or if the reasons for admitting and denying create a "tie," the evidence is not admitted. In contrast, a presumption favoring admissibility under a "liberal thrust" approach does not hold the proponent of the evidence to a minimum proof threshold, leading to what some courts describe

[2] *See* U.S. District Courts – Combined Civil and Criminal Federal Court Management Statistics (Dec. 31, 2020), *available at* https://www.uscourts.gov/sites/default/files/data_tables/fcms_na_distprofile1231.2020.pdf.
[3] *See Financial Guar. Ins. Co. v. Putnam Advisory Co*., *LLC*, 2020 WL 4251229, at *2 (S.D.N.Y. Feb. 19, 2020) (preponderance); 2020 WL 3582029, at *1 (S.D.N.Y. July 1, 2020) (no preponderance).
[4] *See* Appendix A for a representative sample of cases from the research, disaggregated by federal judicial district, indicating whether the court mentioned the preponderance standard or not.
[5] *See* Mark A. Behrens & Andrew J. Trask, *The Rule of Science and the Rule of Law*, 49 Sw. U. L. Rev. 436, 452 (2021) ("The attractiveness of our nation as a place for investors to deploy their capital is diminished when lawsuit outcomes are unpredictable and divorced from mainstream science.").
[6] *See* Appendix B for list of cases that cite both the preponderance standard and a presumption favoring admissibility.

as "shaky but admissible evidence." And even if some proof is shown, "ties" result in admitting the evidence. This data point indicates that some federal courts are confused about the correct standard to apply, or even what the different standards mean.

Additionally, approximately 13% of cases (133 cases) addressed multiple motions for exclusion, some of which reflected different decisions regarding admission for different expert testimony. In 192 cases (18%), the trial judge specifically mentioned that the court conducted a "*Daubert* hearing" to assess the admissibility of testimony.[7]

Conclusion: Courts' inconsistent application of the preponderance standard in 2020 cases demonstrates that Rule 702 is not applied the same way throughout the country, or even within the same federal circuit or judicial district. Further, the number of courts that acknowledge the preponderance standard but still adopt a "liberal thrust" favoring admissibility may reflect larger confusion among federal courts about how to apply Rule 702.

The evidence demonstrates the need for an amendment clarifying that Rule 702 requires courts to find that the rule's admissibility requirements are established by a preponderance of the evidence prior to admitting expert evidence. This change would improve practice by reducing confusion and inconsistency in the federal courts.

[7] Since 2020 was a year in which, for public health reasons related to COVID-19, few hearings occurred, we note that the count of hearings included telephonic hearings and teleconferences.

Appendix A

Federal Rule of Evidence 702 Cases by Judicial District
Preponderance Standard Versus Non-Preponderance Approach

Central District of California

Sportspower Ltd. v. Crowntec Fitness Mfg. Ltd., 2020 WL 3213704, at *2 (C.D. Cal. Feb. 3, 2020) (admits expert testimony; recognizing that "[t]he proponent of the expert carries the burden of proving admissibility" and that "[e]xpert testimony is admissible if the [expert] requirements are satisfied by a preponderance of the evidence"); *see also Starstone Nat'l Ins. Co. v. Indep. Cities Risk Mgmt. Auth.*, 2020 WL 6143608, at *1 (C.D. Cal. Aug. 19, 2020).

* * *

Novoa v. GEO Group, Inc., 2020 WL 8514832, at *1-2 (C.D. Cal. Dec. 18, 2020) (partially admits expert testimony; "[Rule] 702 should be applied consistent with the 'liberal thrust' of the Federal Rules and their 'general approach of relaxing the traditional barriers'" to testimony.); *see also Renteria v. Ethicon Inc.*, 2020 WL 7414744, at *3 (C.D. Cal. Nov. 18, 2020) (admits expert testimony; "[T]he inquiry into admissibility of expert opinion is a 'flexible one,' where '[s]haky but admissible evidence is to be attacked by cross examination, contrary evidence, and attention to the burden of proof, not exclusion.'… Rule 702 should be applied with a liberal thrust favoring admission.").

District of Arizona

United States ex rel. Scott v. Arizona Ctr. for Hematology & Oncology, 2020 WL 2059926, at *1, 4 (D. Ariz. Apr. 29, 2020) (admits expert testimony; "The proponent of expert testimony has the ultimate burden of showing, by a preponderance of the evidence, that the proposed testimony is admissible.") (cleaned up); *see also Wood v. Provident Life & Accident Ins. Co.*, 2020 WL 7013949, at *2 (D. Ariz. July 29, 2020).

* * *

Madsen v. City of Phoenix, 2020 WL 5057652, at *2 (D. Ariz. Apr. 27, 2020) (admits expert testimony; "Rule 702 should be applied with a liberal thrust favoring admission."); *see also Toth Gray v. LG&M Holdings LLC*, 2020 WL 9074812, at *2-3 (D. Ariz. Sept. 3, 2020).

District of Colorado

Scott v. Antero Res. Corp., 2020 WL 1138473, at *2-3 (D. Colo. Mar. 9, 2020) (admits expert testimony; "The proponent of the expert testimony bears the burden of proving the foundational requirements of Rule 702 by a preponderance of the evidence."); *see also FidoTV Channel Inc. v. Inspirational Network*, 2020 WL 417586, at *3 (D. Colo. Jan. 24, 2020).

* * *

Heatherman v. Ethicon Inc., 2020 WL 5798533, at *2 (D. Colo. Sept. 29, 2020) (partially admits expert testimony; "A key but sometimes forgotten principle of Rule 702 and

Daubert is that Rule 702, both before and after *Daubert*, was intended to relax traditional barriers to admission of expert opinion testimony. Accordingly, courts are in agreement that Rule 702 mandates a liberal standard for the admissibility of expert testimony… [T]he rejection of expert testimony is the exception rather than the rule.") (cleaned up); *see also Hutchison v. Walmart Inc.*, 2020 WL 9075067, at *1 (D. Colo. Oct. 27, 2020) (limits testimony; "Rule 702 mandates a liberal standard for the admissibility of expert testimony.").

District of Connecticut

Greco v. Broan-NuTone LLC, 2020 WL 1044002, at *5 (D. Conn. Mar. 4, 2020) (excludes expert testimony; "The party seeking to admit the witness bears the burden of demonstrating, by a preponderance of the evidence, that his or her testimony is admissible."); *see also Floodbreak LLC v. Art Metal Indus. LLC*, 2020 WL 6060974, at *2 (D. Conn. Oct. 13, 2020).

* * *

Armour Cap. Mgmt. LP v. SS&C Tech., Inc., 2020 WL 64297, at *7-9 (D. Conn. Jan. 5, 2020) (partially admits expert testimony without preponderance because proposed expert "appears to be a qualified expert whose testimony may be helpful to the jury provided that he does not stray from the scope of his expertise"); *see also Ashley v. City of Bridgeport*, 473 F. Supp. 3d 41, 44-45 (D. Conn. July 22, 2020).

District of Delaware

Delaware State Univ. v. Thomas Co Inc., 2020 WL 6799605, at *7 (D. Del. Nov. 19, 2020) (excludes expert testimony; "The party proffering the expert bears the burden of demonstrating that the expert's opinion is reliable and fits the facts by a preponderance of the evidence.").

* * *

Align Tech. Inc. v. 3Shape AS, 2020 WL 5979353, at *4 n.8 (D. Del. Oct. 8, 2020) (admits expert testimony; "[Rule] 702, which governs admissibility of expert testimony, embodies a 'liberal policy of admissibility.'"); *see also Guardant Health Inc. v. Foundation Med. Inc.*, 2020 WL 6742965, at *5 n.5 (D. Del. Nov. 17, 2020) (admits expert testimony; "Rule 702 embodies a 'liberal policy of admissibility.'").

District of the District of Columbia

United States ex rel. Morsell v. Symantec Corp., 2020 WL 1508904, at *3-5 (D.D.C. Mar. 30, 2020) (partially admits expert testimony; "The burden is on the proponent of [expert] testimony to show by a preponderance of the evidence that the proffered expert witness is qualified, that his proposed testimony would be useful to the finder of fact, and that the testimony is reliable."); *see also United States v. Harris*, 502 F. Supp. 3d 28, 33-34 (D.D.C. Nov. 4, 2020).

* * *

Pinkett v. Dr. Leonard's Healthcare Corp., 2020 WL 1536305, at *6-7 (D.D.C. Mar. 31, 2020) (admits expert testimony because "[a]t this stage, given the 'liberal thrust' of the

Federal Rules, the Court finds that [the expert's] testimony is admissible"; recognizing "the liberal thrust of the Federal Rules and their general approach of relaxing the traditional barriers to opinion testimony") (cleaned up); *see also Phoenix Restoration Grp., Inc. v. Liberty Mut. Grp. Inc.*, 2020 WL 622152, *3 (D.D.C. Feb. 10, 2020).

District of Maryland

Elkharroubi v. Six Flags Am., LP, 2020 WL 1043304, at *2-3 (D. Md. Mar. 4, 2020) (excludes expert testimony; "[T]he party seeking admission of the expert testimony bears the burden of establishing admissibility by a preponderance of the evidence.") (cleaned up); *see also Holland Constr. Corp. v. Boxxuto Contracting Co.*, 2020 WL 4338883, at *10 (D. Md. July 28, 2020).

* * *

Rice v. SalonCentric Inc., 2020 WL 42760, at *3 (D. Md. Jan. 3, 2020) (partially admits expert testimony; acknowledging that the "Court's inquiry into the reliability of an expert's testimony is flexible," such that "the court has broad latitude to consider whatever factors bearing on validity the court finds to be useful"); *see also Thibodeaux v. Sterling*, 2020 WL 5076004, at *1-2 (D. Md. Aug. 26, 2020).

District of Minnesota

Johannessohn v. Polaris Ind., Inc., 450 F. Supp. 3d 931, 969 (D. Minn. Mar. 31, 2020) (admits expert testimony; "[T]he proponent of the expert testimony must show by a preponderance of the evidence both that the expert is qualified to render the opinion and that the methodology underlying his conclusions is scientifically valid.") (cleaned up); *see also S. Minn. Beet Sugar Coop. v. Agri. Sys.*, 2020 WL 5105763, at *3-4 (D. Minn. Aug. 31, 2020).

* * *

Hudock v. LG Elec. U.S.A., Inc., 2020 WL 2848180, at *3 (D. Minn. June 2, 2020) (partially admits expert testimony; no Rule 702 analysis and includes no preponderance standard); *see also United States ex rel. Johnson v. Golden Gate Nat'l Senior Care, LLC*, 2020 WL 1942409, at *3-4 (D. Minn. Apr. 22, 2020).

District of Nebraska

Byrd v. Union Pac. R.R. Co., 453 F. Supp. 3d 1260, 1265-67 (D. Neb. Apr. 13, 2020) (excludes expert testimony; "The party offering the challenged testimony bears the burden of establishing admissibility by a preponderance of the evidence."); *see also Ranney v. Union Pac. R.R. Co.*, 2020 WL 3036200, at *4-5 (D. Neb. June 5, 2020).

* * *

Bettisworth v. BNSF Ry. Co., 2020 WL 3498139, at *9-10 (D. Neb. June 29, 2020) (admits expert testimony; "*Daubert* calls for the liberal admission of expert testimony."); *see also Gruttemeyer v. Trans. Auth. of City of Omaha*, 2020 WL 974004, at *2-3 (D. Neb. Feb. 28, 2020) (partially admits expert testimony without a preponderance showing).

District of Nevada

Brumer v. Gray, 2020 WL 343798, at *1-2 (D. Nev. Jan. 21, 2020) (excludes expert testimony because "Defendant ha[d] not shown by a preponderance of proof that [expert's] statements are admissible under Rule 702") (cleaned up).

* * *

Otto v. Refacciones Neumaticas La Paz, 2020 WL 907560, at *2 (D. Nev. Feb. 25, 2020) (excludes expert testimony; explaining that "Rule 702 is applied consistent with the liberal thrust of the Federal Rules and their general approach of relaxing the traditional barriers to opinion testimony") (cleaned up); *see also V5 Tech., LLC v. Switch, Ltd.*, 501 F. Supp. 3d 960, 962-64 (D. Nev. Nov. 19, 2020).

District of New Jersey

Reilly v. Vivint Solar, 2020 WL 3047546, at *1-2 (D.N.J. June 8, 2020) (partially admits expert testimony; "The party offering the expert testimony bears the burden of establishing the existence of each factor by a preponderance of the evidence."); *see also Johnson v. Comodo Grp., Inc.*, 2020 WL 525898, at *3-4 (D.N.J. Jan. 31, 2020) (admits expert testimony; "The proponent of the expert testimony must prove these requirements by a preponderance of the evidence.").

* * *

Florio v. Ryobi Techs. Inc., 2020 WL 5234924, at *2 (D.N.J. Sept. 2, 2020) (excludes expert testimony; "Rule 702 demands a 'flexible' inquiry"; "Although expert testimony 'can be both powerful and quite misleading because of the difficulty in evaluating it,' I must apply Rule 702's requirements in accordance with the Federal Rules' 'liberal thrust,' erring on the side of admission"; "I well understand that the Rules of Evidence favor the admission of expert testimony… [yet] [e]ven under the liberal Federal Rules admission standard, [the] proposed 'expert' testimony is little more than inadmissible wool gathering.") (cleaned up); *see also Nagy v. Outback Steakhouse*, 2020 WL 5105196, at *1 (D.N.J. Aug. 31, 2020).

District of New Mexico

Salopek v. Zurich Am. Life Ins. Co., 2020 WL 6384250, at * (D.N.M. Oct. 30, 2020) (excludes expert testimony; "As the proponent of the expert, Plaintiff bears the burden to establish by a preponderance of the evidence that the requirements for admissibility have been met."); *see also Rawers v. United States*, 2020 WL 5658093, at *8-10 (D.N.M. Sept. 23, 2020) (admits expert testimony; "The proponent of expert testimony has the burden of establishing by a preponderance of the evidence that the pertinent admissibility requirements are met.") (cleaned up).

* * *

Pepe v. Casa Blanca Inn & Suites LLC, 2020 WL 5219391, at *7-8 (D.N.M. Apr. 10, 2020) (admits expert testimony; "Rule 702 offers a liberal standard"); *see also Munoz v. FCA US LLC*, 495 F. Supp. 3d 1008, 1011 (D.N.M. Oct. 16, 2020) (admits expert testimony;

"*Daubert* provides a 'flexible' framework for courts to use in their roles as gatekeepers of expert testimony.").

District of Puerto Rico

De Jesus v. Andres Reyes Burgos Inc., 2020 WL 5520642, at *4 (D.P.R. Sept. 14, 2020) (admits expert testimony; "The proponent of the expert testimony… must establish admissibility by a preponderance of the evidence.") (citing Fed. R. Evid. 702 advisory committee's note to 2000 amendment ("[T]he admissibility of all expert testimony is governed by the principles of Rule 104(a). Under that Rule, the proponent has the burden of establishing that the pertinent admissibility requirements are met by a preponderance of the evidence.").

* * *

Romero v. Inspira Behavioral Care, 2020 WL 402274, at *1-2 (D.P.R. Jan. 23, 2020) (admits expert testimony; no clear standard for admitting evidence because "the Court's analysis must be flexible, not rigid"); *see also Arroyo v. Doctor's Ctr. Hosp. Bayamon, Inc.*, 2020 WL 4516012, at *2-3 (D.P.R. Aug. 5, 2020).

District of South Carolina

Nobles v. DePuy Synthes Sales, Inc., 471 F. Supp. 3d 717, 722 (D.S.C. June 2, 2020) (excludes expert testimony; "The proponent of the expert testimony carries the burden to establish the admissibility of the testimony by a preponderance of the evidence."); *see also Beard v. Palmetto Health*, 2020 WL 4698974, at *2-3 (D.S.C. July 27, 2021) (admits expert testimony; "The party offering the expert testimony must establish its admissibility by a preponderance of proof.").

* * *

In re Nelums, 2020 WL 7249548, at *5-6 (D.S.C. Mar. 17, 2020) (excludes expert testimony; "Ultimately, an expert's testimony is admissible under Rule 702 if it rests on a reliable foundation and is relevant" without the proponent bearing any burden to prove admissibility.) (cleaned up); *see also Schaeffer v. Williams*, 2020 WL 833017, at *1-2 (D.S.C. Feb. 20, 2020).

District of Utah

United States ex rel. Polukoff v. St. Mark's Hosp., 2020 WL 3271044, at *1-2 (D. Utah June 17, 2020) (admits expert testimony; "Preliminary questions concerning the qualification of a person to be a witness should be established by a preponderance of proof.").

* * *

Wright v. Amazon.com Inc., 2020 WL 6204401, at *3-4 (D. Utah Oct. 22, 2020) (excludes expert testimony; acknowledging that "'[t]he proponent of expert testimony bears the burden of demonstrating' that the expert is indeed qualified," but not mentioning whether that burden requires a preponderance showing); *see also Tycz v. Am. Family Mut. Ins. Co.*, 2020 WL 5753303, at *2 (D. Utah July 22, 2020).

District of Wyoming

Great N. Ins. Co. v. Grounded Tech., 2020 WL 3494103, at *2 (D. Wyo. May 5, 2020) (partially admits expert testimony; "The proponent of the expert testimony bears the burden of proving the foundational requirements of Rule 702… by a preponderance of the evidence."); *see also Silverthorn v. Killpack Trucking Inc.*, 2020 WL 8515055, at *2-3 (D. Wyo. July 22, 2020).

* * *

Mountain v. United States, 2020 WL 8571674, at *6 (D. Wyo. Sept. 11, 2020) (partially admits expert testimony; recognizing "the liberal thrust of the Federal Rules of Evidence, [and] the flexible nature of the *Daubert* inquiry") (cleaned up); *see also Garcia v. Wyoming*, 2020 WL 8575651, at *1-2 (D. Wyo. Aug. 7, 2020).

Eastern District of Arkansas

Watkins v. Lawrence Cnty., Ark., 2020 WL 2544469, at *1-2 (E.D. Ark. May 19, 2020) (admits expert testimony; "The proponent of the expert testimony has the burden of establishing by a preponderance of the evidence the admissibility of the expert's testimony."); *see also Meade v. Ethicon Inc.*, 2020 WL 6395814, at *2-3 (E.D. Ark. Nov. 2, 2020).

* * *

Mitchell v. Union Pac. R.R. Com., 2020 WL 7379933, at *1, *6 (E.D. Ark. Jan. 7, 2020) (excludes expert testimony; court "assum[ed]" that expert's opinion was relevant); *see also Fuller v. Ethicon Inc.*, 2020 WL 4043517, at *3 (E.D. Ark. July 17, 2020).

Eastern District of Kentucky

Owens v. Ethicon, Inc., 2020 WL 1976642, at *1-3 (E.D. Ky. Apr. 24, 2020) (partially admits expert testimony; "[U]nder *Daubert* and its progeny, a party proffering expert testimony must show by a preponderance of proof that the expert whose testimony is being offered… will testify to scientific knowledge that will assist the trier of fact in understanding and disposing of issues relevant to the case."); *see also Boyer v. Shirley*, 2020 WL 6785940, at *5 (E.D. Ky. Nov. 18, 2020).

* * *

J.B-K.-1 v. Sec'y of Kentucky Cabinet for Health & Family Servs., 462 F. Supp. 3d 724, 732-33 (E.D. Ky. May 28, 2020) (admits expert testimony; explaining that when it comes to admitting evidence, "the district court ultimately enjoys broad discretion"); *see also Burton v. Ethicon Inc.*, 2020 WL 5809992, at *2 (E.D. Ky. Sept. 29, 2020) (partially admits expert testimony; "Determining whether expert testimony should be admitted requires a flexible inquiry and any doubts should be resolved in favor of admissibility.") (cleaned up).

Eastern District of Louisiana

Adriatic Marine, LLC v. Harrington, 2020 WL 748024, at *5 (E.D. La. Feb. 14, 2020) (excludes expert testimony; "When expert testimony is challenged, the party seeking to present the testimony has the burden of proving, by a preponderance of the evidence, that

the testimony satisfies [Rule 702]."); *see also Willow Bend Ventures, LLC v. Van Hook*, 2020 WL 2113607, at *5-6 (E.D. La. May 4, 2020).

* * *

Henderson v. Atmos Energy, 496 F. Supp. 3d 1011, 1015-18 (E.D. La. Oct. 21, 2020) (excludes expert testimony; acknowledging that "[w]hen expert testimony is challenged under Rule 702 and *Daubert*, the burden of proof rests with the party seeking to present the testimony," but staying silent as to whether that burden requires preponderance of evidence) (cleaned up); *see also Collins v. Benton*, 470 F. Supp. 3d 596, 601-02 (E.D. La. July 2, 2020) (admits expert testimony; "The court's inquiry into the reliability of expert testimony is flexible and fact-specific"; "As a general rule, questions relating to the bases and sources of an expert's opinion affect the weight to be assigned that opinion rather than its admissibility.") (cleaned up).

Eastern District of Michigan

AWGI, L.L.C. v. Atlas Trucking Co. L.L.C., 2020 WL 3546100, at *10 (E.D. Mich. June 30, 2020) (admits expert testimony; "It is the proponent of the testimony that must establish its admissibility by a preponderance of proof."); *see also Gould Elec. Inc. v. Livingston Cnty. Rd. Comm'n*, 2020 WL 6793335, at *8 (E.D. Mich. Nov. 19, 2020).

* * *

Dean v. United States, 2020 WL 3412264, at *7 (E.D. Mich. June 22, 2020) (admits expert testimony; "Considering… the liberal standard for admission of expert testimony under Rule 702, the Court finds [the expert] qualified…").

Penn. Lumbermens Mut. Ins. Co. v. Precision Lawn Irrigation Inc., 2020 WL 8673131, at *11 (E.D. Mich. Nov. 25, 2020) (admits expert testimony; no mention of preponderance standard when admitting expert evidence); *see also Frontczak v. City of Detroit*, 2020 WL 6479553, at *1-2 (E.D. Mich. July 23, 2020).

Eastern District of Missouri

Refrig. Supplies Inc. v. Acadia Ins. Co., 507 F. Supp. 3d 1096, 1101-02 (E.D. Mo. Dec. 17, 2020) (admits expert testimony; "the party offering the expert testimony 'must show by a preponderance of the evidence both that the expert is qualified to render the opinion and that the methodology underlying his conclusions is scientifically valid'") (cleaned up); *see also Pitlyk v. Ethicon Inc.*, 478 F. Supp. 3d 784, 786-87 (E.D. Mo. Aug. 12, 2020).

* * *

Bayes v. Biomet Inc., 2020 WL 5095346, at *5-6 (E.D. Mo. Aug. 28, 2020) (admits expert testimony; no discussion of the proponent's burden or the preponderance standard); *see also Wallace v. Pharma Medica Rsch., Inc.*, 2020 WL 7624846, at *1-2 (E.D. Mo. Dec. 22, 2020) (admits expert testimony; recognizing the "liberal admission of expert testimony").

Eastern District of Pennsylvania

Maude v. City of Phila., 507 F. Supp. 3d 593, 599 (E.D. Pa. Dec. 15, 2020) (partially admits expert testimony; "The party offering the expert must prove each of [the Rule 702] requirements by a preponderance of the evidence."); *see also Jacoby Donner PC v. Aristone Realty Capital LLC*, 2020 WL 5095499, at *6 (E.D. Pa. Aug. 28, 2020).

* * *

In re Domestic Drywall Antitrust Litig., 2020 WL 1695434, at *14-16 (E.D. Pa. Apr. 7, 2020) (partially admits expert testimony; recognizing that "in doubtful cases, Rule 702 favors admissibility"); *see also Robinson v. Fair Acres Geriatric Ctr.*, 2020 WL 1313721, at *9 (E.D. Pa. Mar. 20, 2020).

Eastern District of Texas

Image Processing Techs., LLC v. Samsung Elec., 2020 WL 2499736, at *2-3 (E.D. Tex. May 14, 2020) (admits expert testimony; "The burden is on the party offering the expert testimony to establish admissibility by a preponderance of the evidence."); *see also Maxwell Ltd. v. Apple Inc.*, 2020 WL 8269548, at *2-3 (E.D. Tex. Nov. 11, 2020) (partially admits experts testimony; "The proponent… must prove by a preponderance of the evidence that the testimony is reliable.") (cleaned up).

* * *

Hale v. Denton Cnty., 2020 WL 4431860, at *2 (E.D. Tex. July 31, 2020) (admits expert testimony; "[T]he decision to allow or exclude experts from testifying under *Daubert* is committed to the sound discretion of the district court," and not based on the proponent's burden of proof.); *see also Kumar v. Frisco Indep. Sch. Dist.*, 2020 WL 1503270, at *2 (E.D. Tex. Mar. 27, 2020) (admits expert testimony; "[T]he *Daubert* framework is 'a flexible one.'").

Middle District of Florida

Pierce Mfg. v. E-One, Inc., 2020 WL 416268, at *3 (M.D. Fla. Jan. 27, 2020) (admits expert testimony; "The party offering the expert has the burden of satisfying [expert admissibility] elements by a preponderance of the evidence.") (cleaned up); *see also Santa Fe Surgery LLC v. Sentinel Ins. Co. Ltd.*, 2020 WL 6018871, at *3-4 (M.D. Fla. Oct. 7, 2020).

* * *

Jackson v. United States, 2020 WL 1665960, at *3-4 (M.D. Fla. Apr. 3, 2020) (excludes expert testimony; no mention of a preponderance standard for admissibility); *see also Katsiafas v. C.R. Bard, Inc.*, 2020 WL 1808895, at *2 (M.D. Fla. Apr. 9, 2020).

Middle District of Pennsylvania

Bardo v. Norfolk S. R.R. Co., 459 F. Supp. 3d 618, 623-25 (M.D. Pa. May 11, 2020) (excludes expert testimony; recognizing that the proponent "has the burden of establishing the reliability and admissibility of the expert's testimony by a preponderance of the evidence"); *see also Stoud v. Susquehanna Cnty.*, 2020 WL 6047576, at *5 (M.D. Pa. Oct. 13, 2020).

* * *

Penn v. Detweiler, 2020 WL 1016203, at *4 (M.D. Pa. Jan. 22, 2020) (partially admits expert testimony; "Rule 702 'has a liberal policy of admissibility.'"); *see also Hunter v. Kennedy*, 2020 WL 3980450, at *7-8 (M.D. Pa. July 14, 2020) (partially admits expert testimony; no mention of an admissibility standard when assessing multiple motions to exclude); *Gorton v. Air & Liquid Sys. Corp.*, 2020 WL 4193649, at *2-3 (M.D. Pa. July 21, 2020) (admits expert testimony; "As long as an expert's scientific testimony rests upon 'good grounds, based on what is known,' it should be tested by the adversary process.") (cleaned up).

Northern District of Alabama

Walker v. Ergon Trucking, Inc., 2020 WL 6537651, at *2-4 (N.D. Ala. Apr. 23, 2020) (excludes expert testimony because proponent of expert testimony "has not shown by a preponderance of the evidence that [expert] is qualified to offer an opinion").

* * *

Johnson v. ABF Freight Sys. Inc., 2020 WL 7320994, at *1 (N.D. Ala. Dec. 11, 2020) (partially admits expert testimony; explaining that "[t]he party offering testimony from an expert must demonstrate that the anticipated testimony is admissible under Rule 702," but failing to explain how) (cleaned up); *see also Dysart v. Trustmark Nat'l Bank*, 2020 WL 4815131, at *1-2 (N.D. Ala. Aug. 19, 2020).

Northern District of California

United States v. Mercado, 2020 WL 496069, at *6 (N.D. Cal. Jan. 30, 2020) (excludes expert testimony; "The burden is on the proponent of the expert testimony to show, by a preponderance of the evidence, that the admissibility requirements are satisfied."); *see also Contour IP Holding LLC v. GoPro Inc.*, 2020 WL 5106845, at *3 (N.D. Cal. Aug. 31, 2020).

* * *

Sumotext Corp. v. Zoove, Inc., 2020 WL 533006, at *9-10 (N.D. Cal. Feb. 3, 2020) (admits expert testimony; the court's inquiry into expert reliability is "a flexible one"); *see also Snyder v. Bank of Am. N.A.*, 2020 WL 6462400, at *2 (N.D. Cal. Nov. 3, 2020) (partially admits expert testimony; the admissibility inquiry is "a flexible one"); *In re Viagra and Cialis*, 424 F. Supp. 3d 781, 788-90 (N.D. Cal. Jan. 13, 2020) (admits expert testimony; recognizing "*Daubert*'s admonition that a district court should conduct the analysis 'with a liberal thrust favoring admission.'").

Northern District of Florida

Fernandez v. United States, 2020 WL 3105925, at *4-5 (N.D. Fla. June 4, 2020) (excludes expert testimony; "The party offering the purported expert has the burden of showing, by a preponderance of the evidence, that each of [the expert admissibility] requirements has been met.") (cleaned up); *see also Arevalo v. Coloplast Corp.*, 2020 WL 3958505, at *1-2 (N.D. Fla. July 7, 2020).

* * *

In re Deepwater Horizon Belos Cases, 2020 WL 6689212, at *1 (N.D. Fla. Nov. 4, 2020) (excludes expert testimony; no mention of any admissibility standard or burden of proof).

Northern District of Georgia

Dotson v. Am. Med. Sys., Inc., 2020 WL 2844738, at *1-2 (N.D. Ga. Mar. 11, 2020) (admits expert testimony; "The burden of laying the proper foundation for the admission of the expert testimony is on the party offering the expert, and admissibility must be shown by a preponderance of the evidence."); *see also Wind Logistics Prof. LLC v. Univ. Truckload*, 2020 WL 3411037, at *2-3 (N.D. Ga. June 22, 2020) (admits expert testimony; "The party seeking to introduce expert testimony must establish, by a preponderance of the evidence, the factors set out in Rule 702.").

* * *

In re Ethicon Prod. Liab. Litig., 2020 WL 9887625, at *1-2 (N.D. Ga. Nov. 25, 2020) (partially admits expert testimony; "evidence should be admitted if it 'rests on a reliable foundation' and is 'relevant to the task at hand'"); *see also Guinn v. Norfolk S. R.R. Co.*, 441 F. Supp. 3d 1319, 1326-27 (N.D. Ga. Aug. 5, 2020).

Northern District of Illinois

Couture v. Haworth, Inc., 2020 WL 70931, at *6-7 (N.D. Ill. Jan. 7, 2020) (excludes expert testimony; "The burden is on the party seeking to admit the expert to show by a preponderance of the evidence that the expert meets the requirements of Rule 702 and *Daubert*."); *see also Neurografix v. Brainlab Inc.*, 2020 WL 3643057, at *1-2 (N.D. Ill. July 6, 2020).

* * *

Chicago Teachers Union v. Bd. of Educ., 2020 WL 914882, at *1 (N.D. Ill. Feb. 25, 2020) (partially admits expert testimony; "The Rule 702 inquiry 'is a flexible one…' [and] 'shaky' expert testimony may be admissible.") (cleaned up); *see also Kirk v. Clark Equip. Co.*, 2020 WL 5593750, at *2 (N.D. Ill. Sept. 18, 2020).

Northern District of Indiana

Constructora Mi Casita v. NIBCO, Inc., 448 F. Supp. 3d 965, 970-72 (N.D. Ind. Mar. 24, 2020) (excludes expert testimony; "The proponent of expert testimony must establish its admissibility by a preponderance of the evidence."); *see also Bordoni v. Forest River Inc.*, 2020 WL 7022485, at *4 (N.D. Ind. Nov. 30, 2020).

* * *

Med. Protective Co. v. Am. Int'l Specialty Lines Ins. Co., 2020 WL 408462, at *1-2 (N.D. Ind. Jan. 24, 2020) (partially admits expert testimony; "The reliability inquiry is fact-dependent and flexible"); *see also Smith v. Nexus RVs LLC*, 472 F. Supp. 3d 470, 475-77 (N.D. Ind. July 13, 2020).

Northern District of Iowa

Nicholson v. Biomet, Inc., 2020 WL 3399899, at *3, *5 (N.D. Iowa Mar. 6, 020) (partially admits expert testimony; "To satisfy the reliability requirement, the party offering the expert testimony 'must show by a preponderance of the evidence both that the expert is qualified to render the opinion and the methodology underlying his conclusions is scientifically valid.'") (cleaned up).

* * *

Wessels v. Biomet Orthopedics, LLC, 2020 WL 3421478, at *4 (N.D. Iowa June 22, 2020) (partially admits expert testimony; "District courts have 'broad discretion' in determining the admissibility of expert testimony.") (cleaned up); *see also Webb v. City of Waterloo*, 2020 WL 1159755, at *2 (N.D. Iowa Mar. 10, 2020).

Northern District of New York

Guardino v. Alutiiq Diversified Servs., LLC, 457 F. Supp. 3d 158, 161-62 (N.D.N.Y. Apr. 29, 2020) (admits expert testimony; "The party offering the testimony has the burden of establishing its admissibility by a preponderance of the evidence."); *see also Durant v. U.S.*, 2020 WL 1274326, at *5 (N.D.N.Y. Mar. 17, 2020).

* * *

Doe v. Colgate Univ., 457 F. Supp. 3d 164, 176 (N.D.N.Y. Apr. 30, 2020) (excludes expert testimony; no mention of preponderance); *see also Arruda v. C.R. Bard Inc.*, 2020 WL 4569436, at *15-16 (N.D.N.Y. Aug. 6, 2020).

Northern District of Oklahoma

Perry v. Safeco Ins. Co. of Am., 2020 WL 1166085, at *1-2 (N.D. Okla. Mar. 11, 2020) (excludes expert testimony; explaining that "the proponent of the testimony bears the burden of proving by a preponderance of the evidence that its witness's opinions are both relevant and reliable").

* * *

Teel v. United States, 2020 WL 71254, at *2-4 (N.D. Okl. Jan. 7, 2020) (admits expert testimony; acknowledging "the liberal thrust of the Federal Rules and their general approach of relaxing the traditional barriers" to testimony.); *see also Denton v. Nationstar Mortgage LLC*, 2020 WL 3261008, at *1 (N.D. Okla. May 1, 2020) (partially admits expert testimony; "Under Rule 702, the district court must satisfy itself that the proposed expert testimony is both reliable and relevant," although there is no stated requirement for the proponent to bear a burden of proof.); *Smith v. Am. Nat'l Prop. & Cas. Co.*, 2020 WL 7635436, at *5 (N.D. Okla. Dec. 22, 2020).

Northern District of Texas

Bailon v. Landstar Ranger Inc., 2020 WL 7046852, at *2-3 (N.D. Tex. Nov. 30, 2020) (excludes expert testimony; "The burden is on the proponent of the expert testimony to establish its admissibility by a preponderance of the evidence."); *see also Nationwide Agribusiness Ins. Co. v. Deere & Co.*, 2020 WL 8768073, at *4 (N.D. Tex. Oct. 23, 2020).

* * *

McCaleb v. Rely Transp. Inc., 2020 WL 8242164, at *1 (N.D. Tex. Dec. 24, 2020) (admits expert testimony; noting that "under *Daubert* and [Rule] 702, a district court has broad discretion"); *see also Double Diamond Del., Inc. v. Homeland Ins. Co.*, 475 F. Supp. 3d 576, 577-78 (N.D. Tex. July 27, 2020).

Northern District of West Virginia

Wells v. Antero Res. Corp., 497 F. Supp. 3d 96, 98-99 (N.D. W.Va. Oct. 29, 2020) (excludes expert testimony; "The proponent of the expert testimony bears the burden of establishing its admissibility by a preponderance of the evidence.").

* * *

Romeo v. Antero Res. Corp., 2020 WL 1430468, at *2-3 (N.D. W.Va. Mar. 23, 2020) (admits expert testimony; "[T]he test of reliability is flexible and the law grants a district court the same broad latitude when it decides how to determine reliability as it enjoys in respect to its ultimate reliability determination.").

Southern District of California

Parks v. Ethicon Inc., 2020 WL 6118774, at *2-3 (S.D. Cal. Oct. 16, 2020) (admits expert testimony; "[T]he proponent [of the proposed expert] has the burden of establishing that the pertinent admissibility requirements are met by a preponderance of the evidence.") (cleaned up); *see also Golden Eye Media USA Inc. v. Trolley Bags U.K. Ltd.*, 2020 WL 4559181, at *1 (S.D. Cal. Aug. 6, 2020).

* * *

Stone Brewing Co., LLC v. Miller Coors LLC, 2020 WL 907060, at *2 (S.D. Cal. Feb. 25, 2020) (admits expert testimony; "The tests for admissibility in general, and reliability, are flexible."); *see also Kurin, Inc. v. Magnolia Med. Techs., Inc.*, 473 F. Supp. 3d 1117, 1140-41 (S.D. Cal. July 20, 2020).

Southern District of Florida

Sunderland Mar. Ins. Co. v. C. Servs., 2020 WL 5545624, at *1-2 (S.D. Fla. May 22, 2020) (excludes expert testimony; "A party who seeks to admit expert testimony bears the burden of laying the proper foundation for its admissibility by a preponderance of the evidence."); *see also Gatearm Tech., Inc. v. Access Masters, LLC*, 2020 WL 6808670, at *13-14 (S.D. Fla. Apr. 30, 2020).

* * *

Vision Power, LLC v. Midnight Express Power Boats, 2020 WL 770547, at *2-3 (S.D. Fla. Feb. 18, 2020) (admits expert testimony; no mention of a preponderance standard of proponent's burden of proof).

Southern District of Georgia

Taylor v. USA King Trans., Inc., 2020 WL 1821014, at *3-4 (S.D. Ga. Apr. 9, 2020) (admits expert testimony; "The proponent of the expert opinion bears the burden of

establishing qualification, reliability, and helpfulness by a preponderance of the evidence."); *see also Whatley v. Hart*, 2020 WL 1441432, at *9-10 (S.D. Ga. Mar. 13, 2020).

* * *

Kennedy v. Elec. Ins. Co., 2020 WL 1493935, at *2 (S.D. Ga. Mar. 24, 2020) (admits expert testimony; not relying on the preponderance standard to admit); *see also Greater Hall Temple Church of God v. S. Mut. Church Ins. Co.*, 2020 WL 1809747, at *5 (S.D. Ga. July 15, 2020).

Southern District of Indiana

Block v. Ethicon Inc., 2020 WL 6440516, at *1 (S.D. Ind. Nov. 2, 2020) (partially admits expert testimony; "The proponent of expert testimony bears the burden of establishing admissibility by a preponderance of the evidence.").

* * *

Senior Lifestyle Corp. v. Key Benefit Admins., Inc., 2020 WL 1905706, at *1 (S.D. Ind. Apr. 17, 2020) (admits expert testimony; no mention of the preponderance standard); *see also Poer v. United States*, 2020 WL 1443197, at *3-4 (S.D. Ind. Mar. 25, 2020).

Southern District of Iowa

Atos IT Solutions & Servs., Inc. v. ACT, Inc., 2020 WL 3399905, at *1-2 (S.D. Iowa Jan. 22, 2020) (partially admits expert testimony; "The reliability requirement is satisfied if the proponent shows, by a preponderance of the evidence, both that the expert is qualified to render the opinion and that the methodology underlying his conclusions is scientifically valid.").

* * *

Glenn Golden v. Stein, 2020 WL 6487687, at *1-4 (S.D. Iowa Oct. 5, 2020) (admits expert testimony; "[C]ases are legion that under *Daubert*, liberal admission is prevalent… and courts should resolve doubts regarding the usefulness of an expert's testimony in favor of admissibility.") (cleaned up).

Southern District of Mississippi

James v. Antarctic Mech. Servs., Inc., 2020 WL 1339640, at *1-2 (S.D. Miss. Mar. 23, 2020) (admits expert testimony; "The party offering the expert bears the burden of establishing reliability by a preponderance of the evidence."); *see also Am. Contractors Indem. Co. v. Reflectech, Inc.*, 2020 WL 1190474, at *3 (S.D. Miss. Mar. 12, 2020).

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Keyes v. Techtronic Indus. Factory Outlets Inc., 2020 WL 5592694, at *1 (S.D. Miss. Aug. 4, 2020) (partially admits expert testimony; "[T]he decision to admit or exclude evidence is within the discretion of the trial court."); *see also James v. Antarctic Mech. Servs., Inc.*, 2020 WL 1479090, at *1 (S.D. Miss. Sept. 11, 2020).

Southern District of New York

Potter v. United States, 2020 WL 2836440, at *2-3 (S.D.N.Y. May 5, 2020) (excludes expert testimony; "The party seeking to introduce expert testimony 'bears the burden of establishing its admissibility by a preponderance of the evidence.'") (cleaned up); *see also Ureteknologia De Mexico v. Uretek (USA), Inc.*, 434 F. Supp. 3d 517, 529-30 (S.D. Tex. Jan. 17, 2020).

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Solid Oak Sketches, LLC v. 2K Games, Inc., 449 F. Supp. 3d 333, 350-51 (S.D.N.Y. Mar. 26, 2020) (admits expert testimony; "Rule 702 embodies a liberal standard of admissibility for expert opinions" rather than requiring a preponderance of evidence); *see also Conti v. Doe*, 2020 WL 6162104, at *4-5 (S.D.N.Y. Oct. 21, 2020) (admits expert testimony; "It is a well-accepted principle that Rule 702 embodies a liberal standard of admissibility for expert opinions"; "[Admitting shaky testimony with a limiting instruction for the jury] avoids complete preclusion and better aligns with Rule 702's 'liberal standard of admissibility for expert opinions.'") (cleaned up).

*Notably, in one case in the Southern District of New York, two different judges relied on different standards when deciding expert motions. *See Financial Guar. Ins. Co. v. Putnam Advisory Co*., *LLC*, 2020 WL 4251229, at *2 (S.D.N.Y. Feb. 19, 2020) (preponderance); 2020 WL 3582029, at *1 (S.D.N.Y. July 1, 2020) (no preponderance).

Southern District of Ohio

In re EI du Pont de Nemours & Co., 2020 WL 278499, at *5 (S.D. Ohio Jan. 19, 2020) (excludes expert testimony; "The burden is on the party proffering the expert report to demonstrate by a preponderance of proof that the opinions of their experts are admissible."); *see also Cook v. Erie Ins. Co.*, 478 F. Supp. 3d 658, 662-63 (S.D. Ohio Aug. 11, 2020).

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Hobart Corp. v. Dayton Power & Light Co., 2020 WL 614041, at *2-3 (S.D. Ohio Feb. 10, 2020) (admits expert testimony; noting the court's broad discretion to admit expert witness testimony); *see also Kondash v. Kia Motor Am.*, 2020 WL 5816228, at *6-7 (S.D. Ohio Sept. 30, 2020).

Southern District of Texas

AmGuard Ins. Co. v. Lone Star Legal Aid, 2020 WL 60247, at *6-7 (S.D. Tex. Jan. 6, 2020) (partially admits expert testimony; "The party offering expert testimony has the burden to prove by a preponderance of the evidence that the proffered testimony satisfies the admissibility requirements of [Rule] 702."); *see also Tijerina v. Isidro Guerra & Molano, Inc.*, 2020 WL 7632259, at *7 (S.D. Tex. Dec. 22, 2020).

* * *

OneSubsea IP U.K. Ltd. v. FMC Techs. Inc., 2020 WL 7263266, at *3-4 (S.D. Tex. Dec. 10, 2020) (excludes expert testimony; acknowledging the ability to put forth "shaky *but*

admissible evidence"); *see also Recif Res. LLC v. Juniper Capital Advisors LP*, 2020 WL 5623982, at *1-2 (S.D. Tex. Sept. 18, 2020) ("shaky but admissible evidence").

Western District of Arkansas

Ivory v. McCarthy, 2020 WL 1159389, at *1 (W.D. Ark. Mar. 10, 2020) (excludes expert testimony; "The proponent of the expert testimony has the burden of establishing by a preponderance of the evidence that the expert is qualified."); *see also Archer v. Bond*, 2020 WL 4931397, at *1 (W.D. Ark. Aug. 21, 2020).

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Browne v. PAM Transp. Inc., 434 F. Supp. 3d 712, 717 (W.D. Ark. Jan. 17, 2020) (partially admits expert testimony; "The decision whether or not to admit [expert] testimony is 'within the district court's considerable discretion.'") (cleaned up); *see also Elite Aviation Serv. LLC v. Ace Pools LLC*, 2020 WL 5513421, at *1 (W.D. Ark. Sept. 14, 2020).

Western District of Kentucky

Commins v. Genie Indus., Inc., 2020 WL 1189937, at *2-3 (W.D. Ky. Mar. 12, 2020) (admits expert testimony; "It is the proponent of the testimony that must establish its admissibility by a preponderance of proof.").

* * *

Kentucky v. Marathon Pet Co., 464 F. Supp. 3d 880, 888-89 (W.D. Ky. June 1, 2020) (partially admits expert testimony; "*Daubert* provided a non-exclusive checklist for trial courts to consult in evaluating the reliability of expert testimony… Although the factors are not a 'definitive checklist or test.'") (cleaned up); *see also Schall v. Suzuki Motor of Am., Inc.*, 449 F. Supp. 3d 689, 693-94 (W.D. Ky. Mar. 27, 2020).

Western District of Louisiana

Terral River Serv. Inc. v. SCF Mar. Inc., 2020 WL 6827795, at *2-3 (W.D. La. Nov. 11, 2020) (excludes expert testimony; "When faced with expert testimony, the court must determine at the outset if the proponent of the evidence has proven its admissibility by a preponderance of the evidence."); *see also Magnolia Island Plantation LLC v. Lucky Family LLC*, 2020 WL 6833512, at *1-2 (W.D. La. Nov. 20, 2020).

* * *

Allen v. Royal Trucking Co., 2020 WL 6822947, at *1 (W.D. La. Nov. 2, 2020) (admits expert testimony; "[T]he rejection of expert testimony is the exception rather than the rule.") (cleaned up); *see also Moore v. LaSalle Corr., Inc.*, 2020 WL 6389183, at *9-10 (W.D. La. Oct. 30, 2020).

Western District of Michigan

Phillips v. Tricam Inds., 2020 WL 1816468, at *7-9 (W.D. Mich. Feb. 20, 2020) (excludes expert testimony; "The proffering party bears the burden by preponderant evidence of establishing the foundational requirements for the admission of opinion testimony under Rule 702.").

* * *

Wolverine World Wide, Inc. v. Am. Ins. Co., 2020 WL 8340139, at *2 (W.D. Mich. Nov. 11, 2020) (excludes expert testimony; "Rule 702 is to be broadly interpreted based on whether the use of expert testimony will assist the trier of fact."); *see also Stryker Corp. v. XL Ins. Am.*, 2020 WL 5588774, at *3 (W.D. Mich. July 21, 2020).

Western District of Missouri

Monroe v. Freight All Kinds Inc., 2020 WL 6588352, at *2 (W.D. Mo. Nov. 10, 2020) (partially admits expert testimony; "The proponent of the expert testimony must prove its admissibility by a preponderance of the evidence."); *see also Lampton v. C.R. Bard, Inc.*, 2020 WL 7013356, at *1 (W.D. Mo. Nov. 27, 2020).

* * *

BPS LLC v. Covington Specialty Ins. Co., 2020 WL 9218532, at *1 (W.D. Mo. Aug. 26, 2020) (partially admits expert testimony; "Generally, doubts as to the usefulness of the testimony should be resolved in favor of admissibility."); *see also S&H Farm Supply Inc. v. Bad Boy Inc.*, 2020 WL 5491313, at *1-2 (W.D. Mo. Aug. 19, 2020) (partially admits expert testimony; recognizing that "Rule 702 is not a rule of exclusion"; "[C]ases are legion that, correctly, under *Daubert*, call for the liberal admission of expert testimony.") (cleaned up).

Western District of New York

Sarkees v. E.I. DuPont de Nemours & Co., 2020 WL 906331, at *11-13 (W.D.N.Y. Feb. 25, 2020) (admits expert testimony; "[The proponents] have to demonstrate by a preponderance of evidence that their opinions are reliable.") (cleaned up).

* * *

United States v. Acquest Transit LLC, 2020 WL 2933168, at *6-7 (W.D.N.Y. June 3, 2020) (partially admits expert testimony; court's gatekeeping role does not require a preponderance showing); *see also Amica Mut. Ins. Co. v. Electrolux Home Prods., Inc.*, 440 F. Supp. 3d 211, 216 (W.D.N.Y. Feb. 18, 2020).

Western District of North Carolina

Rhyne v. U.S. Steel Corp., 474 F. Supp. 3d 733, 750-51 (W.D.N.C. July 23, 2020) (partially admits expert testimony; "[Proponents] bear the burden of proving that [an expert] is qualified to give the offered opinions by a preponderance of proof.").

* * *

Wiener v. Axa Equitable Life Ins. Co., 481 F. Supp. 3d 551, 558-60 (W.D.N.C. Aug. 24, 2020) (partially admits expert testimony; "The [admissibility] inquiry to be undertaken by the district court is a flexible one focusing on the principles and methodology employed by the expert, not the conclusions reached.").

Western District of Pennsylvania

UPMC v. CBIZ, Inc., 2020 WL 2736691, at *3 (W.D. Pa. May 26, 2020) (admits expert testimony; "The party offering the expert must prove each of [the Rule 702] requirements by a preponderance of the evidence."); *see also Sherwin-Williams Co. v. PPG Indus. Inc.*, 2020 WL 8249014, at *2-3 (W.D. Pa. Nov. 3, 2020).

* * *

Moultrie v. Coloplast Corp., 2020 WL 1248913, at *2-3 (W.D. Pa. Mar. 16, 2020) (partially admits expert testimony; acknowledging the "liberal thrust of the Federal Rules of Evidence") (cleaned up); s*ee also Allied Erecting & Dismantling Co. Inc. v. United States Steel Corp.*, 2020 WL 4676351, at *1 (W.D. Pa. Aug. 12, 2020).

Western District of Tennessee

Kines v. Ford Motor Co., 2020 WL 5217408, at *2 (W.D. Tenn. June 29, 2020) (admits expert testimony; "The party proffering expert testimony bears the burden of establishing its admissibility by a preponderance of proof."); *see also Flowers v. Troxel Co.*, 2020 WL 3525606, at *1-2 (W.D. Tenn. Feb. 13, 2020).

* * *

Sheffield v. Int'l Paper Co., 2020 WL 1882906, at *1 (W.D. Tenn. Feb. 26, 2020) (excludes expert testimony; describing the trial court's discretion in deciding whether to admit expert testimony).

Western District of Texas

Gallagher v. Lucas, 2020 WL 6385291, at *1-2 (W.D. Tex. Oct. 30, 2020) (partially admits expert testimony; "The proponent need not prove that the expert's testimony is correct, but she must prove by a preponderance of the evidence that the testimony is reliable."); *see also Cantu v. Wayne Wilkens Trucking LLC*, 2020 WL 5948267, at *1-2 (W.D. Tex. Oct. 7, 2020).

* * *

Spegele v. USAA Life Ins. Co., 336 FRD 537, at *544-45 (W.D. Tex. Sept. 23, 2020) (admits expert testimony; no description of a preponderance standard); *see also Smith W. Tex. Props. Ltd. v. Allied Prop. & Cas. Ins. Co.*, 2020 WL 5521137, at *1-2 (W.D. Tex. Aug. 21, 2020).

Western District of Virginia

United States v. Peterson, 2020 WL 5039504, at *4 (W.D. Va. Aug. 26, 2020) (partially admits expert testimony; "The proponent of expert testimony must establish the admissibility of th[e] testimony by a preponderance of the evidence.")..

* * *

Lake v. Adams, 2020 WL 1016352, at *1 (W.D. Va. Mar. 2, 2020) (excludes expert testimony; "A district court enjoys broad latitude in determining the admissibility of expert testimony."); *see also Mountain Valley Pipeline, LLC v. 185 Acres of Land*, 2020 WL 1067001, at *3-5 (W.D. Va. Mar. 5, 2020).

Western District of Washington

Schladetzky v. Doe, 2020 WL 5910060, at *2 (W.D. Wash. Oct. 10, 2020) (admits expert testimony; "The proponent of an expert's testimony bears the burden of establishing by a preponderance of the evidence that the requirements for admissibility have been satisfied.") (cleaned up); *see also USI Ins. Servs. Nat'l Inc. v. Ogden*, 2020 WL 4431500, at *1-2 (W.D. Wash. July 31, 2020).

* * *

Bluetooth SIG, Inc. v. FCA US LLC, 463 F. Supp. 3d 1169, 1181-82 (W.D. Wash. May 29, 2020) (admits expert testimony; acknowledging the acceptance of "[s]haky but admissible evidence"); *see also Coalview Centralia LLC v. TransAlta Centralia Mining LLC*, 2020 WL 5106720, at *1 (W.D. Wash. Aug. 31, 2020).

Appendix B

Federal Rule of Evidence 702 Cases Employing Preponderance Standard *and* Presumption Favoring Admissibility

Archer v. Bond, 2020 WL 4931397, at *1 (W.D. Ark. Aug. 21, 2020) (admits expert testimony; "The proponent of expert testimony has the burden of showing by a preponderance of the evidence that these requirements are satisfied, but Rule 702 favors admissibility if the testimony will assist the trier of fact, and doubts regarding whether an expert's testimony will be useful should generally be resolved in favor of admissibility.") (cleaned up).

Balura v. Ethicon, Inc., 2020 WL 819293, *6 (N.D.N.Y. Feb. 19, 2020) (partially admits expert testimony; "The proponent of expert testimony bears the burden of establishing the admissibility of such testimony by a preponderance of the evidence … Overall, though, the rejection of expert testimony is the exception rather than the rule.") (cleaned up).

Bardo v. Norfolk S. Ry. Co., 459 F. Supp. 3d 618, 624 (M.D. Pa. 2020) (excludes expert testimony at summary judgment; "The proponent of the expert bears the burden of establishing the reliability and admissibility of the expert's testimony by a preponderance of the evidence. Rule 702 has a liberal policy favoring admissibility.") (cleaned up).

Boatman v. Comcast of the S., L.P., 2020 WL 714146, at *7 (E.D. Tenn. Feb. 12, 2020) (partly admits expert testimony; "A party must show, by a preponderance of proof, that the witness will testify in a manner that will ultimately assist the trier of fact in understanding and resolving the factual issues involved in the case" but "[e]xclusion is the exception rather than the rule.") (cleaned up).

Bobcar Media, LLC v. Aardvark Event Logistics, Inc., 2020 WL 1673687, at *2 (S.D.N.Y. Apr. 6, 2020) (excludes expert testimony at summary judgment; "The proponent of expert testimony has the burden of establishing by a preponderance of the evidence that the admissibility requirements of Rule 702 are satisfied. Although Rule 702 requires courts to serve an initial gatekeeping function to keep out 'junk science,' it is nonetheless a well-accepted principle that Rule 702 embodies a liberal standard of admissibility for expert opinions.") (cleaned up).

Boyle v. Union Pac. R.R. Co., 2020 WL 6204342, at *4 (D. Neb. Oct. 22, 2020) (admits expert testimony; "To satisfy the reliability requirement, the party offering the expert testimony must show by a preponderance of the evidence that the methodology underlying the expert's conclusions is scientifically valid" *but* "[c]ases are legion in the Eighth Circuit that call for the liberal admission of expert testimony.").

Browning v. Edmonson Cnty., Ky., 2020 WL 4718763, at *16 (W.D. Ky. Aug. 13, 2020) (admits expert testimony; "It is the proponent of the testimony that must establish its admissibility by a preponderance of proof. That being said, any doubts regarding the admissibility of an expert's testimony should be resolved in favor of admissibility.").

Castles v. Tricam Indus., Inc., 2020 WL 4569209, at *2 (D.S.C. Mar. 27, 2020) (admits expert testimony; "First, courts should be mindful that Rule 702 was intended to liberalize the

introduction of relevant expert evidence and second courts must recognize that due to the difficulty of evaluating their testimony, experts witnesses have the potential to be both powerful and quite misleading. Regardless, the proponent of the expert testimony must establish its admissibility by a preponderance of proof.") (cleaned up).

Commins v. Genie Indus., Inc., 2020 WL 1189937, *3 (W.D. Ky. Sept. 1, 2020) (admits expert testimony; "It is the proponent of the testimony that must establish its admissibility by a preponderance of proof. That being said, any doubts regarding the admissibility of an expert's testimony should be resolved in favor of admissibility.") (cleaned up).

Cosby v. KPMG, LLP, 2020 WL 3548653, at *10 (E.D. Tenn. Jun. 29, 2020) (partially admits expert testimony; "A party must show, by a preponderance of proof, that the witness will testify in a manner that will ultimately assist the trier of fact in understanding and resolving the factual issues involved in the case" *but* "[e]xclusion is the exception, not the rule …") (cleaned up).

Cox v. Callaway Cnty., Missouri, 2020 WL 1669425, at *1-2 (W.D. Mo. Apr. 2, 2020) (partially admits expert testimony; "Under Federal Rule of Evidence 702 and the guidance set forth in *Daubert*, expert testimony should be liberally admitted" including resolving doubts in favor of admissibility and favoring admissibility over exclusion, *but* "[t]he party seeking to admit expert testimony has the burden of establishing the admissibility of the experts' testimony by a preponderance of the evidence.") (cleaned up).

Cyntec Co. Ltd. v. Chilisin Elecs. Corp., 2020 WL 5366319, at *3 (N.D. Cal. Sep. 8, 2020) (partially admits expert testimony at summary judgment; "The proponent of expert testimony bears the burden of establishing by a preponderance of the evidence that the admissibility requirements are met," *but* "there is a presumption of admissibility").

Dries v. Sprinkler, Inc., 2020 WL 7425602, at *3 (W.D. Wash. Dec. 18, 2020) (admits expert testimony; "The proponent of expert testimony has the burden of establishing that the admissibility requirements are met by a preponderance of the evidence" *but* "Rule 702 should be applied with a liberal thrust favoring admission") (cleaned up).

Durant v. United States, 2020 WL 1274326, at *6 (N.D.N.Y. Mar. 17, 2020) (excludes expert evidence; "The proponent of expert testimony must establish its admissibility by a preponderance of the evidence" *but* "there should be a presumption of admissibility of evidence").

Estate of Freiwald v. Fatoki, 2020 WL 6712467 (E.D. Wisc. Nov. 16, 2020) (admits expert testimony; "The proponent of the expert bears the burden of demonstrating that the expert's testimony would satisfy the *Daubert* standard by a preponderance of the evidence. The rule on expert testimony is liberal, however, and doubts about the usefulness of an expert's testimony are generally resolved in favor of admissibility.") (cleaned up).

Fair Isaac Corp. v. Fed. Ins. Co., 447 F. Supp. 3d 857, 869 (D. Minn. 2020) (partially admits expert testimony at summary judgment; "The proponent of expert testimony must prove its admissibility by a preponderance of the evidence" *but* "Rule 702 reflects an attempt to liberalize the rules governing the admission of expert testimony and favors admissibility over exclusion.").

Financial Guar. Ins. Co. v. Putnam Advisory Co., LLC, 2020 WL 4251229, at *2-3 (S.D.N.Y. Feb. 19, 2020) (partially admits expert testimony at summary judgment; "The proponent of expert testimony has the burden of establishing by a preponderance of the evidence that the admissibility requirements of Rule 702 are satisfied" *but* "[b]ecause the federal rules emphasize liberalizing expert testimony, doubts about whether an expert's testimony will be useful should generally be resolved in favor of admissibility") (cleaned up).

Gustafson v. BI-State Dev. Agency, 2020 WL 409011, at *1-2 (E.D. Mo. Jan. 24, 2020) (partially admits expert testimony; "The reliability requirement means that the party offering the expert testimony must show by a preponderance of the evidence both that the expert is qualified to render the opinion and that the methodology underlying his conclusions is scientifically valid" *but* "Rule 702's requirements notwithstanding, courts should resolve doubts regarding the usefulness of an expert's testimony in favor of admissibility") (cleaned up).

Hoekman v. Educ. Minn., 335 F.R.D. 219, 236 (D. Minn. 2020) (partially admits expert testimony at class certification; "The proponent of the expert testimony must show, by a preponderance of the evidence, that the expert is qualified to render the opinion offered, and that his or her methodology is scientifically valid" *but* "under *Daubert,* liberal admission of expert testimony is prevalent, and courts should resolve doubts regarding the usefulness of an expert's testimony in favor of admissibility") (cleaned up).

Hughes v. C.R. Bard Inc., 2020 WL 9078128, at *1 (W.D. Mo. Apr. 22, 2020) (admits expert testimony; "The party offering expert testimony must show by a preponderance of the evidence that the methodology underlying the expert's conclusions is valid" *but* "[t]he standard for admission of expert testimony is a liberal one.") (cleaned up).

In re Davol C.R. Bard Mesh Prod. Liab. Litig., 2020 WL 6605612, at *3 (S.D. Ohio Sep. 11, 2020) (partially admits expert testimony; "The burden is on the party proffering the expert testimony to demonstrate by a preponderance of proof that the opinions of their expert are admissible" *but* "[a]ny doubts regarding the admissibility of an expert's testimony should be resolved in favor of admissibility") (cleaned up).

In re Davol C.R. Bard Mesh Prod. Liab. Litig., 2020 WL 6603389, at *2 (S.D. Ohio Sep. 10, 2020) (partially admits expert testimony; "The burden is on the party proffering the expert testimony to demonstrate by a preponderance of proof that the opinions of their expert are admissible" *but* "[a]ny doubts regarding the admissibility of an expert's testimony should be resolved in favor of admissibility") (cleaned up).

In re Davol C.R. Bard Mesh Prod Liab Litig., 2020 WL 6605542, at *3 (S.D. Ohio Sep. 1, 2020) (partially admits expert testimony; "The burden is on the party proffering the expert testimony to demonstrate by a preponderance of proof that the opinions of their expert are admissible" *but* "[a]ny doubts regarding the admissibility of an expert's testimony should be resolved in favor of admissibility") (cleaned up).

In re E.I. DuPont de Nemours & Co. C-8 Pers. Injury Litig., 2020 WL 278499, at *5 (S.D. Ohio Jan. 19, 2020) (excludes expert testimony; "The burden is on the party proffering the

expert report to demonstrate by a preponderance of proof that the opinions of their experts are admissible" *but* "[a]ny doubts regarding the admissibility of an expert's testimony should be resolved in favor of admissibility").

In re ResCap Liquidating Trust Litig., 432 F. Supp. 3d 902, 913 (D. Minn. 2020) (partially admits expert testimony; "proponents must demonstrate by a preponderance of evidence that the expert's opinion is reliable" *but* "Courts generally support an attempt to liberalize the rules governing the admission of expert testimony, and favor admissibility over exclusion").

In re Suboxone Antitrust Litig., 2020 WL 6887885, at *2 (E.D. Pa. Nov. 24, 2020) (partially admits expert testimony; "The party offering an expert must demonstrate, by a preponderance of the evidence, that the expert's qualifications and opinions comply with Federal Rule of Evidence 702" *but* "Rule 702 has a liberal policy of admissibility and the rejection of expert testimony is the exception rather than the rule").

In re Term Commodities Cotton Futures Litig., 2020 WL 5849142, at *11 (S.D.N.Y. Sep. 30, 2020) (partially admits expert testimony; "There is a presumption of admissibility of expert evidence and the rejection of expert testimony is the exception rather than the rule. However the proponent of expert testimony has the burden of establishing by a preponderance of the evidence that the admissibility requirements of Rule 702 are satisfied.") (cleaned up).

Jayne v. City of Sioux Falls, 2020 WL 2129599, at *2-3 (D.S.D. May 5, 2020) (admits expert testimony; Rule 702 "clearly is one of admissibility rather than exclusion" *but* "the party offering the expert testimony must show by a preponderance of the evidence that the methodology underlying the expert's conclusions is scientifically valid") (cleaned up).

Jorn v. Union Pac. R.R. Co., 2020 WL 6261693, at *4-5 (D. Neb. Mar. 25, 2020) (admits expert testimony; "the party offering the expert testimony must show by a preponderance of the evidence that the methodology underlying the expert's conclusions is scientifically valid" *but* "[c]ases are legion in the Eighth Circuit that call for the liberal admission of expert testimony") (cleaned up).

King v. Union Pac. R.R. Co., 2020 WL 3036073, at *4-5 (D. Neb. Jun. 5, 2020) (admits expert testimony; "The proponent of expert testimony bears the burden of [proving] admissibility by a preponderance of the evidence" *but* "[c]ases are legion in the Eighth Circuit that call for the liberal admission of expert testimony") (cleaned up).

Krause v. Cnty. of Mohave, 459 F. Supp. 3d 1258 (D. Ariz. 2020) (partially admits expert testimony; "Rule 702 should be applied consistent with the liberal thrust of the Federal Rules and their general approach of relaxing the traditional barriers to opinion testimony" *but* "[i]n applying the Rule, the district court acts as a gatekeeper and determines whether expert testimony has a reliable basis in the knowledge and experience of the relevant discipline by the preponderance of the evidence") (cleaned up).

Lampton v. C.R. Bard Inc., 2020 WL 7013356, at *1 (W.D. Mo. Nov. 27, 2020) (admits expert testimony; "The party offering expert evidence must show by a preponderance of the evidence that the methodology underlying the expert's conclusions is valid" *but* "[t]he standard for admission of expert testimony is a liberal one") (cleaned up).

Lancaster v. Ethicon, Inc., 2020 WL 819291, at *5 (N.D.N.Y. Feb. 19, 2020) (partially admits expert testimony; "The proponent of the expert testimony bears the burden of establishing the admissibility of such testimony by a preponderance of the evidence" *but* "[o]verall, though, the rejection of expert testimony is the exception rather than the rule").

Langrell v. Union Pac. R.R. Co., 2020 WL 3037271, *4, 6 (D. Neb. Jun. 5, 2020) (admits expert testimony; "The proponent of expert testimony bears the burden of [proving] admissibility by a preponderance of the evidence" *but* "[c]ases are legion in the Eighth Circuit that call for the liberal admission of expert testimony") (cleaned up).

Lemberger v. Union Pac. R.R. Co., 463 F. Supp. 3d 954, 961, 963 (D. Neb. 2020) (admits expert testimony; "The proponent of expert testimony bears the burden of [proving] admissibility by a preponderance of the evidence" *but* "[c]ases are legion in the Eighth Circuit that call for the liberal admission of expert testimony") (cleaned up).

Liberty Towers Philly LP v. Ulysses Asset Sub II LLC, 2020 WL 3642483, at *4 (E.D. Pa. Jul. 6, 2020) (partially admits expert testimony; "The party offering the expert testimony has the burden to show each threshold by a preponderance of the evidence" *but* "[w]ith a liberal approach toward admitting expert testimony, the rejection of expert testimony is the exception and not the rule") (cleaned up).

Mannacio v. LG Elecs. USA Inc., 2020 WL 4676285, at *7 (D. Minn. Feb. 11, 2020) (partially admits expert testimony; "The proponent of the expert testimony must prove its admissibility by a preponderance of the evidence" *but* "[w]hen considering admissibility of expert witness [sic], the Court should resolve doubts regarding the usefulness of an expert's testimony in favor of admissibility") (cleaned up).

Marchlewicz v. Bros. Xpress, Inc., 2020 WL 7319550, at *2-3 (W.D. Tex. Dec. 10, 2020) (partially admits expert testimony; "The proponent need not prove that the expert's testimony is correct, but she must prove by a preponderance of the evidence that the testimony is reliable" *but* "the rejection of expert testimony is the exception rather than the rule") (cleaned up).

Mason Dixon Contracting Inc. v. Allied Prop. & Cas. Ins. Co., 2020 WL 5995664, at *5 (M.D. Fla. Jul. 31, 2020) (admits expert testimony; "The party offering the expert opinion bears the burden of establishing, by a preponderance of the evidence, the expert's qualification, reliability, and helpfulness" *but* "[a]ccording to Rule 702's Advisory Committee Notes on the 2000 Amendments, since *Daubert* was decided, the rejection of expert testimony is the exception rather than the rule") (cleaned up).

McBride v. Petulla, 2020 WL 1032535, at *2 (W.D. Pa. Mar. 3, 2020) (admits expert testimony; "The party offering the expert must prove each of these requirements by a preponderance of the evidence" *but* "[e]xclusion of expert testimony is the exception rather than the rule").

Meade v. Ethicon, Inc., 2020 WL 6395814, at *2 (E.D. Ark. Nov. 2, 2020) (partially admits expert testimony; Rule 702 "is clearly one of admissibility rather than exclusion" *but* "[t]he proponent of expert testimony has the burden of establishing by a preponderance of the evidence the admissibility of the expert's testimony").

Medical Soc'y of N.Y v. UnitedHealth Group, Inc., 2020 WL 1489800, at *2 (S.D.N.Y. Mar. 26, 2020) (admits expert testimony; "The proponent of expert testimony has the burden of establishing by a preponderance of the evidence that the admissibility requirements of Rule 702 are satisfied" *but* "it is nonetheless a well-accepted principle that Rule 702 embodies a liberal standard of admissibility for expert opinions") (cleaned up).

Mitchell v. Michael Weinig, Inc., 2020 WL 5798043, at *20 (S.D. Ohio Sep. 29, 2020) (admits expert testimony; "The burden is on the party proffering the expert report and testimony to demonstrate by a preponderance of proof that the opinions of their experts are admissible" *but* "any doubts should be resolved in favor of admissibility") (cleaned up).

Mitsubishi Tanabe Pharma Corp. v. Sandoz Inc., 2020 WL 3169372, at *2 (D.N.J. Jun. 15, 2020) (partially admits expert testimony; "The party offering the expert testimony bears the burden of establishing the existence of each matter by a preponderance of the evidence" *but* "Rule 702, however, has a liberal policy of admissibility") (cleaned up).

Monroe v. Freight All Kinds, Inc., 2020 WL 6588352, at * (W.D. Mo. Nov. 10, 2020) (partially admits expert testimony; "The proponent of the expert testimony must prove its admissibility by a preponderance of the evidence" *but* "the Eighth Circuit has held that expert testimony should be liberally admitted") (cleaned up).

NAACP v. City of Myrtle Beach, 2020 WL 7054437, at *1-2 (D.S.C. Dec. 1, 2020) (admits expert testimony; "the proponent has the burden of establishing that the pertinent admissibility requirements are met by a preponderance of the evidence" *but* "Rule 702 was intended to liberalize the introduction of relevant expert evidence") (cleaned up).

Packard v. City of New York, 2020 WL 1479016, at *1, 3 (S.D.N.Y. Mar. 25, 2020) (partially admits expert testimony at summary judgment; "The proponent of expert testimony has the burden of establishing by a preponderance of the evidence that the admissibility of Rule 702 are satisfied" *but* "[t]he liberal thrust of the Federal Rules of Evidence and their general approach of relaxing the traditional barriers to opinion testimony counsels in favor of admissibility").

Pitlyk v. Ethicon Inc., 2020 WL 8224837, at *2 (E.D. Mo. Aug. 12, 2020) (admits expert testimony;) ("The proponent of expert testimony must prove its admissibility by a preponderance of the evidence" *but* "the Eighth Circuit has held that expert testimony should be liberally admitted") (cleaned up).

Pitlyk v. Ethicon Inc., 478 F. Supp. 3d 784, 786-87 (E.D. Mo. 2020) (admits expert testimony; "The proponent of expert testimony must prove its admissibility by a preponderance of the evidence" *but* "the Eighth Circuit has held that expert testimony should be liberally admitted") (cleaned up).

Ranney v. Union Pac. R.R. Co., 2020 WL 3036200, at *4-5 (D. Neb. Jun. 5, 2020) (admits expert testimony; "The proponent of expert testimony bears the burden of [proving] admissibility by a preponderance of the evidence" *but* "[c]ases are legion in the Eighth Circuit that call for the liberal admission of expert testimony") (cleaned up).

Rawers v. United States, 2020 WL 5658093, at *8-9 (D.N.M. Sep. 23, 2020) (admits expert testimony; "The proponent of expert testimony has the burden of establishing by a preponderance of the evidence that the pertinent admissibility requirements are met" *but* "Courts should, under the Federal Rules of Evidence, liberally admit expert testimony").

Refrig. Supplies Inc. v. Acadia Ins. Co., 2020 WL 7397002, at *3 (E.D. Mo. Dec. 17, 2020) (admits expert testimony; "the party offering the expert testimony must show by a preponderance of the evidence both that the expert is qualified to render the opinion and that the methodology underlying his conclusions is scientifically valid" *but* "[t]he rule is clearly one of admissibility rather than exclusion").

S. Minn. Beet Sugar Coop. v. Agri. Sys., 2020 WL 5105763, at *3 (D. Minn. Aug. 31, 2020) (excludes expert testimony; "The proponent of expert testimony must prove its admissibility by a preponderance of the evidence" *but* "Rule 702 reflects an attempt to liberalize the rules governing the admission of expert testimony and favors admissibility over exclusion") (cleaned up).

Trice v. Napoli Shkolnik PLLC, 2020 WL 4816377, at *10-11 (D. Minn. Aug. 19, 2020) (partially admits expert testimony; "The proponent of the expert testimony bears the burden of showing by a preponderance of the evidence that the testimony is admissible" *but* "[r]ejection of expert testimony is the exception rather than the rule") (cleaned up).

United States v. Begay, 497 F. Supp. 3d 1025, 1056 (D.N.M. 2020) (partially admits expert testimony; "The proponent of the expert testimony has the burden of establishing by a preponderance of the evidence that the pertinent admissibility requirements are met" *but* "Courts should, under the Federal Rules of Evidence, liberally admit expert testimony").

UPMC v. CBIZ, Inc., 2020 WL 2736691, at *3 (W.D. Pa. May 26, 2020) (admits expert testimony; "The party offering the expert must prove each of these requirements by a preponderance of the evidence" *but* "[e]xclusion of expert testimony is the exception rather than the rule") (cleaned up).

Washam v. BNSF Ry. Co., 2020 WL 5880133 (E.D. Ark. Oct. 2, 2020) (partially admits expert testimony; "The rule is clearly one of admissibility rather than exclusion" *but* "[t]he proponent of the expert testimony has the burden of establishing by a preponderance of the evidence the admissibility of the expert's testimony") (cleaned up).

Watkins v. Lawrence Cnty., 2020 WL 2544469, at *1 (E.D. Ark. May 19, 2020) (admits expert testimony; Rule 702 "clearly is one of admissibility rather than exclusion" *but* "[t]he proponent of the expert testimony has the burden of establishing by a preponderance of the evidence the admissibility of the expert's testimony") (cleaned up).

Wegmann v. Ethicon Inc., 2020 WL 5814475, at *4 (E.D. Mo. Sep. 30, 2020) (partially admits expert testimony; "the party offering the expert testimony must show by a preponderance of the evidence both that the expert is qualified to render the opinion and that the methodology underlying his conclusions is scientifically sound" *but* "the Eighth Circuit has held that expert testimony should be liberally admitted") (cleaned up).

Wegmann v. Ethicon Inc., 2020 WL 5960923, at *1 (E.D. Mo. Oct. 8, 2020) (partially admits expert testimony; "the party offering the expert testimony must show by a preponderance of the evidence both that the expert is qualified to render the opinion and that the methodology underlying his conclusions is scientifically sound" *but* "the Eighth Circuit has held that expert testimony should be liberally admitted") (cleaned up).

Wichterman v. City of Phila., 2020 WL 7488645 (E.D. Pa. Dec. 21, 2020) (partially admits expert testimony; "Rule 702 has a liberal policy of admissibility. As such, the rejection of expert testimony is the exception and not the rule" *but* "[t]he party offering the expert must establish each requirement by a preponderance of the evidence") (cleaned up).

TAB 9

TESTIMONY OF ANDREW E. KANTRA
IN SUPPORT OF PROPOSED AMENDMENTS TO FRE 702

I. BACKGROUND

A. Partner at Troutman Pepper (Philadelphia)

B. 25+ years

C. Lead a team that advises clients on expert witness issues and challenges the admissibility of expert opinions in in MDLs and mass torts on behalf of pharmaceutical companies

D. Observed first-hand the misunderstanding of Rule 702 that leads to erroneous decisions to admit unreliable expert opinions

II. CASE STUDY: ZYPREXA MDL

A. Focus on one MDL in which I was involved that helps explain why the proposed amendment to the rules is necessary.

B. Zyprexa: General Background

1. Formed in 2004/terminated 2012

2. Before Judge Jack Weinstein in the EDNY

3. Zyprexa is an antipsychotic medication that was alleged to cause diabetes and excessive weight gain.

4. Plaintiffs included thousands of individual Zyprexa patients. In addition, there were state attorneys general and third-party payors alleging financial injury

C. Judge Weinstein's Rule 702 decisions in Zyprexa

1. Illustrate why the rule should be amended

2. Between June 2007 and May 2009, Judge Weinstein made rulings on close to 30 experts, admitting all of them

3. This included third-party payor litigation in which there were 21 experts across multiple disciplines and complicated damages calculations.

a. But Judge Weinstein disposed of plaintiffs' Rule 702 challenges in one paragraph, describing each of defendants' experts as "a distinguished scientist whose expertise probably will be helpful in deciding relevant scientific and economic issues." *In re Zyprexa Prods. Liab. Litig.*, 493 F.Supp.2d 571, 580 (E.D.N.Y. 2007)

b. He also conducted a sua sponte review of plaintiffs' experts under Rule 702, without any briefing from the parties, and concluded in two sentences that they should be admitted. *Id.*

4. To explain his rulings, he invoked the "liberal standard of admissibility for expert opinions" stated by the U.S. Court of Appeals for the Second Circuit. *E.g., In re Zyprexa Prods. Liab. Litig.*, 489 F.Supp.2d 230, 282 (E.D.N.Y. 2007) (quoting *Nimely v. City of New York*, 414 F.3d 381, 395-96 (2d Cir. 2005)).

5. And relied on pre-*Daubert* Second Circuit case law to support a presumption in favor of admissibility "unless there are strong factors such as time or surprise favoring exclusion." *E.g., In re Zyprexa Prods. Liab. Litig.*, 489 F.Supp.2d at 285 (quoting *U.S. v. Jakobetz*, 955 F.3d 786, 797 (2d Cir. 1992)).

6. In May 2009, however, Judge Weinstein held for the first time that the exclusion of a Zyprexa expert witness was "mandate[d]" under Rule 702. *See In re Zyprexa Prods. Liab. Litig.*, No. 04-MD-1596, 2009 WL 1357236 (E.D.N.Y. May 12, 2009)

a. Stephen Hamburger was an endocrinologist proposed as a specific causation expert on behalf of 20 plaintiffs.

b. Two years after his initial Rule 702 rulings and with greater knowledge about the benefits and risks of antipsychotic drugs like Zyprexa, Judge Weinstein correctly noted that "precision with respect to the relevant scientific knowledge and its application to the facts of individual cases is expected."

c. He described Dr. Hamburger as "shockingly careless about the facts in the cases 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 new theories and explanations to establish causal relationships. He repeatedly and impermissibly stretched the truth to support findings of causality."

d. Judge Weinstein 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."

e. He concluded that allowing 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 the law" and cited the 2000 Advisory Committee Notes to Rule 702.

III. CONCLUSIONS

A. What lessons should be drawn from these rulings in the Zyprexa MDL for the proposed amendments to Rule 702?

1. Judge Weinstein was a smart, independent-minded, respected jurist, who wrote the book on the Federal Rules of Evidence.

2. 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.

3. This is a far cry from the intent behind Rule 702, as the testimony of so many has demonstrated.

4. The proposed amendments to Rule 702 and the Advisory Committee Notes are essential to clear up the misunderstanding of what the rule requires of federal judges and to state unequivocally their obligation to scrutinize the scientific methodology and reliability of expert opinion, not presume its admissibility.

5. In Judge Weinstein's words, doing so will "improve the utilization of science by the law."

TAB 10

JANUARY 21, 2002 HEARING ON PROPOSED AMENDMENT TO EVIDENCE RULES

Written Testimony of Eric Lasker, Esq. on Proposed Amendment to Rule 702

Members of the Advisory Committee, thank you for the opportunity to speak with you in support of the proposed amendment to Rule 702. My name is Eric Lasker. I am a co-author of the 2015 Law Review article that first called upon this Committee to amend Rule 702 to address the confusion and apparent recalcitrance of many courts that were failing to properly exercise their gatekeeping responsibility under Rule 702 to protect juries from scientifically unreliable or irrelevant expert testimony. DE Bernstein & EG Lasker, *Defending Daubert: It's Time to Amend Federal Rule of Evidence 702*, William & Mary L. Rev. 57(1); 1-48 (2015). At the invitation of this Committee, I had the opportunity to speak with you at length during a roundtable discussion on the proposed amendment to Rule 702 held at the University of Denver, Strum College of Law in October 2018. *The Philip D. Reed Lecture Series, Advisory Committee on Evidence Rules, Conference on Proposed Amendments: Experts, the Rule of Completeness, and Sequestration of Witnesses*, Fordham L. Rev. 87; 1361-1423 (2019). And I have shared additional thoughts with the Committee on the need for an amendment to Rule 702 in written comments submitted in August 2021.

Having thus followed this Committee's deliberations and analyses from the beginning, I speak first to commend the Committee on its good work and to add my voice in support of the proposed amendment to Rule 702. While the proposed amendment does not adopt the specific language changes proposed in my 2015 article, I believe that the amendment now being considered will go a long way towards improving the administration of justice in the federal

courts and, in the words of Rule 102, promoting the development of evidence law to the end of ascertaining the truth and securing a just determination.

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. This proposed amendment would expressly instruct courts that it is their responsibility to hold proponents of expert testimony to their burden to establish the admissibility of such testimony as specifically laid out in the Rule. While I can understand the objection that might be made that this requirement is already implicit in the Rule, we have clear precedent in the 20 years of judicial misunderstanding of this Committee's prior work in amending Rule 702 in 2000 that what should be implicitly understood is too often overlooked when it comes to the issue of admitting expert testimony.

My main purpose here 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 insure that its work is not undone in the same fashion as was its work leading up to the 2000 amendment to the Rule.

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 the United States. 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. At the same time, humanity is facing an existential threat from climactic changes that scientists had identified and forewarned about decades ago. Scientific skepticism has become engrained in our society, in our politics, and in our understanding or misunderstanding of the world. In a recent essay in

the Boston Review, Andrew Jewett, the author of Science, Democracy, and the American University: From the Civil War to the Cold War, states that "Science is under fire as never before in the United States." A. Jewett, *How Americans Came to Distrust Science*, Boston Review (Nov. 2020), available at https://bostonreview.net/articles/andrew-jewett-science-under-fire/ As Mr. Jewett explains, the distrust in science is not limited to one political party or one segment of society. It is widespread, bipartisan, and endemic:

> Across the political spectrum, citizens tend to pick and choose among scientific theories and applications based on preexisting commitments. They are frequently suspicious of basic research procedures as well; many believe that peer review and other internal policing mechanisms fail to remove powerful biases. Conservatives often charge that peer review enforces liberal groupthink, while some progressives say it leaves conventional social norms unexamined.

Most of us, as individuals, can do little to remedy this problem. But this Committee can do a lot. The admission of shoddy scientific evidence in court 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 speculative testimony has improperly condemned innocent people, weakening the public's faith both in the courts and in the supposed science those courts have implicitly endorsed. In the realm of civil tort law, where I have focused much of my practice, the failure of some courts to fulfill their gatekeeping function 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. Indeed, one of the initial drivers behind the need for stringent protections under Rule 702 was the promotion in civil tort cases of false science casting doubt on the safety of vaccines.

Obviously, the proposed amendment to Rule 702 is not going to solve the societal problems caused by mistrust in scientific evidence. But it is an important step. And it is an important step that 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 insuring that judges live up to their gatekeeping responsibility against unreliable science. When I began research for my 2015 law review article, I was frankly stunned when I read this 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 products liability and tort law for roughly 25 years. I began working in this area right around the time that the Supreme Court issued its ruling in *General Electric v. Joiner*, during the very time that this Committee was revising the language of Rule 702 and shortly before the new rule came into effect. My practice thereafter was heavily focused on cases involving scientific expert testimony and the admissibility of such testimony and my firm has been involved in many of the most important rulings excluding unreliable scientific evidence under *Daubert*, including leading opinions in five different federal courts of appeal. Throughout this entire period though, I had misunderstood that the amendments to Rule 702 were designed and intended solely to "codify *Daubert*." This misunderstanding – which I believe was widespread throughout the legal and judicial community – had the practical effect of robbing Rule 702 of any independent meaning. Litigants raised *Daubert* challenges to expert testimony. Courts held *Daubert* hearings. Attorneys and judges parsed the language of the *Daubert* opinion to determine what standard should be applied in admitting expert testimony.

It was only as I researched my law review article though, analyzed the Committee's deliberations, and payed closer attention to that Advisory Committee's Note to the 2000

amendment that I realized my error. As I set forth in my law review article, this Committee had amended Rule 702 with the express goal and intent to resolve confusion that had arisen following *Daubert* as to the proper standard of expert admissibility. To quote the Advisory Committee's Reporter, Professor Capra, the new Rule 702 "clearly envision[ed] a more rigorous and structured approach than some courts were currently employing."

As a result of the Committee's work, the language of Rule 702 was significantly revised to provide that rigorous and structured approach, and it is far different than the language of the old Rule 702 that the Supreme Court interpreted and applied in the *Daubert* trilogy. But only some courts took notice. Many other courts ignored the amendment altogether, perhaps most notably the Ninth Circuit in *SQM North America* expressly rejected the proposition that "any step that renders [an expert's] analysis unreliable renders the expert's testimony inadmissible," a standard that this Committee specifically quoted as being incorporated into the Rule in its Note to the 2000 amendment.

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 this 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 those recommendations, but beyond that, I call upon the Committee to consider what other steps may be necessary to make certain that – this time – Rule 702 is properly and uniformly applied in every federal court in every circuit across the county.

TAB 11

PLUNKETT COONEY

January 14, 2022

Advisory Committee on Evidence Rules
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, DC 20544

Re: Proposed Amendment to Federal Rule of Evidence 702

Dear Committee Members:

As an appellate lawyer who has handled appeals involving individuals, corporations, and governmental entities for three decades, I am writing to preview some points I hope to make during the virtual hearing next week.

In my experience, when a jury trial results in an aberrant result, it is often due to expert testimony that was unreliable but was accepted by the jury as the basis for their verdict. Federal Rule of Evidence 702 was revised to make trial courts the gatekeepers responsible for determining whether proffered expert testimony is reliable. To pass muster, the trial courts are obligated under the rule to determine whether the testimony is based on sufficient facts or data, is the product of reliable principles and methods, and reflects a reliable application of those principles and methods to the facts of the case.

But district courts across the country are changing those standards and allowing testimony in when it fails to satisfy the criteria included in the rule. And once they do so, if the opposing party seeks to challenge those decisions, their ability to do so is hampered by the widely varying approaches of the circuit courts of appeal and by the appellate abuse-of-discretion standard of review.

While district courts scrutinize a proffered expert's credentials and generally get this initial inquiry right, they too-often leave the rigorous gatekeeping about the reliability of principles and methods, and even more often, the reliable application of those principles and methods to the facts of the case for the jury to consider. This is the most problematic approach ad threatens the worst consequences.

Research shows that when jurors lack the ability to understand scientific methodology and principles and their application to the facts, they fall back on the expert's credentials and defer to his or her conclusions. As a result, when a party hires an expert who is willing to shade his or her opinion to meet that party's need for a conclusion, the jury is misled and all-too-often, an aberrant and unjustified result follows.

Unfortunately, the observation that there is nothing that cannot be proved by a so-called "expert" is still noticeable despite the strictures of Rule 702. *Chaulk v. Volkswagen of*

America, Inc., 808 F.2d 639, 644 (7th Cir. 1986) (Posner, J., dissenting) (the expert's testimony "was the testimony either of a crank or, what is more likely, of a man who is making a career out of testifying for plaintiffs in automobile accident cases in which a door may have opened…[h]is testimony illustrated the age-old problem of expert witnesses who are 'often the mere paid advocates or partisans of those who employ and pay them, as much so as the attorneys who conduct the suit. There is hardly anything, not palpably absurd on its face, that cannot now be proved by some so-called 'experts.'"). Witnesses, parading as experts, can hide behind a veil of jargon and statistics, to undermine or entirely erase the integrity of the jury trial.

In my experience, the greater risk to the justice system lies in this situation: a jury trial in which a highly credentialed-expert relies on underlying methodology that is scientifically unreliable or is unreliably applied to the facts of the case or applied when no facts in the case support its application. These partisans throw up clouds of confusion and yet their testimony may be given credence, not because they have a well-founded methodology, but because they have presented as scientific something that no one outside of a courtroom would agree is scientific to justify their unfounded conclusion.

Psychologists agree that when jurors are presented with complex information beyond their ability to understand, "they rely more on external cues such as the expert's credentials" to evaluate the testimony. Jonathan J. Koehler, et al., *Science, Technology, or the Expert Witness: What Influences Juror's Judgments About Forensic Science Testimony?*, Psychology, Public Policy, and Law, Vol 22, No. 4, 401-413 (2016). Thus, when confronted with complex technical information that they cannot understand, jurors will look to an expert's credentials or other peripheral cues – such as the expert's "likeability" - as the basis for evaluating their testimony. Accordingly, placing credentialed, but still unreliable expert testimony before a jury, particularly in cases involving complex scientific and statistical principles, undermines the jury system and the inherent fairness that the rules are intended to guarantee.

We have seen this in both civil and criminal cases – and it is a serious problem to the administration of justice. It is also a reason why litigants lose faith in the ability of the jury system to reach a correct outcome. It has resulted in wrongful convictions based on now-discredited "science." In Michigan, for example, multiple criminal convictions were based on so-called "bite" evidence, which has since been discredited. But while some convictions were later set aside, this obviously does not make up for the wrongful conviction with all its horrifying impact on those who were wrongfully convicted and their families.

This Committee can make a difference. If the rule makes clear that the gatekeeping inquiry embodied in the rule goes to admissibility, not weight, that will help. In addition, I strongly urge the Committee to point out the many judicial decisions that misinterpret Rule 702 in the Comment. This would help ensure that the federal courts – trial and appellate – are not misled by published opinions applying an incorrect analysis of Federal Rule of Civil

Procedure. And it would help those, like me, who try to help the appellate courts reach a legally correct result by discrediting past decisions that fail to properly interpret Rule 702.

Thank you for your consideration and your work to improve our justice system.

Sincerely,

PLUNKETT COONEY

MARY MASSARON
Direct Dial (313) 983-4801
mmassaron@plunkettcooney.com

MM/slp

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TAB 12

WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Avenue, NW
Washington, DC 20036
(202) 588-0302

January 21, 2022

Prepared Testimony to the Committee on Rules of Practice and Procedure by John M. Masslon II on behalf of Washington Legal Foundation

Thank you, Mr. Chairman, 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 a 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. Yet many courts quote that decision's language to disregard Rule 702's gatekeeping requirement.

Similarly, the Committee should explicitly reject the Fifth Circuit's decision in *Viterbow v. Dow Chemical Company*. There, the court said that "As a general rule, questions relating 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 and courts should not be able to cite that decision to bypass Rule 702's gatekeeping 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 them.

Second, the Committee should ensure that courts apply Rule 702 fairly. The clarification that the proponent of expert evidence must prove by a preponderance of evidence that it is 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 is nothing explicit in the rule that explains whether courts 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 that expert testimony is admissible. 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 inadmissible.

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 applies, it is a factual question for the jury—not the judge.

There is 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.

FWASHINGTON LEGAL FOUNDATION
2009 Massachusetts Avenue, NW
Washington, DC 20036
(202) 588-0302

December 14, 2021

Submitted via regulations.gov

Honorable John D. Bates
Chair, Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle Northeast
Washington, District of Columbia 20544

Re: Proposed Amendments to Federal Rule of Evidence 702

Judge Bates:

Washington Legal Foundation submits this comment on proposed changes to Federal Rule of Evidence 702. WLF appreciates the opportunity to weigh in on whether the Committee on Rules of Practice and Procedure should submit the proposed changes to the Supreme Court for approval. As explained below, the Committee should submit the proposed changes, with slight modifications.

I. WLF Has An Interest In Ensuring That Jurors Do Not Consider Junk Science.

WLF is a nonprofit, public-interest law firm and policy center with supporters nationwide. It defends free enterprise, individual rights, limited government, and the rule of law. WLF participated in this rulemaking process by submitting a letter to the Committee when it was considering whether to publish the proposed changes to Rule 702. *See* WLF Letter, *In* re *Federal Rule Of Evidence 702 Amendment* (Mar. 12, 2020).

WLF often appears before federal tribunals urging that district courts act as gatekeepers to prevent jurors from considering junk science. *See, e.g.*, *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993); *Adams v. Merck Sharp & Dohme Corp.*, No. 21-55342 (9th Cir. brief filed Oct. 25, 2021); *In re Zoloft (Sertraline Hydrochloride) Prod. Liab. Litig.,* 858 F.3d 787 (3d Cir. 2017).

WLF's Legal Studies Division, WLF's publishing arm, often produces and distributes articles on legal issues related to federal courts' misapplication of Rule 702. *See, e.g.*, Lee Mickus, *Trial Court's Evidentiary Ruling in Natural Vanilla Class Action Reflects Need for Changes to Rule 702*, WLF LEGAL OPINION LETTER (Nov. 12, 2021); Lawrence A. Kogan, *Weight of the Evidence: A Lower Expert Evidence Standard Metastasizes in Federal Courts*, WLF WORKING PAPER (Mar. 2020); Joe G. Hollingsworth & Mark A. Miller, *Inconsistent Gatekeeping Undercuts the Continuing Promise of* Daubert, WLF WORKING PAPER (July 2019).

II. Circuit Courts And District Courts Continue To Misapply Rule 702's Requirements.

Many circuit courts and district courts misapply Rule 702. A recent decision highlights how these courts avoid Rule 702's requirements. In *In re Roundup Prod. Liab. Litig.*, 358 F. Supp. 3d 956 (N.D. Cal. 2019), the defendant challenged the plaintiffs' experts because the experts admitted that their methodology failed to rule out idiopathic causes of non-Hodgkins lymphoma. *Id.* at 959. As the Court recognized, "[u]nder a strict interpretation of" Rule 702, the plaintiffs' experts could not testify. *Id.* But the Ninth Circuit refuses to follow Rule 702's command. *See id.*

Ignoring Rule 702, the Ninth Circuit's decisions allow for specific-causation opinions that are based on speculation. *See Wendell v. GlaxoSmithKline LLC*, 858 F.3d 1227, 1234 (9th Cir. 2017); *Messick v. Novartis Pharm. Corp.*, 747 F.3d 1193, 1198-99 (9th Cir. 2014). As the *Roundup* court explained, "district courts in the Ninth Circuit must be more tolerant of borderline expert opinions than" they should be. *Roundup*, 358 F. Supp. 3d at 959.

The Ninth Circuit's continued practice of allowing "expert" testimony based on speculation conflicts with Rule 702. Under the rule, an expert's testimony must be "based on sufficient facts or data." Fed. R. Evid. 702(b). But the Ninth Circuit allows expert testimony bottomed on almost no data. *See Clausen v. M/V NEW CARISSA*, 339 F.3d 1049, 1060 (9th Cir. 2003). Second, the evidence must be "the product of reliable principles and methods." Fed. R. Evid. 702(c). The Ninth Circuit, however, allows differential diagnoses that do not consider idiopathic causes. This is not a reliable scientific method. Finally, expert testimony is admissible only if "the expert has reliably applied the principles and methods to the facts of the case." Fed. R. Evid. 702(d). Yet the

Ninth Circuit allows experts to testify based on art rather than science. *Messick*, 747 F.3d at 1198.

Although improper admission of "expert" testimony on specific causation in mass tort cases accounts for some Rule 702 errors, district courts incorrectly apply Rule 702 in many contexts. A recent decision exemplifies this problem. In *Vizcarra v. Unilever U.S., Inc.*, 2021 WL 5370754 (N.D. Cal. Oct. 27, 2021), the defendants moved to exclude the plaintiffs' expert's testimony. The expert's testimony was based on a consumer survey of consumers' perceptions about where the vanilla flavor in ice cream came from, whether the origin affected their purchasing decisions, and how much more they paid because of the vanilla flavor's origin.

The district court denied the motion to exclude. In its view, it is improper for district courts to act as a gatekeeper when the expert evidence is about survey data. *Vizcarra*, 2021 WL 5370754, at *6. According to the *Vizcarra* court, the defendant's challenge went to the weight of the expert's evidence—not its admissibility. *Id.* (citation omitted). This was wrong. The only way that witnesses can offer expert testimony is under Rule 702. And that rule requires that the district court act as a gatekeeper to ensure the jury hears only admissible evidence that meets Rule 702's rigorous standards.

Unfortunately, lower courts' Rule 702 errors are not limited to the Ninth Circuit. For example, in *Canary v. Medtronic, Inc.*, 2018 WL 5921327 (E.D. Mich. Nov. 13, 2018), the plaintiff's expert was allowed to testify about causation despite neither conducting a differential diagnosis nor considering idiopathic causes. *Id.* at *2-3. This means that the expert's opinion was based on insufficient facts and data. *Cf.* Fed. R. Evid. 702(b). Nor did the expert use reliable scientific methods. *Cf.* Fed. R. Evid. 702(c). This is the type of evidence that Rule 702 forbids. But because of some ambiguity in the rule's language, district courts can ignore the rule's command and admit "expert" testimony that does not follow the scientific method.

There are multiple reasons why circuit and district courts, have trouble applying Rule 702's straightforward standard. First, the Rule does not specify who bears the burden of proof and what that burden is. Must the plaintiff show probable cause that the expert testimony is admissible? Or must the defendant show that the evidence is inadmissible beyond a reasonable doubt? Neither Rule 702 nor its comments answer these questions.

Rule 702's current language is also ambiguous about what link is required between an expert's reliable principles and methods and the expert's opinion in the case. The rule can be interpreted to allow expert testimony if the expert's testimony is based on reliable principles and methods even if the

testimony does not result from the reliable application of those principles and methods to these facts. In other words, the court can bifurcate the inquiry to eliminate the need for a testifying expert to reliably apply the methods and principles to the facts of the case.

Pre-Rule 702 case law is also a hinderance to the rule's proper application. Many attorneys fail to live up to their ethical obligations and cite case law that has been superseded by Rule 702. And because a few courts of appeals have not explicitly overturned their pre-Rule 702 decisions, courts and attorneys often cite these cases. There are three decisions that are particularly problematic. Courts and parties often cite *Loudermill v Dow Chem. Co.*, 863 F.2d 566 (8th Cir. 1988), *Viterbow v. Dow Chem. Co.*, 826 F.2d 420 (5th Cir. 1987), and *Smith v. Ford Motor Co.*, 215 F.3d 713, 718 (7th Cir. 2000). These cases have very quotable holdings that predated, and conflict with, Rule 702. All these problems are pressing matters that deserve the Committee's attention.

III. The Proposed Rule Changes Fix Problems With Courts' Current Interpretations of Rule 702.

The proposed change fixes some problems that lead to courts' misapplication of Rule 702. The first amendment fixes the problem of courts' requiring the party objecting to expert testimony to show that the testimony was inadmissible. The amendment explicitly states that the party offering the expert testimony carries the burden of proving the evidence's admissibility. The proposal also eliminates any confusion about what that burden of proof is. The party offering the expert testimony must show its admissibility by a preponderance of the evidence. In other words, satisfying only a lower standard—like probable cause—cannot make expert testimony admissible.

The second proposed amendment fixes the problem of expert opinions unmoored from the application of reliable methods and principles to the facts of the case. The amendment explicitly requires that the expert's testimony be based on sound application of reliable methods and principles to these facts. So courts will be unable to bifurcate the inquiry if the amendment takes effect. This would be a positive development and would help ensure that juries do not hear junk science from "expert" witnesses. As both proposed amendments to Rule 702 fix ambiguities, WLF urges the Committee to submit the proposed amendments to the Supreme Court for its approval.

IV. Slight Modifications To The Proposed Changes Would Further Clarify District Courts' Gatekeeping Function.

Although the proposed changes to Rule 702 should be submitted to the Supreme Court, there are refinements that would further address circuit courts' and district courts' flawed application of Rule 702. The Committee should thus consider modifying the changes before it submits the proposal to the Supreme Court.

A. The Committee should explicitly disavow bad case law.

As discussed above, there are a few 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 specifically states that those cases are not good law. The Committee took this approach in 2015. Then, the Committee added a note stating that a rule "rejects cases such as *Residential Funding Corp. v. DeGeorge Financial Corp.*, 306 F.3d 99 (2d Cir. 2002)." Fed. R. Civ. P. 37 committee note.

Here, the Committee should add a note that Rule 702 rejects *Loudermill*, *Viterbow*, and *Smith*. This would ensure that those cases receive a red flag on Westlaw and Lexis, which in turn would help avoid courts 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.

B. The Committee should ensure that courts apply Rule 702 fairly.

As discussed above, the clarification that the proponent of expert evidence must prove by a preponderance of evidence that it is 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 is nothing explicit in the rule or committee notes that explains if courts 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 that expert testimony is admissible. Nor is there a presumption against admissibility. 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 inadmissible.

C. The Committee should ensure courts 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 you are applying a preponderance-of-the-evidence standard, it is a factual question for the jury—not the judge. But since our Nation's founding, questions about the admissibility of evidence must be decided by the trial judge. *See* 1 Burr's Trial 443 (1807).

There is 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.

* * *

Many district courts and courts of appeals refuse to follow Rule 702's command and act as a gatekeeper. They allow witnesses to testify as "experts" despite the witnesses' using unreliable methods. The proposed amendments to Rule 702 go a long way in instructing these courts about their duties to permit juries to hear expert evidence only if Rule 702's requirements are satisfied. In other words, not everything goes to the weight of the evidence. Many issues affect the evidence's admissibility, which the judge must decide. So the proposed amendments to Rule 702 are a good start. But slight modifications will help ensure that courts properly apply Rule 702. The Committee should thus submit slight revised amendments to Rule 702 to the Supreme Court for its approval.

Respectfully submitted,

John M. Masslon II
SENIOR LITIGATION COUNSEL

Cory L. Andrews
GENERAL COUNSEL & VICE PRESIDENT OF LITIGATION

TAB 13

E | F | S
Evans Fears & Schuttert LLP

3200 Cherry Creek Drive South, Suite 380
Denver, Colorado 80209
Phone: (303) 656-2199
efstriallaw.com

January 13, 2022

VIA EMAIL to RulesCommittee_Secretary@ao.uscourts.gov
Advisory Committee on Evidence Rules
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, DC 20544

RE: Written Testimony and Comment of Lee Mickus
In Support of Proposed Amendment to Fed.R.Evid. 702

Dear Members of the Committee:

Thank you for the opportunity to express my perspective on the proposed amendment to Rule 702. As a civil litigator who defends manufacturers and other commercial entities in product liability and other tort cases across the country, I encounter Rule 702 admissibility disputes frequently.

Rule 702 as it currently exists does not effectively convey the courts' gatekeeping responsibility. A few very recent decisions show the point. One court in August described its understanding that, despite Rule 702(d):

> outright exclusion of the evidence is warranted only if the methodology was so altered by a deficient application as to skew the methodology itself. Generally, deficiencies in application go to the weight of the evidence, not its admissibility.[1]

Courts also frequently misunderstand that, pursuant to Rule 702(b), they must determine the sufficiency of an expert's factual basis. Instead, courts often pass that responsibility to the jury, as these judges did in opinions issued in the last months of 2021:

> As a general rule, questions relating to the bases and sources of an expert's opinion affect the weight to be assigned that opinion rather than its admissibility and should be left for the jury's consideration. Thus, the County's argument is best saved for the factfinder. As

[1] *Doubletap Defense, LLC v. Hornady Mfg. Co*., No. 8:18CV492, 2021 WL 3631135, at *5 (D. Neb. Aug. 17, 2021) (quotations omitted).

> such, cross examination is the best proper way to expose any alleged deficiencies.[2]

and

> While the concessions Leus highlights could diminish the strength of Morris' testimony, they do not render his opinion so fundamentally unsupported that it could provide no assistance to the jury. To the extent Leus wishes to attack the factual basis of Morris' testimony, such an attack should be done before the jury on cross-examination. [*United States v.*] *Coutentos*, 651 F.3d [809,] 820 [(8th Cir. 2011)] ("As a general rule, the factual basis of an expert opinion goes to the credibility of the testimony, not the admissibility.").[3]

Rulings such as these are common. Lawyers for Civil Justice, the Colorado Civil Justice League, and Bayer have identified hundreds of recent decisions in which courts fail to recognize that Rule 702 gatekeeping requires courts to evaluate experts' factual basis and methodological application to the facts of the case.[4] Many of these decisions follow pre-*Daubert* caselaw statements that do not interpret Rule 702, indicating that courts are deeply confused about the standard they should apply.[5] The large body of decisions that overlook essential aspects of the reliability evaluation demonstrate that the current rule simply does not give courts adequate guidance.

Amending Rule 702 to incorporate the preponderance of evidence standard into the rule will better convey that the elements of Rule 702 are all admissibility issues. The amendment,

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[2] *Wooten v. Collin Cty., Texas*, No. 4:18-CV-380, 2021 WL 5834437, at *5 (E.D. Tex. Dec. 9, 2021) (quotation and citations omitted).

[3] *Leus v. C.R. Bard, Inc.*, No. 4:13-CV-00585-NKL, 2021 WL 4313607, at *5 (W.D. Mo. Sept. 22, 2021).

[4] *See* Lawyers for Civil Justice, *Clarity and Emphasis: the Committee's Proposed Rule 702 Amendment Would Provide Much-Needed Guidance About the Proper Standards for Admissibility of Expert Evidence and the Reliable Application of an Expert's Basis and Methodology*, Sept. 1, 2021, available at https://www.regulations.gov/comment/USC-RULES-EV-2021-0005-0007; Colorado Civil Justice League, *Colorado Civil Justice League's Comments to the Advisory Committee on Rules of Evidence*, Oct. 28, 2021, available at https://www.regulations.gov/comment/USC-RULES-EV-2021-0005-0010;
Letter from Scott S. Partridge, General Counsel, Bayer U.S., to Rebecca A. Womeldorf (Sept. 30, 2020) available at https://www.uscourts.gov/sites/default/files/20-ev-o_suggestion_from_bayer_-_rule_702_1_0.pdf.

[5] For example, the excerpted passage from *Wooten* quotes from *Viterbo v. Dow Chem. Co*., 826 F.2d 420, 422 (5th Cir. 1987). 2021 WL 5834437, at *5. The *Leus* opinion directly references *Coutentos*, 651 F.3d at 820, but the "general rule" sentence it parenthetically quotes actually originates in *Loudermill v. Dow Chem. Co*., 863 F.2d 566, 570 (8th Cir. 1988). 2021 WL 4313607, at *5.

however, would benefit from additional language to focus attention on the court as the decision-maker. Including the phrase "if the court determines" in the rule's text would more effectively communicate that Rule 702's components cannot be deferred to the jury. Notably, members of the Advisory Committee have used similar phrasing when describing how Rule 702, in either its present or amended form, should operate:

- "[The proposed amendment to Rule 702] emphasizes that the court must determine that the reliability-based requirements for expert testimony are established by a preponderance of the evidence[.]"[6]

- "[T]he trial judge, as gatekeeper, must determine whether such challenges are so significant that the factual basis for the opinion fails to reach the preponderance standard[.]"[7]

Placing "if the court determines" in the rule would unmistakably signal that the judge's gatekeeping responsibility includes evaluating the sufficiency of experts' factual bases and the reliability of experts' application of methodology. Further, incorporating that phrase would provide a bulwark against any possible confusion about the status of problematic caselaw declaring "general rules" that the factual basis or methodological application underlying an expert's opinions affects the weight and not the admissibility of the expert's testimony.[8] Adding "if the court determines" to the rule's text would render those opinions necessarily incompatible with Rule 702.

Including these words in Rule 702 should not change the expectation, inherent within the adversary system, that an opponent must object to admission of an expert's testimony to initiate the court's scrutiny. Shifting the paradigm so that Rule 702, alone among the Federal Rules of Evidence, obligates judges to conduct an admissibility analysis even in the absence of an objection would require more indication than an unintended implication from the words "if the court determines."[9] If amended to add this phrase, Rule 702 would contain no direct statement that a

[6] Hon. Patrick J. Schiltz, Report of the Advisory Committee on Evidence Rules (Dec. 1, 2021) at 3, *in* Committee on Rules of Practice and Procedure Jan. 4, 2022 Agenda Book (2022) 302 (emphasis added), available at https://www.uscourts.gov/sites/default/files/standing_committee_agenda_book_jan_2022_0.pdf.

[7] Thomas D. Schroeder, *Toward a More Apparent Approach to Considering the Admission of Expert Testimony*, 95 NOTRE DAME L. REV. 2039, 2061 (2020).

[8] *See*, *e.g.*, *In re: Bair Hugger Forced Air Warming Dev. Prods. Liab. Litig*., 9 F.4th 768, 778 (8th Cir. 2021) ("[a]s a general rule, the factual basis of an expert opinion goes to the credibility of the testimony, not the admissibility."); *see also Puga v. RCX Sols*., Inc., 922 F.3d 285, 294 (5th Cir. 2019) ("As a general rule, questions relating to the bases and sources of an expert's opinion affect the weight to be assigned that opinion rather than its admissibility.").

[9] The U.S. Supreme Court recently noted that a rule intended to produce a major functional change can be expected to contain language indicating that the rule has that broad purpose. In *Hall v. Hall*, the Court rejected an argument

party need not object, and nothing in the Committee Note as presently drafted suggests that a purpose of the amendment is to create a new requirement that judges conduct a detailed admissibility assessments for every expert who will testify.

To the extent the Committee envisions that some judges may overread "if the court determines" as establishing a duty to review all proffered expert testimony even in the absence of any objection, that possible interpretation can be controlled by adding a sentence in the Committee Note stating that the amendment does not intend judges to take that approach. The Advisory Committee Note provides an appropriate mechanism for signaling if a change in practice is consistent with the rule's purpose.[10] Alternatively, adding a clause such as "on timely request" or "at a party's request" to the rule would provide explicit direction that the court should act in response to a party's objection and would be consistent with the content of some other Federal Rules of Evidence.[11]

With the amendment revised to add the words "if the court determines," the proposal will put all the necessary information in the text of the rule, so that there will be no ambiguity when a judge opens the rulebook. The preponderance burden of production will be stated. The admissibility considerations will be listed out. The court will be identified as the decision-maker who must assess whether the proponent has met the admissibility burden for each element. Such

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that Federal Rule of Civil Procedure 42 should be interpreted to change entirely the conception and operation of case consolidation, despite no direct indication set forth in the rule:

> We think, moreover, that if Rule 42(a) were meant to transform consolidation into something sharply contrary to what it had been, we would have heard about it. Congress, we have held, does not alter the fundamental details of an existing scheme with vague terms and subtle devices. That is true in spades when it comes to the work of the Federal Rules Advisory Committees. Their laborious drafting process requires years of effort and many layers of careful review before a proposed Rule is presented to this Court for possible submission to Congress. No sensible draftsman, let alone a Federal Rules Advisory Committee, would take a term that had meant, for more than a century, that separate actions do not merge into one, and silently and abruptly reimagine the same term to mean that they do.

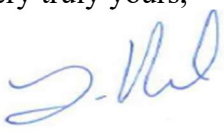
138 S. Ct. 1118, 1130 (2018) (citations and quotation omitted).

[10] *See id*. at 1130 ("nothing in the pertinent proceedings of the Rules Advisory Committee supports the notion that Rule 42(a) was meant to overturn the settled understanding of consolidation.").

[11] For instance, Rules 105 and 201(e) include the words "on timely request," and Rule 615 contains the similar phrase "[a]t a party's request."

an amendment will provide courts that are presently confused about their responsibility with the guidance they need, and will unify the federal courts in the approach to gatekeeping that Rule 702 expects.

Very truly yours,



Lee Mickus

TAB 14

From: Nassihi, Amir (SHB)
To: RulesCommittee Secretary
Subject: RE: January 21, 2022 Hearing on Proposed Amendments to Evidence Rules
Date: Friday, January 14, 2022 12:35:09 PM

Hi,
At the hearing, I will be briefly addressing issues related to 702 as it relates to class actions.
Thanks very much.
Amir

Amir Nassihi
Partner
Shook, Hardy & Bacon L.L.P.

Cell 415-608-1365; Direct 415-544-1949
anassihi@shb.com

SHOOK
HARDY & BACON

November 9, 2021

Madeleine M. McDonough

2555 Grand Blvd.
Kansas City, MO 64108
816.474.6550
mmcdonough@shb.com

Via Electronic Mail

Rebecca A. Womeldorf, Secretary
Committee on Rules of Practice & Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, DC 20544
RulesCommittee_Secretary@ao.uscourts.gov

Re: Comment on Amending Federal Rule of Evidence 702

Dear Ms. Wolmeldorf:

On behalf of Shook, Hardy & Bacon L.L.P. ("Shook"), we respectfully submit this comment to the Advisory Committee on Evidence Rules in support of amendments to Rule 702. We urge the Committee to clarify that the proponent of expert testimony bears the burden of satisfying Rule 702's admissibility requirements by a preponderance of the evidence.

Shook is an international, trial-oriented firm with an emphasis on defending complex civil cases. The *Global Legal Post* has recognized Shook as "the most active defendants' firm for product liability cases between 2015 and 2019, working on 27,240 cases."[1] Shook's vast trial experience gives it specific insights into courts' application of Rule 702, and how inconsistencies across jurisdictions highlight the need for reform.

Shook files this comment to update the Committee on its experience with Rule 702. Shook previously submitted a comment on November 9, 2020 (Appendix A). In that comment, Shook identified three problematic trends that underscore apparent confusion or misunderstanding regarding the Rule's application: (1) courts often substitute cross-examination for mandated gatekeeping; (2) courts often rule that challenges regarding an expert's methodology are questions of weight to be determined by a jury, not questions of admissibility to be determined by the judge; and (3) courts often allow experts to offer opinions based on cherry-picked data.

In addition, Shook associate Kateland Jackson, in her capacity as a fellow for Lawyers for Civil Justice, recently conducted empirical research into the standards employed for Rule 702 rulings in 2020 (summary at Appendix B). Of particular note, the study found that of the 1,059 federal opinions that applied Rule 702 in 2020, only 35% (373) mentioned the preponderance standard. In almost

[1] Ben Edwards, *Product Liability Case Filings in US Federal Courts Reach Eight-Year High*, The Global Legal Post, June 1, 2020, https://www.globallegalpost.com/big-stories/product-liability-case-filings-in-us-federal-courts-reach-eight-year-high-49884800/.

two-thirds of the cases—65% (686)—the trial judge did not mention the preponderance standard. About 13% (135) of the opinions described the Rule 702 analysis as having a "liberal thrust" or mentioned a presumption favoring admissibility. Approximately 6% (61) of the cases cited both the preponderance standard *and* a presumption favoring admissibility. This inconsistency emphasizes the need for a clear statement that a preponderance of the evidence standard applies to Rule 702 determinations.

Finally, one of the authors of this letter, Tom Sheehan, joined Shook this year. Tom co-authored a comment to this Committee while at his prior law firm (Appendix C). In that comment, he and his co-authors examined Rule 702 in the context of multi-district litigation. They noted substantive differences in the application of the Rule across jurisdictions, ranging from mischaracterization of the Rule 702 standard to failure to apply the Rule as intended. Most troubling was the frequency with which courts held that questions about the sufficiency of the factual basis of an expert's opinion are credibility (or weight) issues, not admissibility issues. Such differences in the interpretation of Rule 702 indicate insufficient guidance from the Rule itself, uncertainty about the Rule's meaning, and misunderstanding regarding the application of the Rule's essential provisions.

Shook's experience since its last comment, as illustrated by subsequent federal opinions in cases it has litigated, reinforces these conclusions.

Inconsistent Standards

The largest problem apparent from Shook's experience is that—consistent with LCJ's findings—courts do not apply Rule 702 consistently.

Some courts properly apply the preponderance of the evidence standard to expert testimony. *See, e.g., Infernal Tech., LLC,* 2021 WL 4391250, at *11 (N.D. Tex. Sep. 16, 2021) ("The proponent of expert testimony must establish its reliability by a preponderance of the evidence."); *Zeiger v. WellPet LLC,* 526 F. Supp. 3d 652, 667 (N.D. Cal. 2021) ("The burden is on the proponent of the expert testimony to show, by a preponderance of the evidence, that the admissibility requirements are satisfied.").[2]

Other courts do not apply the preponderance standard, and often do not articulate any standard of proof at all.[3] *See Africano v. Atrium Med. Corp.,* 2021 WL 4264237, at *1 (N.D. Ill. Sept. 20, 2021); *Baker v. Saint-Gobain Performance Plastics Corp.,* 2021 WL 2548825, at *1 (N.D.N.Y. May 7, 2021); *Sprint Commc'ns*

[2] While the *Zeiger* court properly applied the preponderance standard, it denied a Shook client's request to exclude expert evidence, showing that a more rigorous inquiry does not automatically favor the opponent of expert evidence in a given case.

[3] When they occur, these errors do not systematically benefit only one side or the other in litigation. For example, in *Africano*, Shook represented a medical device product liability defendant whose expert's opinions were admitted. 2021 WL 4264237, at *1 (denying plaintiff's motion to exclude experts). Shook is confident that a preponderance of the evidence showed that admitting these opinions was proper, though the court did not apply that standard.

Co. L.P. v. Charter Commc'ns, Inc., 2021 WL 982729, at *1-2 (D. Del. Mar. 16, 2021); *Union Pac. R.R. Co. v. Winecup Ranch, LLC,* 2020 WL 7125918, at *4 (D. Nev. Dec. 4, 2020). In fact, some courts go so far as to specifically repudiate the correct standard. *See Vincent v. Boston Sci. Corp.,* 2020 WL 7186762, at *1 (S.D. W. Va. Dec. 7, 2020) ("The proponent of expert testimony does not have the burden to 'prove' anything. However, he or she must 'come forward with evidence from which the court can determine that the proffered testimony is properly admissible.'") (citation omitted).

Most concerning, and consistent again with LCJ's study, some courts apply the preponderance standard, but immediately also declare that the court should resolve doubts about expert evidence in favor of admissibility. *See Cline v. Boston Sci. Corp.,* 2021 WL 1197794, at *1 (W.D. Ark. Mar. 29, 2021) ("It follows that the proponent of expert testimony bears the burden of showing by a preponderance of the evidence that the [admissibility] requirements are satisfied; however, 'courts should resolve doubts regarding the usefulness of an expert's testimony in favor of admissibility.") (citation omitted); *Augé v. Stryker Corp.,* 2021 WL 3312396, at *2 (D.N.M. Aug. 2, 2021) ("The party that proffers the expert testimony bears the burden of proving its compliance with Rule 702 by a preponderance of the evidence. Nonetheless, a court should liberally admit expert testimony.").

Assertions embracing the liberal admission of opinion testimony are fundamentally at odds with the requirement that the proponent of expert testimony must establish its reliability. Such misstatements reflect a misunderstanding of the gatekeeping purpose of Rule 702, and further demonstrate the need to clarify the gatekeeping framework. Explicitly making clear that the preponderance standard governs, and therefore there is no "liberal thrust" favoring admission, will help courts consistently and objectively apply all of the Rule's provisions.

Glossing Over Questionable Data

Inconsistent application of Rule 702 continues to produce opinions that misconstrue the court's gatekeeping role. For example, in *Union Pacific R.R. Co. v. Winecup Ranch, LLC,* 2020 WL 7125918 (D. Nev. Dec. 4, 2020), which involved a dispute over who was responsible for water damage from a failed dam, the plaintiff moved to exclude meteorology testimony that was based on unreliable data. Specifically, the proposed expert's model rested on data from an incorrect time period and from the wrong weather station. The court held that the critiques of the data forming the basis of the opinion "go not to [the expert's] methodology, but to the data imputed. This is a question of accuracy, not admissibility…." *Id.* at *4. This is not the correct method of evaluating an expert's opinion; if the foundation is not reliable, the opinion it produces is not admissible.[4]

[4] *See generally* Mark A. Behrens & Andrew J. Trask, *The Rule of Science and the Rule of Law*, 49 Sw. U. L. Rev. 436, 452 (2021) (discussing impacts when science in the courtroom is divorced from the mainstream scientific consensus).

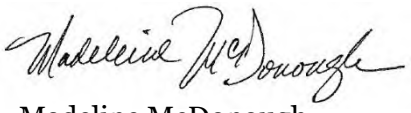
For these reasons, Shook supports the proposed amendment. In addition, Shook supports the following Committee Note language, which has been proposed:

> Unfortunately many courts have held or declared that the critical questions of the sufficiency of an expert's basis, and the application of the expert's methodology, are generally questions of weight and not admissibility. These rulings are an incorrect application of Rules 702 and 104(a).

(*See* App. C at 23.)

Thank you for your consideration of these important issues.

Respectfully submitted,



Madeline McDonough
Firm Chair

Appendix A

SHOOK
HARDY & BACON

November 9, 2020

Via Electronic Mail

Madeleine M. McDonough

2555 Grand Blvd.
Kansas City, MO 64108
816.474.6550
mmcdonough@shb.com

Rebecca A. Womeldorf, Secretary
Committee on Rules of Practice & Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, DC 20544
RulesCommittee_Secretary@ao.uscourts.gov

Re: Comment on Amending Federal Rule of Evidence 702

Dear Ms. Wolmeldorf:

On behalf of Shook, Hardy & Bacon L.L.P. ("Shook"), we respectfully submit this Comment to the Advisory Committee on Evidence Rules ("Committee") and its Rule 702 Subcommittee concerning potential amendments to Rule 702 and its Committee Notes. We urge the Committee to clarify that the proponent of expert testimony bears the burden of satisfying the admissibility requirements of Rule 702 by a preponderance of the evidence.

Shook is an international, trial-oriented firm with an emphasis on defending complex civil cases. The *Global Legal Post* recently recognized Shook as "the most active defendants' firm for product liability cases between 2015 and 2019, working on 27,240 cases."[1] Shook's vast trial experience gives it specific insights into courts' application of Rule 702 and the ways in which that use sometimes goes awry. In particular, Shook has identified three problematic trends in the application of the Rule: (1) the substitution of cross-examination for gatekeeping; (2) perfunctory references to weight versus admissibility; and (3) allowing experts to offer opinions based on cherry-picked data.

1. The substitution of cross-examination for gatekeeping

Judge Sarah Vance of the Eastern District of Louisiana recently observed during a panel discussion on expert testimony, "when I was a lawyer, we always said, 'You don't win a case on cross.' You're not going to win a case on cross-examination, and so I think cross-examining an expert is not going to carry the day with a jury."[2] This is one reason that litigants believe motions to exclude shaky expert testimony are vital: once jurors hear an opinion from an expert designated

[1] Ben Edwards, *Product Liability Case Filings in US Federal Courts Reach Eight-Year High*, The Global Legal Post, June 1, 2020, https://www.globallegalpost.com/big-stories/product-liability-case-filings-in-us-federal-courts-reach-eight-year-high-49884800/.
[2] Daniel J. Capra, et al., *Conference on Best Practices for Managing* Daubert *Questions*, 88 FORDHAM L. REV. 1215, 1227 (2020).

as such by the court, it is unlikely that even brilliant cross-examination will convince them that the testimony is fundamentally unsound. Nonetheless, many courts still back away from their gatekeeping responsibilities, leaving flimsy or outright unsound expert evidence to cross-examination rather than excluding it.

Shook's experience in *Berger v. Philip Morris USA Inc.*, 2014 WL 10715266 (M.D. Fla. Aug. 29, 2014), provides an example. The evidentiary dispute involved the use of a "medical projection" to establish causation in a tobacco case. The plaintiffs offered an expert who had reverse-engineered a "backward projection" that "predicted" the plaintiff's chronic obstructive pulmonary disease in 1996 from pulmonary function test results two years later.

The defendant challenged the testimony on the basis of the "analytical gap." There was no basis, other than the expert's speculation, for the projection. A reconstructed diagnosis like this cannot be proven false. Indeed, it is designed to "fit" subsequent facts in the case rather than adhere to any scientific method.

The trial court admitted the questionable evidence, holding that the analytical gap was better addressed through cross-examination. It also held that the plaintiff would have to inform the jury that the opinion was not a "*conclusion reached through hard science*." *Id.* at *2 (emphasis in original). Thus, the jury heard the evidence *despite* the fact that it was scientifically questionable, and despite the fact that cross-examination is a limited tool for correcting any scientific error.

2. <u>Perfunctory references to "weight versus admissibility"</u>

As numerous other commenters have pointed out,[3] one of the primary difficulties with the current application of Rule 702 is that courts frequently conflate questions of admissibility (which determine whether evidence should be heard at trial) with questions of "weight" or "credibility." Challenges to an expert's underlying methodology should be *admissibility* questions, resulting in exclusion. Nonetheless, many courts—without analysis—treat them as *credibility* questions, which they then allow the jury to hear. Shook's experience in two different cases illustrates this issue.

In *Kay v. Sunbeam Products, Inc.*, 2010 WL 2292474 (W.D. Mo. May 27, 2010), plaintiffs alleged that defendant's electric blanket had caused a house fire.

[3] *See, e.g.,* International Association of Defense Counsel, In Support of Amending Rule 702 and Its Comments to Achieve More Robust and Consistent Gatekeeping (July 31, 2020); Federation of Defense & Corporate Counsel, Comment on Potential Amendment to Federal Rule of Evidence 702 (June 30, 2020); Letter from 50 General Counsel re Amending Federal Rule of Evidence 702 to Clarify Courts' "Gatekeeping" Obligation (Mar. 2, 2020); Lawyers for Civil Justice, Comment to the Advisory Committee on Evidence Rules and its Rule 702 Subcommittee, Clearing Up the Confusion: The Need for a Rule 702 Amendment to Address the Problems of Insufficient Basis and Overstatement (Sept. 6, 2019).

Plaintiffs proffered a fire investigator and an electrical engineer to establish that the electric blanket was the source of the fire because its fail-safe circuit had failed, purportedly leading to electrical arcing. The defendant challenged the experts on the grounds that they had not tested the blanket at issue (tests revealed the circuit was working) and there was no way to determine whether melting of the blanket's heating element was caused by an arcing event or the heat of the fire. *Id.* at *2.

The court did not evaluate the experts' methodologies. Instead, after a brief review of each side's contentions, it simply found that the defendant's objections "go more to the weight than the reliability" of the experts' opinions. *Id.* at *4.

Similarly, in *Dover v. R.J. Reynolds Tobacco Co.,* 2014 WL 4723116 (M.D. Fla. Sept. 22, 2014), defendants challenged the admission of testimony from a proposed expert who would testify that there existed "an effective dose range of nicotine necessary to initiate and sustain addiction" to cigarettes. *Id.* at *5. The defendants argued that the proposed expert—who held a doctorate in psychology rather than pharmacology—was proffering a results-driven theory invented by plaintiff's experts to prove that defendants' cigarettes were defective. The court spent only a paragraph on its analysis before allowing the testimony, concluding that the defendants' "contentions regarding methodology . . . go to the weight, not the admissibility," of the testimony. *Id.*

As these cases illustrate, all too often, under the current Rule, courts do not engage their actual gatekeeping responsibilities. Instead, without revealing any reasoning, they find that defendants' objections—even objections to whether the methodology used comports with the scientific method—are merely credibility issues, and then leave it to the jury to decide whether the methodological objections disqualify the testimony.

3. Allowing experts to base opinions on cherry-picked data

Expert testimony, like a computer algorithm, is subject to the principle "garbage in, garbage out." If an otherwise qualified expert is fed one-sided evidence or data generated only for litigation, then the testimony will be unreliable. Shook's experience with *Bryant v. Wyeth,* 2012 WL 12844751 (W.D. Wash. Aug. 22, 2012), illustrates this issue. The lawsuit challenged the prescription of specific types of hormone replacement therapy.

Various defendants moved to exclude two experts after they testified at deposition that, instead of conducting an independent investigation of the literature surrounding the challenged therapy, they "relied on documents 'hand-picked by counsel' to generate their reports." *Id.* at *2. The court nonetheless allowed the testimony, reasoning that "Defendants' objections go to the weight of the evidence to be offered, not its admissibility." *Id.* at *3.

The admissibility of expert evidence is supposed to relate directly to its reliability. The reliability of expert evidence depends upon the underlying information supporting it. Courts rightly look in part to whether expert opinion rests on data and methodology that have been independently developed or done so only for the purposes of litigation. Cherry-picked data, particularly when supplied by counsel, is not reliable, and a finding that one side's testimony rests on such data should preclude its admissibility if there is no other evidence of reliability.

Proposed Amendment

We join other commenters in proposing the following amendment to Rule 702: "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, after findings consistent with Rule 104, the court determines:...."

This language ensures that the trial court will refer to Rule 104 and its preponderance standard. It should also encourage both sides to brief the issues in terms of the preponderance of available evidence, which should help guide courts through the dangers of relying on cherry-picked or litigation-generated scientific evidence. Finally, it encourages courts to make findings on each factor, instead of perfunctorily dismissing objections as related to jury "weight," or deciding that cross-examination can prevent jury confusion. The Committee Notes to Rule 702 should reflect this intent.

Shook also endorses the comments submitted on these issues by Lawyers for Civil Justice, the International Association of Defense Counsel, and the Washington Legal Foundation, which illustrate, through numerous empirical examples, the gravity of the problem and the need for further guidance from the Committee.

Thank you for your consideration of these important issues.

Respectfully submitted,

Madeline McDonough
Firm Chair

Appendix B

FEDERAL RULE OF EVIDENCE 702: A ONE-YEAR REVIEW AND STUDY OF DECISIONS IN 2020

September 30, 2021

Kateland R. Jackson – Fellow, Lawyers for Civil Justice[1]
Associate, Shook Hardy & Bacon L.L.P. (Washington, DC)

Andrew J. Trask
Of Counsel, Shook Hardy & Bacon L.L.P. (Los Angeles)

[1] Lawyers for Civil Justice ("LCJ") is a national coalition of corporations, law firms, and defense trial lawyer organizations that promotes excellence and fairness in the civil justice system to secure the just, speedy, and inexpensive determination of civil cases. LCJ Fellows are selected by LCJ's Diversity and Young Lawyers Committee from LCJ's corporate and law firm members as future leaders who offer diverse, unique, and fresh perspectives, and have a demonstrated interest in civil justice reform. Each LCJ Fellow serves a three-year term.

Executive Summary

Lawyers for Civil Justice ("LCJ") conducted a comprehensive research study examining all federal cases decided in 2020 that addressed the admissibility of expert testimony under Federal Rule of Evidence 702. The research focused on various objective factors, including:

- whether the court articulated a standard requiring the proponent of proffered expert evidence to show proof of admissibility by a "preponderance of the evidence";
- whether the court held a hearing to determine admissibility;
- whether the court noted that a determination based on "weight" or "credibility" was distinct from the admissibility;
- whether the court indicated having doubts that the evidence was admissible;
- whether the proffered expert evidence was admitted, partially admitted, or denied; and
- whether the court decided multiple motions to exclude experts at the same time.

The research yielded the following results, among other findings:

- 1,059 federal opinions in 2020 addressed expert admissibility under Rule 702.
  - 35% (373) mention that the proponent bears the burden of proving admissibility by a preponderance of the evidence.
  - 65% (686) do not mention the proponent's burden of proof or preponderance standard.
  - 13% (135) use language indicating a presumption of admissibility (e.g., Rule 702 has a "liberal thrust" favoring admission).
  - 6% (61) required a showing of admissibility by a preponderance of the evidence *and* stated a presumption favoring admissibility ("liberal thrust" standard).
- In 61% of federal judicial districts (57 of 93), courts split over whether to apply the preponderance standard when assessing admissibility. District splits exist in every federal appellate circuit. In one judicial district, conflict even arose between two judges assigned to the same case—one judge articulated the preponderance standard in deciding expert motions while the other did not.
- The evidence demonstrates the need for an amendment clarifying that the court must find Rule 702's admissibility requirements to be established by a preponderance of the evidence prior to admitting expert evidence. This change would improve practice by reducing confusion and inconsistency in the federal courts.

FEDERAL RULE OF EVIDENCE 702: A ONE-YEAR REVIEW AND STUDY OF CASE DECISIONS IN 2020

September 30, 2021

Introduction: LCJ examined and analyzed one year of federal court rulings on the admissibility of expert testimony to determine how courts are applying Rule 702.

Methodology: LCJ researchers identified more than 1,000 cases decided in 2020 on the issue of expert evidence admissibility. The researchers focused on cases in which the trial judge admitted, partially admitted, or denied expert testimony using an analysis under Federal Rule of Evidence 702, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), or both. The researchers eliminated cases in which the court did not make a decision on expert admission (i.e., cases only briefly mentioning Rule 702 or *Daubert*, or setting a hearing but not actually deciding admissibility). The researchers reviewed every remaining opinion, noting the following specific factors as individual data points:

- whether the court held a hearing to review the evidence;
- whether the court articulated a standard requiring the proponent of proffered expert evidence to show proof of admissibility by a "preponderance of the evidence";
- whether the court noted that a determination based on "weight" or "credibility" was distinct from the admissibility;
- whether the court indicated having doubts that the evidence was admissible;
- whether the court noted that Rule 702 has a presumption or "liberal thrust" favoring admission of expert evidence;
- whether the proffered evidence was admitted, partially admitted, or denied; and
- whether the court decided multiple motions for exclusion at the same time.

Results: In 2020, there were 1,059 federal cases in which the trial judge admitted, partially admitted, or denied expert testimony. In approximately 35% of the cases (373), the trial judge required the proponent to prove the admissibility of the expert evidence by a preponderance of the evidence. *In almost two-thirds of the cases—65% (686 of 1059)—the trial judge did not mention the preponderance standard at all.* About 13% of the time (135 cases), the judge described the analysis under Rule 702 or *Daubert* as having a "liberal thrust," employed a "liberal policy favoring admissibility," or stated that "exclusion is the exception rather than the rule"— contrary

to the requirement of Rules 702 and 104(a) that the proponent must prove the admissibility of the proffered expert testimony by a preponderance of the evidence.

Courts were split over whether to mention the preponderance standard in at least 57 federal judicial districts, a number of which had the nation's busiest dockets in 2020.[2] These intra-district splits occurred in federal appellate circuit. For example, the Western District of Texas applied the preponderance standard in nine cases, but either adopted a liberal admissibility standard or otherwise did not mention the preponderance standard in eight others. Similarly, the Southern District of New York applied the preponderance standard in twelve cases, failed to mention it in twenty-five cases, and followed a "liberal thrust" in thirteen cases. Even in the same case, two judges for the Southern District of New York articulated different standards when deciding the parties' expert motions.[3] The Central District of California yielded similar results—six cases applying preponderance, twenty-seven cases not mentioning preponderance, and four following a "liberal thrust" approach.[4]

These results indicate that the most active federal courts disagree internally over the correct interpretation of Rule 702. Further, there can be dissimilar outcomes in substantially similar cases since testimony that is excluded by one court applying the preponderance standard of Rules 702 and 104(a) may be admitted by another applying a "liberal thrust" approach.[5]

Approximately 6% of decisions cite both the preponderance standard *and* a presumption favoring admissibility (a "liberal thrust" approach).[6] This is a remarkable finding given that these standards are inconsistent with each other. The preponderance standard establishes a minimum threshold the party putting forth expert evidence must meet. If the proponent fails to meet this threshold, or if the reasons for admitting and denying create a "tie," the evidence is not admitted. In contrast, a presumption favoring admissibility under a "liberal thrust" approach does not hold the proponent of the evidence to a minimum proof threshold, leading to what some courts describe

[2] *See* U.S. District Courts – Combined Civil and Criminal Federal Court Management Statistics (Dec. 31, 2020), *available at* https://www.uscourts.gov/sites/default/files/data_tables/fcms_na_distprofile1231.2020.pdf.
[3] *See Financial Guar. Ins. Co. v. Putnam Advisory Co*., *LLC*, 2020 WL 4251229, at *2 (S.D.N.Y. Feb. 19, 2020) (preponderance); 2020 WL 3582029, at *1 (S.D.N.Y. July 1, 2020) (no preponderance).
[4] *See* Appendix A for a representative sample of cases from the research, disaggregated by federal judicial district, indicating whether the court mentioned the preponderance standard or not.
[5] *See* Mark A. Behrens & Andrew J. Trask, *The Rule of Science and the Rule of Law*, 49 Sw. U. L. Rev. 436, 452 (2021) ("The attractiveness of our nation as a place for investors to deploy their capital is diminished when lawsuit outcomes are unpredictable and divorced from mainstream science.").
[6] *See* Appendix B for list of cases that cite both the preponderance standard and a presumption favoring admissibility.

as "shaky but admissible evidence." And even if some proof is shown, "ties" result in admitting the evidence. This data point indicates that some federal courts are confused about the correct standard to apply, or even what the different standards mean.

Additionally, approximately 13% of cases (133 cases) addressed multiple motions for exclusion, some of which reflected different decisions regarding admission for different expert testimony. In 192 cases (18%), the trial judge specifically mentioned that the court conducted a "*Daubert* hearing" to assess the admissibility of testimony.[7]

Conclusion: Courts' inconsistent application of the preponderance standard in 2020 cases demonstrates that Rule 702 is not applied the same way throughout the country, or even within the same federal circuit or judicial district. Further, the number of courts that acknowledge the preponderance standard but still adopt a "liberal thrust" favoring admissibility may reflect larger confusion among federal courts about how to apply Rule 702.

The evidence demonstrates the need for an amendment clarifying that Rule 702 requires courts to find that the rule's admissibility requirements are established by a preponderance of the evidence prior to admitting expert evidence. This change would improve practice by reducing confusion and inconsistency in the federal courts.

[7] Since 2020 was a year in which, for public health reasons related to COVID-19, few hearings occurred, we note that the count of hearings included telephonic hearings and teleconferences.

Appendix C

Rebecca A. Womeldorf, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, D.C. 20544

June 9, 2020

Re: Amending Federal Rule of Evidence 702 - A Review of Gatekeeping Practices in Multidistrict Litigation

Dear Ms. Womeldorf:

The Advisory Committee on Evidence Rules is considering an amendment to Federal Rule of Evidence 702 and a Committee Note to clarify that problems with the basis of an expert's opinion or the application of an expert's methodology are threshold issues of admissibility.[1] This letter addresses confusion among some federal courts as to the proper application of Rule 702 in the context of high-stakes Multidistrict Litigation cases ("MDLs"). As attorneys who frequently deal with Rule 702-related issues in mass tort MDLs, we believe this perspective may be helpful to the Advisory Committee.

Our review of twenty-seven recent decisions from MDLs in the pharmaceutical, medical device, and chemical exposure fields demonstrates the need for Advisory Committee action on Rule 702. Courts in these cases frequently dismiss problems with an expert's factual basis or applied methodology as relating to the weight of the evidence rather than its admissibility. Further, differences in the application of Rule 702 have split MDL courts on substantive legal questions. To prevent clogging the federal system with meritless claims based on unreliable opinion testimony and undermining

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[1] *See* Daniel Capra, *Memorandum to Rule 702 Subcommittee re: Rule 702(b) and (d) – Weight and Admissibility Questions*, at 1 (Oct. 1, 2018) (Agenda Book, Advisory Committee on Evidence Rules (Oct. 19, 2018, meeting) at 171); *see also* David E. Bernstein & Eric G. Lasker, *Defending* Daubert*: It's Time to Amend Federal Rule of Evidence 702*, 57 WM. & MARY L. REV. 1, 30, 33 (2015).

the goal of uniformity that justifies use of the MDL process, we urge the Advisory Committee to draft an amendment to Rule 702 and a Committee Note expressly stating that an expert's factual basis and application of methodology are matters of admissibility, rather than weight.

I. THE MDL PERSPECTIVE ON RULE 702.

We elected to focus on MDLs for several reasons. The first is the sheer impact of MDL decisions. Rulings in MDLs affect hundreds, and sometimes thousands, of individual cases. As of the end of Fiscal Year 2019, more than 130,000 individual actions were pending in MDL matters.[2] Excluding prisoner and social security cases, MDLs make up a majority of the pending civil docket in federal courts.[3] MDLs are a pervasive means of litigation in federal court.

Given the number of individual cases, the monetary stakes of MDL rulings can be staggering. In large MDLs, total recoveries can measure in the billions of dollars.[4] Defendants threatened with potential MDL liability risk adverse publicity and reputational harm, fear among consumers, and reticence from physicians worried about their own liability. These concerns can lead to the unavailability of products that may

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[2] *See* United States Judicial Panel on Multidistrict Litigation, *Statistical Analysis of Multidistrict Litigation Under 28 U.S.C. § 1407 Fiscal Year 2019*, at 5 (2020), https://www.jpml.uscourts.gov/sites/jpml/files/JPML_Statistical_Analysis_of_Multidistrict_Litigation-FY-2019_0.pdf.

[3] Bloch Judicial Institute, Duke Law School, *Guidelines and Best Practices for Large and Mass-Tort MDLs*, at vi (2d ed. Sept. 2018).

[4] *See* Elizabeth Chamblee Burch, *Judging Multidistrict Litigation*, 90 N.Y.U. L. REV. 71, 73 n.1 (2015).

be important to public health.[5] Other MDL defendants face bankruptcy.[6] Nearly all experience tremendous pressure to settle: "An MDL judge holds the power, with a single decision, to dramatically recast the risk of liability in tens, hundreds, or even thousands of cases at a time," leaving "the painful choice of bearing the risk and expense of trial or succumbing to the pressures to settle."[7] These institutional incentives are amplified by the absence of a practical method for appellate review of district court decisions.[8]

Because of the importance of MDL decisions, Rule 702 issues are more likely to be comprehensively and capably presented and argued by both sides. Similarly, courts are more likely to focus on these matters and provide thorough analyses. If courts are failing to properly apply Rule 702 in MDLs, they are likely failing to do so elsewhere. In this regard, MDL decisions can have a domino effect. Because of their importance, MDL decisions on Rule 702 are frequently cited in both MDL and non-MDL cases

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[5] *See* Joseph Sanders, *The Bendectin Litigation: A Case Study in the Life Cycle of Mass Torts*, 43 HASTINGS L.J. 301, 319, 348, 364 (1992) (noting that the drug Bendectin was pulled from the market following the assertion of MDL claims despite an eventual "scientific consensus that if Bendectin has any teratogenic effects they are virtually undetectable").
[6] *See* Michael Higgins, Mass Tort Makeover? ABA J. Nov. 1998, at 52, 54.
[7] Andrew S. Pollis, *The Need for Non-Discretionary Interlocutory Appellate Review in Multidistrict Litigation*, 79 FORDHAM L. REV. 1643, 1670 (2011) (internal quotation marks omitted); *see In re Gen. Motors LLC Ignition Switch Litig.*, 2019 WL 6827277, at *14 (S.D.N.Y. Dec. 12, 2019) (noting that "the vast majority of MDL cases are, in fact, resolved by settlement . . . due, at least in part, to the sheer magnitude of the risk, in terms of dollar value, of trials").
[8] *See* U.S. Chamber, Institute for Legal Reform, *MDL Imbalance: Why Defendants Need Timely Access to Interlocutory Review* 1 (April 2019) ("Defendants faced with unfavorable dispositive motion rulings that they know will not be addressed by an appellate court for years often feel pressured to settle the hundreds or thousands of claims in an MDL proceeding, rather than incur massive additional litigation expenses and roll the dice on costly trials.").

across jurisdictions.[9] Accordingly, an incorrect application of Rule 702 is more likely to be propagated through MDL decisions.

For many of the same reasons, we concentrated on the portions of MDL decisions that consider the reliability of "general causation" opinions in drug, medical device, and chemical exposure tort cases.[10] General causation decisions typically affect more cases and have more overall impact than specific causation decisions. Experts providing such testimony often rely on similar methodologies, analyses of the Bradford Hill or other causal criteria,[11] in formulating their opinions. Accordingly, the general causation analysis—as its name suggests—is more generalizable between cases of this sort, providing fertile ground for comparison among MDL courts.

We considered twenty-seven most recent decisions from seventeen MDLs to assess how courts in those cases are applying Rule 702. They meet the following criteria: (1) MDL mass tort cases; (2) from the last eight years;[12] (3) concerning

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[9] For example, *In re Fosamax Prods. Liab. Litig.*, 645 F. Supp. 2d 164 (S.D.N.Y. 2009), has been cited in 173 subsequent cases, including district court decisions in every regional circuit.

[10] The general causation question is whether a product is capable of causing a medical problem, as opposed to the specific causation question of whether a product caused the problem in a particular plaintiff. *See, e.g., Goebel v. Denver & Rio Grande W.R.R. Co.*, 346 F.3d 987, 990 (10th Cir. 2003).

[11] These nine criteria for assessing whether a causal relationship exists were first described in a famed epidemiological lecture. *See* Austin Bradford Hill, *The Environment and Disease: Association or Causation?*, 58 PROCEEDINGS OF THE ROYAL SOCIETY OF MEDICINE 205 (1965).

[12] We did not include cases that reconsider or review rulings that were initially made more than eight years ago. *See, e.g., In re Denture Cream Prods. Liab. Litig.*, 2015 WL 392021 (S.D. Fla. Jan. 28, 2015), *aff'd, Jones v. SmithKline Beecham*, 652 F. App'x 848 (11th Cir. 2016) (conducting updated analysis of general causation testimony following *In re Denture Cream Prods. Liab. Litig.*, 795 F. Supp. 2d 1345 (S.D. Fla. 2011)). Similarly. we did not separately analyze cases that merely adopt prior reasoning. *See, e.g., In re Actos*

pharmaceuticals, medical devices, or chemical exposure; and (4) regarding the admissibility of general causation expert opinion testimony.[13]

(Pioglitazone) Prods. Liab. Litig., 2014 WL 108923, at *6 (W.D. La. Jan. 8, 2014) ("[T]his Court adopts and incorporates rulings as to general causation found in [two prior decisions] to address Defendants' 'core arguments' as to general causation.").

[13] The decisions we have considered are: *In re Abilify (Aripiprazole) Prods. Liab. Litig.*, 299 F. Supp. 3d 1291 (N.D. Fla. 2018); *In re Actos (Pioglitazone) Prods. Liab. Litig.*, 2013 WL 6796461 (W.D. La. Dec. 19, 2013); *In re Actos (Pioglitazone) Prods. Liab. Litig.*, 2014 WL 60324 (W.D. La. Jan. 7, 2014); *In re Bair Hugger Forced Air Warming Devices Prods. Liab. Litig.*, 2017 WL 6397721 (D. Minn. Dec. 13, 2017); *In re Bair Hugger Forced Air Warming Devices Prods. Liab. Litig.*, 2019 WL 4394812 (D. Minn. July 31, 2019); *In re Celexa & Lexapro Prods. Liab. Litig.*, 927 F. Supp. 2d 758 (E.D. Mo. 2013); *In re Chantix (Varenicline) Prods. Liab. Litig.*, 889 F. Supp. 2d 1272 (N.D. Ala. 2012); *In re Fosamax (Alendronate Sodium) Prods. Liab. Litig.*, 2013 WL 1558690 (D.N.J. Apr. 10, 2013); *In re Johnson & Johnson Talcum Powder Prods. Marketing, Sales Practices & Prods. Litig.*, No. 3:16-MD-2738(FLW) (D.N.J. Apr. 27, 2020); *In re Lipitor (Atorvastatin Calcium) Marketing, Sales Practices & Prods. Liab. Litig.*, 145 F. Supp. 3d 573 (D.S.C. 2015); *In re Lipitor (Atorvastatin Calcium) Marketing, Sales Practices & Prods. Liab. Litig.*, 174 F. Supp. 3d 911 (D.S.C. 2016); *In re Lipitor (Atorvastatin Calcium) Marketing, Sales Practices & Prods. Liab. Litig.*, 892 F.3d 624 (4th Cir. 2018); *In re Mirena IUD Prods. Liab. Litig.*, 169 F. Supp. 3d 396 (S.D.N.Y. 2016); *In re Mirena IUD Prods. Liab. Litig.*, 713 F. App'x 11 (2d Cir. 2017); *In re Mirena IUS Levonorgestrel-Related Prods. Liab. Litig. (No. II)*, 341 F. Supp. 3d 213 (S.D.N.Y. 2018); *In re Nexium (Esomeprazole) Prods. Liab. Litig.*, 2014 WL 5313871 (C.D. Cal. Sept. 30, 2014); *In re Nexium (Esomeprazole) Prods. Liab. Litig.*, 662 F. App'x 528 (9th Cir. 2016); *In re Prempro Prods. Liab. Litig.*, 2012 WL 13033298 (E.D. Ark. Apr. 11, 2012); *In re Prempro Prods. Liab. Litig.*, 2012 WL 13033302 (E.D. Ark. Apr. 19, 2012); *In re Roundup Prods. Liab. Litig.*, 390 F. Supp. 3d 1102 (N.D. Cal. 2018); *In re Taxotere (Docetaxel) Prods. Liab. Litig.*, 2019 WL 3997122 (E.D. La. Aug. 23, 2019); *In re Testosterone Replacement Therapy Prods. Liab. Litig.*, 2017 WL 1833173 (N.D. Ill. May 8, 2017); *In re Testosterone Replacement Therapy Prods. Liab. Litig.*, 2018 WL 4030585 (N.D. Ill. Aug. 23, 2018); *In re Viagra (Sildenafil Citrate) & Cialis (Tadlafil) Prods. Liab. Litig.*, 424 F. Supp. 3d 781 (N.D. Cal. Jan. 13. 2020); *In re Zoloft*

II. MDL DECISIONS FREQUENTLY HOLD THAT RELIABILITY ISSUES RELATE TO WEIGHT RATHER THAN ADMISSIBILITY.

Our review of these important MDL decisions revealed some troubling trends. Many courts mischaracterize the Rule 702 standard, indicating insufficient guidance from the Rule and uncertainty about the Rule's meaning. Even in cases that correctly state the standard, some courts fail to apply it as intended. Although many MDL decisions properly considered whether a proffered expert had a sufficient factual basis for his or her opinion and whether the expert reliably applied his or her methodology, we also found numerous instances in which courts failed to conduct these inquiries.

A. Overview and Background.

Judges are not scientists. Faced with competing accounts of confidence intervals, p-values, or confounding variables, judges may be all too tempted to simply throw up their hands and send the matter to a jury. Indeed, there is no shortage of cases repeating the refrain that any underlying problems with a proposed expert's testimony are fodder for cross-examination at trial and can be weighed by the trier of fact. This impulse to shift responsibility is understandable, but misguided. If federal judges have trouble sorting good science from bad, why would lay juries fare better? As Justice Breyer has written, "neither the difficulty of the task nor any comparative lack of expertise can excuse the judge from exercising the 'gatekeeper' duties that the Federal Rules of Evidence impose."[14]

One core purpose of the Federal Rules of Evidence is to provide clear guidance to federal judges. The drafters of the 2000 amendment to Rule 702 explained that the proponent of expert testimony "has the burden of establishing that the pertinent admissibility requirements are met by a preponderance of the evidence" under Rule

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(Sertraline Hydrochloride) Prods. Liab. Litig., 2015 WL 7776911 (E.D. Pa. Dec. 2, 2015); *In re Zoloft (Sertraline Hydrochloride) Prods. Liab. Litig.*, 26 F. Supp. 3d 449 (E.D. Pa. 2014); *In re Zoloft (Sertraline Hydrochloride) Prods. Liab. Litig.*, 858 F.3d 787 (3d Cir. 2017).

[14] *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 148 (1997) (Breyer, J., concurring).

104(a).[15] They believed "[t]he amendment makes clear that the sufficiency of the basis of an expert's testimony is to be decided under Rule 702."[16] And they noted that "[t]he 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."[17]

Despite this ostensible clarity, several Circuits have held that courts cannot review the factual basis of an expert's testimony.[18] Others have concluded that the misapplication of an expert's methodology is an issue for the jury.[19] The Advisory Committee has taken note of these decisions, in which "courts appear to have not read the Rule as it is intended."[20] As described in an influential article by David Bernstein and Eric Lasker, "[m]any courts continue to resist the judiciary's proper gatekeeping

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[15] Fed. R. Evid. 702 advisory committee's note to 2000 amendment (citing *Bourjaily v. United States*, 483 U.S. 171 (1987)). The Supreme Court mandated this standard in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 592 & n.10 (1993).
[16] Fed. R. Evid. 702 advisory committee's note to 2000 amendment.
[17] *Id.* (citing *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 745 (3d Cir. 1994)).
[18] *See, e.g., Manpower, Inc. v. Ins. Co. of Pa.*, 732 F.3d 796, 806 (7th Cir. 2013) ("The soundness of the factual underpinnings of the expert's analysis and the correctness of the expert's conclusions based on that analysis are factual matters to be determined by the trier of fact, or, where appropriate, on summary judgment." (quoting *Smith v. Ford Motor Co.*, 215 F.3d 713, 718 (7th Cir. 2000))); *Milward v. Acuity Specialty Prods. Grp.*, 639 F.3d 11, 22 (1st Cir. 2011) (same).
[19] *See, e.g., City of Pomona v. SQM N. Am. Corp.*, 750 F.3d 1036, 1048 (9th Cir. 2014) ("[O]nly a faulty methodology or theory, as opposed to imperfect execution of laboratory techniques, is a valid basis to exclude expert testimony."); *United States v. Shea*, 211 F.3d 658, 668 (1st Cir. 2000) ("[A]ny flaws in [an expert]'s application of an otherwise reliable methodology went to weight and credibility and not to admissibility.").
[20] *See* Capra, *supra* note 1, at 1 (citing Bernstein, *supra* note 1).

role, either by ignoring Rule 702's mandate altogether or by aggressively reinterpreting the Rule's provisions."[21]

Such misunderstanding regarding the meaning and application of Rule 702 is disconcerting. Excluding unreliable expert testimony "is particularly important considering the aura of authority experts often exude, which can lead juries to give more weight to their testimony."[22] If courts do not fulfill their gatekeeping role, "expert testimony may be assigned talismanic significance in the eyes of lay jurors."[23] This is, of course, the danger that Rule 702 seeks to address: "for the very reason that an expert is needed (because lay jurors need assistance) the jury may well be unable to figure out whether the expert is providing real information or junk."[24]

B. MDL Decisions Frequently Misstate the Rule 702 Standard.

Uncertainty among some federal courts regarding Rule 702's meaning leads to problems in its application in the MDL context. In some cases, MDL courts hold directly and in broad terms that required findings under Rule 702 relate to weight rather than admissibility. Such rulings clearly indicate a fundamental misunderstanding of the Rule.

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[21] Bernstein & Lasker, *supra* note 1, at 48. Other scholars have reached the same conclusion. *See, e.g.*, Brandon L. Garret & M. Chris Fabricant, *The Myth of the Reliability Test*, 86 FORDHAM L. REV. 1559, 1564 (2018) (noting the "reliability language" of Rule 702 "has largely been ignored by state and federal judges" and that "[m]ore forceful language might make the importance of assessing reliability more salient to judges, perhaps with more detailed accompanying guidance in Advisory Committee notes").

[22] *Elsayed Mukhtar v. Cal. State Univ., Hayward*, 299 F.3d 1053, 1063-64 (9th Cir. 2002), *amended*, 319 F.3d 1073 (9th Cir. 2003).

[23] *United States v. Frazier*, 387 F.3d 1244, 1263 (11th Cir. 2004).

[24] Daniel J. Capra, *Memorandum to Advisory Committee on Evidence Rules re: Possible Amendment to Rule 702*, at 11 (Oct. 1, 2019) (Agenda Book, Advisory Committee on Evidence Rules (Oct. 25, 2019, meeting) at 131).

In the *Nexium* MDL, for example, the district court announced that under Rule 702, "the factual basis of an expert opinion goes to the credibility of the testimony, not the admissibility, and it is up to the opposing party to examine the factual basis for the opinion in cross-examination."[25] In the *Bair Hugger* case, the court stated that "generally, the credibility of an expert's basis goes to weight."[26] And in the *Prempro* MDL, the court read Rule 702 to provide that "in most cases, objections to the inadequacies of a study are more appropriately considered an objection going to the weight of the evidence rather than its admissibility."[27]

Similarly, in the *Testosterone Replacement Therapy* MDL, the court understood Rule 702 as indicating that "[t]he soundness of the factual underpinnings of the expert's analysis and the correctness of the expert's conclusions based on that analysis are factual matters to be determined by the jury."[28] The *Talcum Powder* MDL also relied on this quotation, and held that disputes regarding study results and trends "cannot be resolved in the context of this *Daubert* motion" because its review "is only confined to whether [an expert's] methodologies in interpreting the studies are reliable."[29] In the same decision, the court stated that "disagreement with the methods used by an expert is a question that goes more to the weight of the evidence than to reliability for *Daubert* purposes" and that the court's role is "simply to evaluate whether the methodology

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[25] *In re Nexium*, 2014 WL 5313871, at *1 (quoting *Hangarter v. Provident Life & Accident Ins. Co.*, 373 F.3d 998, 1017 n.14 (9th Cir. 2004)).
[26] *In re Bair Hugger Forced Air Warming Devices*, 2017 WL 6397721, at *3.
[27] *In re Prempro*, 2012 WL 13033298, at *3 (quoting *Hemmings v. Tidyman's Inc.*, 285 F.3d 1174, 1188 (9th Cir. 2002)).
[28] *In re Testosterone Replacement Therapy*, 2017 WL 1833173, at *5 (quoting *Smith*, 215 F.3d at 718).
[29] *In re Johnson & Johnson Talcum Powder*, No. 3:16-MD-2738(FLW), Slip Op. at 79 (quoting *Smith*, 215 F.3d at 718); 126.

used by the expert is reliable, *i.e.*, whether, when correctly employed, that methodology leads to testimony helpful to the trier of fact."[30]

In the *Chantix* decision, the court also stated that "[t]he soundness of the factual underpinnings of the expert's analysis and the correctness of the expert's conclusions based on that analysis are factual matters to be determined by the jury"[31] and emphasized that "the factual basis of an expert opinion is assessed by the jury."[32] Importantly, the Chantix MDL followed an FDA-required black box warning regarding potential risks identified through adverse event reports (uncontrolled and often unverified reports from the public and health professionals). After the district court denied defendant's motion to exclude general causation experts, the litigation settled for approximately $300 million.[33] Subsequently, results from a randomized controlled trial (the gold standard for determining scientific causation) did not show a significantly increased risk of the alleged side effects with the drug and the FDA removed the black box warning from the Chantix label.[34]

MDL decisions also often rely on Circuit Court opinions that demonstrate similar confusion regarding the scope of Rule 702 and thus include analogous, incorrect statements when discussing general standards. For example, the *Roundup* decision cited repeatedly to *City of Pomona v. SQM North America Corp.*;[35] the *Abilify* decision

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[30] *Id.* at 46 (quoting *In re Diet Drugs Prods. Liab. Litig.*, 2000 WL 962545, at *13 (E.D. Pa. June 28, 2000), and *Walker v. Gordon*, 46 F. App'x 691, 695 (3d Cir. 2002)).
[31] *In re Chantix*, 889 F. Supp. 2d at 1286 (quoting *Tucker v. SmithKline Beecham Corp.*, 701 F. Supp. 2d 1040, 1055 (S.D. Ind. 2010), in turn quoting *Smith*, 215 F.3d at 718).
[32] *Id.* at 1297 (citing *Larson v. Kempker*, 414 F.3d 936, 941 (8th Cir. 2005)).
[33] *See* Jeff Lingwall et al., *The Imitation Game: Structural Asymmetry in Multidistrict Litigation*, 87 MISS. L.J. 131, 158 n.160 (2018).
[34] Jeffrey Chasnow & Geoffrey Levitt, *Off-Label Communications: The Prodigal Returns*, 73 FOOD & DRUG L.J. 257, 269 (2018); Natalie Grover, *FDA Drops Black Box Warning on Pfizer's Anti-Smoking Drug*, REUTERS (Dec. 16, 2016).
[35] *In re Roundup*, 390 F. Supp. 3d at 1113, 1141, 1142 (citing *City of Pomona*, 750 F.3d at 1043-49, 1044).

relied on *Quiet Tech. DC-8, Inc. v. Hurel-Dubois UK Ltd.*;[36] and both the *Taxotere* and *Fosamax* cases rested on *Milward v. Acuity Specialty Products Group, Inc.*[37] All three of these Circuit Court rulings were brought to the attention of the Rule 702 Subcommittee by Committee Reporter Daniel Capra as likely misunderstanding the required analysis under the current iteration of Rule 702.[38]

Further, a significant proportion of MDL decisions rely—whether directly or indirectly—on case law that predates the 2000 amendment to Rule 702, or even the *Daubert* decision.[39] Reliance on these older cases is inconsistent with the Rules Enabling Act[40] and suggests that amending the Rule to reinforce the impact of the 2000 amendment is warranted. As the court in the *Viagra and Cialis* MDL recently noted, although issues concerning expert testimony are often referred to as *Daubert* matters,

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[36] *In re Abilify*, 299 F. Supp. 3d at 1305 (quoting *Quiet Tech. DC-8, Inc. v. Hurel-Dubois UK Ltd.*, 326 F.3d 1333, 1341 (11th Cir. 2003)).
[37] *In re Taxotere*, 2019 WL 3997122, at *6 n.34 (citing *Milward*, 639 F.3d at 17-22); *In re Fosamax*, 2013 WL 1558690, at *4, *6 (citing *Milward*, 639 F.3d at 15).
[38] Capra, *supra* note 1, at 5-7 (discussing *Milward*) 12-13 (discussing *City of Pomona*), and 15-16 (discussing *Quiet Tech.*).
[39] *See In re Lipitor*, 892 F.3d at 632 (quoting *Westberry v. Gislaved Gummi AB*, 178 F.3d 257, 261 (4th Cir. 1999)); *In re Zoloft*, 858 F.3d at 792-93 (quoting *In re TMI Litig.*, 193 F.3d 613, 665 (3d Cir. 1999), *amended*, 199 F.3d 158 (3d Cir. 2000)); *In re Testosterone Replacement Therapy*, 2017 WL 1833173, at *12 (quoting *Lust v. Merrell Dow Pharm., Inc.*, 89 F.3d 594, 597 (9th Cir. 1996)); *In re Abilify*, 299 F. Supp. 3d at 1318 (quoting *Bazemore v. Friday*, 478 U.S. 385, 400 (1986)); *In re Lipitor*, 174 F. Supp. 3d at 920 (quoting *Westberry*, 178 F.3d at 261); *In re Lipitor*, 145 F. Supp. 3d at 920 (quoting *Westberry*, 178 F.3d at 261); *In re Zoloft*, 2015 WL 7776911, at *3 (citing *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d at 745, and *Holbrook v. Lykes Bros. S.S. Co.*, 80 F.3d 777, 784 (3d Cir. 1996)).
[40] *See* 28 U.S.C. § 2072(b) ("All laws in conflict with" duly enacted Rules of Evidence "shall be of no further force or effect after such rules have taken effect").

"the governing rule is set out in Rule 702" which "was amended in 2000, seven years after *Daubert* was decided . . . and the amended rule superseded any other law."[41]

C. MDL Decisions Frequently Fail to Apply the Rule 702 Standard as Intended.

In addition to misconstruing Rule 702, many MDL courts dismiss numerous arguments challenging the reliability of expert testimony as going to weight rather than admissibility. For example, in the *Prempro* MDL, the district court accepted that defendants raised "several interesting questions regarding the experts' findings."[42] It asked:

> Why does it appear that one expert lifted her report from another expert? Why does one of Plaintiffs' experts criticize observational studies as potentially misleading but rely on them in the expert report? Why does one of Plaintiffs' experts say it is not appropriate to differentiate receptor status, but other experts say it is appropriate? Why were studies cited in the expert reports that did not support the expert's position?[43]

Nevertheless, the court dispatched these concerns collectively, holding without significant analysis that "all of these points go to credibility, not admissibility."[44] Similarly, the court declined to consider the argument that experts had disregarded differences in drug formulations by noting that the experts "attempted to explain why the differences in formulation were irrelevant" and thus the "jury can determine whether they believe" the proffered reasoning.[45] This deference to "attempted" explanations is plainly not an independent analysis of reliability required by Rule 702, indicating uncertainty about the scope of gatekeeping mandated by the Rule. The

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[41] *In re Viagra & Cialis*, 424 F. Supp. 3d at 788-89.
[42] *In re Prempro*, 2012 WL 13033298, at *4.
[43] *Id.*
[44] *Id.*
[45] *Id.* at *3.

defendants eventually settled thousands of claims in this MDL, probably for more than $1 billion.[46]

A decision in the *Taxotere* MDL likewise demonstrates misapprehension of Rule 702 and the Rule's requirements to independently assess reliability of the proffered opinion. There, the court simply accepted the expert's "personal judgment in deciding what articles to review and include in her analysis."[47] In assessing an expert's consideration of the Bradford Hill criteria, the court held that if "an expert cannot articulate support for a particular factor, this goes to the weight of the expert's opinion, not its admissibility."[48] The court further held that issues with a study's use of overbroad terms to search an FDA database, consideration of studies evaluating medical problems other than the one at issue in the case, and lack of statistically significant results in individual studies were matters that went to weight rather than admissibility.[49]

The *Testosterone Replacement Therapy* MDL provides yet another example. There, the court concluded that Rule 702 did not require an analysis of epidemiological literature underlying the experts' opinions, summarily ruling that larger, more recent studies undercutting plaintiffs' experts' conclusions were "no more authoritative than plaintiffs' argument" and thus "the studies' 'merits and demerits . . . can be explored at trial.'"[50] Although the *Daubert* opinion itself identifies testability and known error rate

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[46] *See* Jordan A. Marzzacco, *A Dose of Reality: The Deadly Truth About Federal Preemption of Generic Drug Manufacturer Liability*, 24 WIDENER L.J. 355, 379 & n.160 (2015).
[47] *In re Taxotere*, 2019 WL 3997122, at *6.
[48] *Id. Cf. In re Zoloft*, 858 F.3d at 796 ("To ensure that the Bradford Hill/weight of the evidence criteria is truly a methodology, rather than a mere conclusion-oriented selection process there must be a scientific method of weighting that is used and explained." (quotation and alteration omitted)).
[49] *In re Taxotere*, 2019 WL 3997122, at *4-5.
[50] *In re Testosterone Replacement Therapy*, 2018 WL 4030585, at *2 (quoting *Schultz v. Akzo Nobel Paints, LLC*, 721 F.3d 426, 433 (7th Cir. 2013) (alteration in original)).

as factors pertinent to admissibility,[51] the court stated that an "expert's inability to quantify the cardiovascular risk he finds" was "an issue affecting the weight to be accorded to his analysis, not its admissibility."[52] It further ruled that criticisms directed toward an expert's use of a "totality-of-the-evidence methodology" unmoored from any particular discipline "bear on the weight, rather than the admissibility" of opinion testimony.[53] The final defendant in that MDL settled after juries in two cases awarded $140 million and $150 million in punitive damages (both awards were later vacated).[54]

Even in cases in which the court generally conducted an appropriate Rule 702 analysis, we find comments suggesting reluctance to assess reliability. For example, in the *Mirena IUD* MDL, the court "expresse[d] no opinion on the validity of" a study, noting that "because the parties so vehemently disagree on its credibility, it is a suitable topic for cross-examination before a jury."[55] In the *Lipitor* MDL, the court provided a cursory evaluation of various studies, stating that arguments indicating an expert misapplied the Bradford Hill criteria were "a matter for cross-examination, not exclusion."[56] And in the *Zoloft* litigation, the Third Circuit affirmed the exclusion of a particular expert, but cautioned that several problems identified by the district court—including reliance on studies with overlapping populations and drawing conclusions from a study opposite those reached by its authors—were "inquiries . . . more appropriately left to the jury."[57] This reluctance to engage with reliability questions suggests that some courts are not clear about their gatekeeping responsibilities under Rule 702.

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[51] 509 U.S. at 593-94.
[52] *In re Testosterone Replacement Therapy*, 2018 WL 4030585, at *3.
[53] *Id.* at *4.
[54] Alexia Elejalde-Ruiz, *AbbVie Nears Settlement in Thousands of Lawsuits Alleging Harm by Testosterone Drug AndroGel*, CHICAGO TRIBUNE (Sept. 18, 2018).
[55] *In re Mirena*, 169 F. Supp. 3d at 419.
[56] *In re Lipitor*, 174 F. Supp. 3d at 921, 922.
[57] *In re Zoloft*, 858 F.3d at 800.

D. MDL Decisions Frequently Lack Clarity Regarding the Rule 702 Standard.

As Professor Capra has previously noted, it can be difficult to determine whether a court is actually applying an incorrect test when it states that a certain argument goes to weight rather than admissibility.[58] This problem is exacerbated by a lack of clarity in many decisions we considered. District courts must find that the three reliability factors are established by a preponderance of the evidence under Rule 104(a).[59] This analysis should be distinguished from inquiries under Rule 104(b), which merely require evidence "sufficient to support a finding" of the proposition urged.[60] Thus, Rule 104(a) requires a finding that expert testimony is more likely than not based on sufficient facts or data, is the product of reliable principles and methods, and that the expert has reliably applied those principles and methods to the facts of the case.[61] Under Rule 104(b), in contrast, the question would be only whether a reasonable person could make those three findings.[62]

Few courts are clear about these distinctions, which indicates a need to clarify Rule 702. Nearly half of the decisions we reviewed do not reference the preponderance standard at all.[63] In decisions that do so, other language muddies the water. For

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[58] Capra, *supra* note 1, at 2 ("A ruling that some disputes are questions of weight is not necessarily a misapplication of Rule 702/104(a) . . . because even under 104(a) there are disputes that will go to weight and not admissibility.").
[59] *Daubert*, 509 U.S. at 592 n.10; Fed. R. Evid. 702 advisory committee's note to 2000 amendment.
[60] Fed. R. Evid. 104(b).
[61] Fed. R. Evid. 702(b), (c), (d).
[62] *See* Capra, *supra* note 1, at 3.
[63] *In re Lipitor*, 892 F.3d 624; *In re Zoloft*, 858 F.3d 787; *In re Mirena*, 713 F. App'x 11; *In re Nexium*, 662 F. App'x 528; *In re Viagra & Cialis*, 424 F. Supp. 3d 781; *In re Bair Hugger Forced Air Warming Devices*, 2019 WL 4394812; *In re Testosterone Replacement Therapy*, 2018 WL 4030585; *In re Bair Hugger Forced Air Warming Devices*, 2017 WL 6397721; *In re*

example, two decisions in the *Actos* MDL directly cite Rule 104(a) as the controlling standard—a rare occurrence in our sample.[64] But these decisions repeatedly referred to plaintiffs' burden as making a "prima facie" showing of reliability,[65] which is language one would expect in the Rule 104(b) context.[66] Such language indicates that this court did not appreciate the actual requirements of Rule 702.

Despite these interpretational difficulties, the MDL decisions we examined reveal a clear problem. Many MDL courts, whether explicitly or implicitly, have misinterpreted Rule 702 and failed to fulfill their duty to ensure expert testimony has a sufficient basis and is the result of a methodology reliably applied.

III. THE LACK OF UNIFORMITY IN MDL DECISIONS RESULTS IN SUBSTANTIVE DIVISIONS ON CORE ISSUES RELATING TO THE RELIABILITY OF GENERAL CAUSATION OPINIONS.

In the foregoing discussion, we highlight those MDL decisions that have diverged most clearly from the intent of Rule 702. This is not to suggest that all courts share the same misapprehensions regarding the Rule's requirements as to weight and admissibility. In some of the decisions we reviewed, courts appropriately engage with the scientific literature and the methodology underlying a proposed expert's opinion. But differences in MDL courts' application of Rule 702 should give us pause. These differences have led courts to split on important questions.

Zoloft, 2015 WL 7776911; *In re Nexium*, 2014 WL 5313871; *In re Celexa*, 927 F. Supp. 2d 758; *In re Chantix*, 889 F. Supp. 2d 1271.

[64] *In re Actos*, 2014 WL 60324, at *1; *In re Actos*, 2013 WL 6796461, at *2.

[65] *In re Actos*, 2014 WL 60324, at *3, *5, *9; *In re Actos*, 2013 WL 6796461, at *4, *7, *10.

[66] *See United States v. Enright*, 579 F.2d 980, 984-5 (6th Cir. 1978) (describing "the language of 104(b) as a classic restatement of the Prima facie test" and noting that "[a] determination under 104(a) is more demanding than a Prima facie test and calls for the exercise of judicial fact-finding responsibilities by the trial judge").

A. Differing Approaches to Rule 702 Lead to Different Results.

In the *Roundup* MDL, the district court was frank about the problem of divergent approaches to Rule 702. It concluded the scientific "evidence, viewed in its totality, seems too equivocal to support any firm conclusion" on general causation.[67] But it nevertheless admitted opinion testimony supporting plaintiffs' general causation theory.[68] The court stressed that in the Ninth Circuit, Rule 702 has been interpreted to mean that "weaknesses in an unpersuasive expert opinion can be exposed at trial, through cross-examination or testimony by opposing experts," which "has resulted in slightly more room for deference to experts in close cases than might be appropriate in some other Circuits."[69]

The *Roundup* court acknowledged that inter-Circuit differences on Rule 702 "could matter in close cases."[70] And the impact of those inter-Circuit differences could be enormous in the *Roundup* MDL. Some observers have estimated a likely settlement amount in the range of $10 billion.[71]

A set of two decisions from the *Bair Hugger* MDL further demonstrates how misunderstanding of Rule 702 can lead to different results. In an initial decision on the admissibility of testimony from several plaintiffs' experts, the district court apparently read Rule 702 as requiring only a superficial appraisal of their factual bases and methodologies.[72] It indicated expert testimony could be excluded only if "so fundamentally unsupported that it can offer no assistance to the jury."[73] And the court

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[67] *In re Roundup*, 390 F. Supp. 3d at 1109.
[68] *Id.*
[69] *Id.* at 1109, 1113.
[70] *Id.* at 1113.
[71] Jef Feeley et al., *Bayer Proposes Paying $8 Billion to Settle Roundup Cancer Claims*, BLOOMBERG (Aug. 9, 2019).
[72] *In re Bair Hugger Forced Air Warming Devices*, 2017 WL 6397721, at *2-6.
[73] *Id.* at *2 (quoting *Children's Broad. Corp. v. Walt Disney Co.*, 357 F.3d 860, 865 (8th Cir. 2004)).

stated that the credibility of an expert's basis, the need to conduct more thorough testing, and bias in conducting a scientific literature review were issues that went to weight rather than admissibility.[74]

After the jury returned a verdict in defendants' favor in a bellwether trial, the court addressed a renewed motion to exclude the same experts.[75] Despite plaintiffs' insistence that "the factual basis of an expert opinion goes to the credibility of the testimony, not the admissibility," the court admirably reconsidered its prior decision.[76] It rejected an expert who did "not have any basis" for his assertions and had "drifted from the factual realities of his test."[77] After conducting a thorough, if belated, evaluation of the scientific literature and case law concerning Rule 702, the court found "too great an analytical gap between the evidence and the expert's conclusions," and excluded the testimony it had previously ruled admissible.[78]

B. Differing Approaches to Rule 702 Lead Courts to Split on Recurring Substantive Issues.

Variations in the application of Rule 702 impact the broader contours of the law, in addition to the outcomes of particular cases. In considering general causation in these matters, we see the same issues arise again and again. Yet courts have not been able to reach a consensus on some common questions. This discord, driven in large measure by some courts' misunderstanding of Rule 702's requirements, engenders uncertainty regarding the resolution of perennial general causation questions.

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[74] *Id.* at *3, *4, *6.
[75] *In re Bair Hugger Forced Air Warming Devices*, 2019 WL 4394812, at *2-3.
[76] *Id.* at *5 (quoting *Bonner v. ISP Techs., Inc.*, 259 F.3d 924, 929 (8th Cir. 2001)), *11.
[77] *Id.* at *7, *9.
[78] *Id.* at *20. This result also highlights the importance of hearing live testimony from proffered experts. The court's prior ruling followed only briefing and oral argument. *In re Bair Hugger Forced Air Warming Devices*, 2017 WL 6397721, at *1.

Courts attempting to apply Rule 702 have reached different conclusions as to the reliability of non-statistically significant, "trending" data. Some courts have permitted experts to rely on such data in support of their general causation conclusions.[79] However, other courts have held that the "novel technique of drawing conclusions by examining 'trends' (often statistically non-significant) across selected studies" is "not scientifically sound."[80]

Many of the proposed experts in the cases we reviewed purport to engage in a Bradford Hill causation analysis. Several courts have recognized that although a statistically significant association is not always required to show causation, it is a necessary first step in applying the Bradford Hill criteria: "the analysis requires a statistician to find a statistically significant association at step one before moving on to apply the factors at step two."[81] Other decisions, however, have rejected the necessity of statistical significance at step one of the Bradford Hill analysis.[82]

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[79] *See In re Testosterone Replacement Therapy*, 2018 WL 4030585, at *3 (allowing an expert to rely on observational studies that "show only 'trends'"); *In re Prempro*, 2012 WL 13033298, at *3 (permitting testimony from an expert who "explained that the studies that lacked statistical significance still revealed a 'trend for association'").

[80] *In re Zoloft*, 26 F. Supp. 3d at 465; *see also In re Abilify*, 299 F. Supp. 3d at 1367 (holding an expert's "five statistically insignificant findings from the clinical trials, and also his characterization of those findings as a trend, must be excluded as unreliable").

[81] *In re Lipitor*, 892 F.3d at 642; *see also In re Mirena (No. II)*, 341 F. Supp. 3d at 265 ("[A]bsent [a demonstrated epidemiological] association, there is no basis to apply the Bradford Hill criteria.").

[82] *See In re Zoloft*, 858 F.3d at 794 n.35 (emphasizing that the lower court declined to hold that "the Bradford-Hill criteria should only be applied after an association is well established"); *In re Testosterone Replacement Therapy*, 2017 WL 1833173, at *9 (rejecting defendant's argument that application of the Bradford Hill criteria requires "an association between the drug at issue and the alleged injury, based on epidemiological studies showing an association that is statistically significant").

We also find substantial disagreement among courts on the degree to which proposed experts may "reinterpret" studies conducted by others to reach conclusions opposite of those made by the studies' authors. Some courts have recognized that if "an expert relies on the studies of others, he must not exceed the limitations the authors themselves place on the study."[83] Without detailed analysis, other courts have misread Rule 702 as permitting the contrary conclusion.[84]

Finally, MDL courts have differed on the role of studies dealing with drugs other than those at issue in a case. Some courts hold that such studies are generally of limited value in determining causation.[85] Yet other MDL decisions have struggled to grasp the requirements of Rule 702 and uncritically permitted experts to rely on such evidence.[86]

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[83] *In re Mirena (No. II),* 341 F. Supp. 3d at 241 (quoting *In re Accutane Prods. Liab. Litig.,* 2009 WL 2496444, at *2 (M.D. Fla. Aug. 11, 2009), *aff'd,* 378 F. App'x 929 (11th Cir. 2010)); *In re Mirena,* 169 F. Supp. 3d at 452 (same); *see also In re Lipitor,* 145 F. Supp. 3d at 593 (holding an expert generally cannot "conduct his own 'reanalysis' solely for the purposes of litigation and testify that the data support a conclusion opposite that of the studies' authors in a peer-reviewed publication").

[84] *See In re Zoloft,* 858 F.3d at 800 (finding no problem with the fact that "in his reanalysis [an expert] drew a different conclusion from a study than its authors did"); *In re Celexa,* 927 F. Supp. 2d at 765 ("There is no requirement that [an expert] reach the same conclusion as [a study's author] just because he relied on [the author's] data.").

[85] *See In re Mirena (No. II),* 341 F. Supp. 3d at 288 ("[C]ourts regularly exclude expert opinions built on analogies to different chemical compounds than the one at issue."); *In re Abilify,* 299 F. Supp. 3d at 1311 (ruling that "extrapolations from drugs within the same class may not support an expert opinion on general causation unless other reliable scientific evidence establishes the validity of the analogy").

[86] *See In re Celexa,* 927 F. Supp. 2d at 762-63 (permitting expert testimony based on an "analysis of studies relating to SSRIs generally, not Celexa and Lexapro specifically"); *In re Prempro,* 2012 WL 13033302, at *4 (rejecting the concern that "if you lump all hormone therapy formulations together, you may mistakenly attribute a risk to all hormone therapy when only some have that risk" by simply quoting an expert's *ipse dixit*, "Oh, I

C. Lack of Uniformity Among MDL Courts is Problematic.

These MDL decisions show that misunderstanding of Rule 702 results in inconsistent outcomes and disagreement on basic questions related to the reliability of general causation opinions. Such differences encourage forum-shopping, undermine confidence in the courts, and diminish the value of the MDL process.

Although a lack of uniformity in cases on a Federal Rule of Evidence is always cause for concern, the foregoing disagreements are particularly troubling in the MDL context. A core purpose of the MDL process is to promote uniformity.[87] Further, structural features of MDLs make it more difficult for appellate review to serve as a meaningful tool to address conflicting decisions.

Rule 702 decisions by district courts in MDLs—particularly those permitting expert testimony—are largely insulated from review. This is because there is no practical mechanism for appealing such rulings.[88] When an MDL decision misstates the law, an aggrieved party faces "an expensive and risky trial conducted under the wrong legal standard" with the potential for liability multiplied by the number of aggregated claims.[89] Because a decision allowing an expert to testify is not subject to interlocutory review, "the lack of an immediate appellate safety valve ensures that the claimed legal

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don't think that's true at all"). Relatedly, courts have permitted experts to analogize between different types of illnesses. *See, e.g., In re Johnson & Johnson Talcum Powder*, No. 3:16-MD-2738(FLW), Slip Op. at 89 n.39 ("[W]hile there are no studies linking these specific metals to ovarian cancer, . . . these metals have been linked to [other] specific types of cancer.").

[87] *See* Abbe R. Gluck, *Unorthodox Civil Procedure: Modern Multidistrict Litigation's Place in the Textbook Understandings of Procedure*, 165 U. PENN. L. REV. 1669, 1682 (2017) ("One of the main problems MDLs aim to solve is therefore horizontal federal duplication and disuniformity.").

[88] *See id.* at 1706 (noting that "the inability for error correction relating to pretrial rulings . . . can have enormous significance for many litigants").

[89] Pollis, *supra* note 7, at 1668.

errors will be repeated in multiple trials in the MDL proceeding."[90] These factors make it far less likely that a party will push on to trial and appeal following an adverse ruling.

Accordingly, few MDL decisions considering Rule 702 issues are ever appealed.[91] And to the extent that Rule 702 issues reach the Courts of Appeals from MDLs, they are highly asymmetrical. Of the decisions we reviewed, only four were appellate rulings, all of which considered district courts' exclusion of expert testimony.[92] Appellate review under current law is thus unlikely to resolve the lack of uniformity we have identified.[93]

IV. THE ADVISORY COMMITTEE SHOULD AMEND RULE 702.

In light of the problems we have identified in some MDL courts' application of Rule 702's core requirements, we urge the Advisory Committee to act. The Committee has considered an amendment to the introductory language of Rule 702 clarifying that "the court must find the following requirements to be established by a preponderance

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[90] U.S. Chamber, Institute for Legal Reform, *supra* note 8, at 9.

[91] Although parties can pursue interlocutory review under 28 U.S.C. § 1292(b), that option has largely proven illusory. A review of 127 mass tort MDL proceedings found no instances in which a court granted a defendant's request for certification of a ruling potentially dispositive of a large number of claims. Letter from John H. Beisner to Rebecca A. Womeldorf 2 (Nov. 21, 2018), https://www.uscourts.gov/sites/default/files/18-cv-bb-suggestion_beisner_0.pdf.

[92] *In re Lipitor*, 892 F.3d at 629 (appeal by plaintiffs from decision excluding expert testimony); *In re Mirena IUD*, 713 F. App'x at 13 (same); *In re Zoloft*, 858 F.3d at 789 (same); *In re Nexium*, 662 F. App'x at 529 (same).

[93] Legislative and rules-based solutions expanding interlocutory review for certain types of MDL decisions have been proposed. *See* The Fairness in Class Action Litigation Act, H.R. 985, 115th Cong. § 105 (2017) (proposed amendment to 28 U.S.C. § 1407); Agenda Book, Advisory Committee on Civil Rules (Apr. 2-3, 2019, meeting) at 212-13 (MDL Subcommittee Report considering amending rules to permit interlocutory review of some MDL decisions).

of the evidence."[94] Our review demonstrates that such clarification is necessary. A specific amendment and an accompanying Committee Note detailing the rationale for the amendment would clarify the courts' gatekeeping responsibilities and encourage them to apply Rule 702 as intended. Similarly, including language specifying that Rule 702's requirements are mandatory and specifically identifying the preponderance standard will focus the courts on their gatekeeping role.

We also support amending the Rule and adding a Committee Note to highlight that an expert's factual basis and applied methods are matters that go to admissibility rather than weight. Specifically, we encourage inclusion of the following proposed language in a Committee Note:

> Unfortunately many courts have held or declared that the critical questions of the sufficiency of an expert's basis, and the application of the expert's methodology, are generally questions of weight and not admissibility. These rulings are an incorrect application of Rules 702 and 104(a).[95]

In addition, we recommend that the Advisory Committee identify the types of rote language that often accompany misapplications of Rule 702. Examples of such language, indicating that an expert's factual basis or application of methodology are matters of weight rather than admissibility, have already been cited to the Committee by Professor Capra.[96] A Note that identifies with particularity the type of problematic analysis the Committee has in mind will best aid courts in applying Rule 702. Regardless of whether the introductory language of Rule 702 is amended, such a

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[94] Capra, *supra* note 1, at 26.
[95] Capra, *supra* note 24, at 34.
[96] *See* Capra, *supra* note 1, at 6, 12-13, 15-16.

Committee Note will encourage courts to make the required reliability findings before permitting an expert to testify.[97]

As the Supreme Court warned in *Daubert*, "[e]xpert evidence can be both powerful and quite misleading because of the difficulty in evaluating it."[98] Permitting junk science in the courtroom invites verdicts based on inadequate or non-existent supporting science. For this reason, courts cannot delegate to juries their gatekeeping duties. Yet recent MDL decisions suggest that some courts may not be sufficiently guided by Rule 702, leading to a misunderstanding of its essential provisions. Advisory Committee action is needed to correct this misunderstanding and provide courts and parties alike with much needed predictability in the application of Rule 702.

Sincerely,

Thomas J. Sheehan
Partner
Phillips Lytle LLP
One Canalside
125 Main Street
Buffalo, NY 14203
(716) 847-8341
tsheehan@phillipslytle.com

Eva Canaan
Partner
King & Spalding LLP
1185 Avenue of the Americas
34th Floor
New York, NY 10036
(212) 790-5351
ecanaan@kslaw.com

Joshua Glasgow
Special Counsel
Phillips Lytle LLP
One Canalside
125 Main Street
Buffalo, NY 14203
(716) 847-5465
jglasgow@phillipslytle.com

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[97] A Committee Note to this effect could be added if Rule 702 is amended to include a new subdivision on "overstatement" of expert opinions, which the Advisory Committee is also considering. *See* Capra, *supra* note 24, at 31.

[98] 505 U.S. at 595 (quotation omitted).

TAB 15

Ciresi Conlin LLP

January 12, 2022

Advisory Committee on Evidence Rules

Re: Hearing on Proposed Amendments to Federal Rule of Evidence 702

Leslie W. O'Leary
Of Counsel

E: LWO@CiresiConlin.com
P: 612-361-8229

225 South 6th St.
Suite 4600
Minneapolis, MN 55402
612-361-8200
CiresiConlin.com

Dear Advisory Committee Members,

My name is Leslie O'Leary. I am an attorney at the law firm Ciresi Conlin. For the past 23 years, I have represented plaintiffs in products liability actions both in federal and state court. Much of my work has focused on the admissibility of expert testimony under Fed. R. Evid. 702.

I write to express concern over the proposal by various interest groups to insert a comment in the Rule 702 Advisory Committee Note calling out certain appellate court decisions as "wrongly decided." While it is understandable that the losing party on a contested issue will disagree with the court's holding and analysis, it is not the function of this committee to declare that a rule of decision is invalid and must no longer be cited as controlling authority. The Advisory Committee is not a court of law. It does not have jurisdiction over cases or controversies, nor is it empowered to decide legal matters, issue binding orders, or announce legal precedents. Whether a Federal Court of Appeal has wrongly interpreted the scope of Fed. R. Evid. 702 is an issue that is properly resolved by the Supreme Court through the appellate process. This committee should therefore decline the invitation to act as a judicial tribunal and hold that appellate decisions are wrong as a matter of law.

There is another risk to taking sides on judicial opinions. Not only does this create an appearance of bias and detract from the Committee's reputation as a neutral advisor; it also forces the Committee to make assumptions about the volumes of data the trial judge and appellate court carefully considered in deciding the admissibility of expert witness'

225 South 6th St.
Suite 4600
Minneapolis, MN 55402
612-361-8200
CiresiConlin.com

opinions. Without comprehensively reviewing the entire record in each case and assessing arguments and witness testimony, how can the Committee conclude with certainty that a case was, in fact, "wrongly decided"?

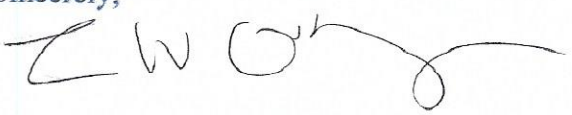
More important, however, the Committee should not accept at face value the contention that appellate decisions should be officially renounced for creating bad precedent. *Loudermill v. Dow Chem. Co.*, 863 F.2d 556 (8th Cir. 1988) is a case in point. Defense organizations seize upon *Loudermill's* rule that the court may exclude an expert opinion if it "is so fundamentally unsupported that it can offer no assistance to the jury." *Id.* at 570. They contend this standard sets such a low bar that it has essentially mandated the admission of expert testimony. But *Loudermill* does not stand for the proposition defense groups claim. In fact, the Eighth Circuit recently defined the "so fundamentally unsupported" standard as simply another way of stating the exception to admissibility announced by the Supreme Court in *Joiner*, that testimony may be excluded if there is "too great an analytical gap between the factual bases for the experts' opinions" and the conclusions they generate. *In re Bair Hugger Forced Air Warming Devices Prods. Liab. Litig.*, 9 F.4th 768, 778 (8th Cir. 2021) (citing *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997). *See also id.* at 788 (the ultimate question for the court was whether there was "too great an analytical gap" between the evidence and the experts' causation opinions under *Joiner*, "*or in other words*, whether the opinions were 'so fundamentally unsupported' that they should be excluded rather than admitted") (emphasis added).

Nor has *Loudermill* opened the floodgates to the admission of junk science as defense groups surmise. To the contrary, the Eighth Circuit has frequently applied *Loudermill's* "so fundamentally unsupported' rationale to exclude experts' opinions as unreliable where they lack a sufficient factual basis. *See, e.g., Klingenberg v. Vulcan Ladder USA, LLC*, 936 F.3d 824, 829-30 (8th Cir. 2019) (citing cases).

Detractors of the current Rule 702 cherry-pick cases like *Loudermill* to create a false narrative that "junk science" has run rampant in the federal courts due to the more flexible approach adopted in *Daubert* and the rule itself. This dire depiction is simply not true. Rather, the caselaw has continuously evolved and refined itself since the Amendments to Rule 702 were adopted in 2000, and courts remain cautious and vigilant in screening expert testimony. Thanks to continued appellate guidance and resources such as the Federal Judicial Center's *Manual on Scientific Evidence*, federal courts have become much better-equipped to act as gatekeepers in assessing the reliability of expert testimony than they were 22 years ago.

I urge the Committee to avoid wading into the partisan fray by calling out longstanding appellate decisions and decreeing them invalid. It would dishonor the judiciary and do irreparable harm to the Committee's venerable role as a neutral advisory body.

Sincerely,



Leslie W. O'Leary

TAB 16

LAW OFFICES
COHEN, PLACITELLA & ROTH
A PENNSYLVANIA PROFESSIONAL CORPORATION
127 MAPLE AVENUE
RED BANK, NEW JERSEY 07701
(732) 747-9003
FAX (732) 747-9004
www.cprlaw.com

PHILADELPHIA, PA
LEMOYNE, PA
BALA CYNWYD, PA
PITTSBURGH, PA
CHERRY HILL, NJ

CHRISTOPHER M. PLACITELLA
MANAGING NJ ATTORNEY
CERTIFIED CIVIL TRIAL ATTORNEY

JARED M. PLACITELLA
jmplacitella@cprlaw.com

January 14, 2022

VIA EMAIL
Hon. Patrick J. Schiltz
Chair, Advisory Committee on Evidence Rules
Administrative Office of the United States Courts
One Columbus Circle Northeast
Washington, District of Columbia 20544
RulesCommittee_Secretary@ao.uscourts.gov

Re: **Testimonial Comments for the January 21, 2022 Hearing on Proposed Amendments to Evidence Rule 702**

Dear Judge Schiltz and the Advisory Committee Members:

My name is Jared Placitella. I am an attorney with the firm of Cohen, Placitella & Roth, P.C., which is located in New Jersey and Pennsylvania, and represents plaintiffs in toxic tort, class action, product liability, and personal injury civil litigation across the country. My firm and I have litigated and argued expert preclusion motions at the trial and appellate level in both state and federal courts.

I write to share comments regarding the Committee's proposal to amend Fed. R. Evid. 702. Although this Committee has stated that it intends to move forward with some revision to Rule 702, I write to urge restraint and caution.

PROPOSED AMENDMENT #1: EMPHASIZING A "PREPONDERANCE OF THE EVIDENCE STANDARD"

The Proposed Committee Note says that the Rule has first "been amended to clarify and emphasize that the admissibility requirements set forth in this rule must be established to the court by a preponderance of the evidence." But a test that analyzes "evidence" is not supported by the Rules of Evidence or judicial precedent. And a "preponderance" standard has been incorporated into Rule 702 for the last 20 years and has been applied by trial courts — whether expressly stated in their opinions or impliedly so — since that time.

In 2000, this Committee amended Rule 702 "in response to" the Supreme Court's opinion in *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993), and the many cases applying it. The 2000 Committee Note introduced the concept that "the proponent has the burden of establishing that the pertinent admissibility requirements are met by a preponderance of the evidence" into Rule 702. But applying Rule 104(a) to the admissibility of expert testimony was first stated in *Daubert*. There, the Court instructed that "the trial judge must determine at the outset, pursuant to Rule 104(a)[10] whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue.[11]" 509 U.S. at 592. Footnote 10 in that sentence first quotes Rule 104(a)'s instruction that "in making its determination [of preliminary questions] [the court] is ***not bound by the rules of evidence***", and then explains that "[t]hese matters should be established by a ***preponderance of the proof***." *Daubert*, 509 U.S. 579 at 601 n.10 (1993) (citing *Bourjaily v. United States*, 483 U.S. 171, 175–76 (1987)).[1]

Although the amendment, according to the Committee Note, does not seek to impose "any new, specific procedures", its import suggests otherwise. Expressly requiring that the proponent must establish the elements of Rule 702 by a "preponderance of the evidence" — rather than a "preponderance of proof" or, better yet, a "preponderance of the information" as suggested in the draft Committee Note — not only contradicts *Daubert* and Rule 104(a) (which does not even cite a "preponderance" standard),[2] but also inevitably and incorrectly binds the proponents of expert testimony, and trial courts as gatekeepers, to the Rules of Evidence.

By comparing "weight" (given to the evidence by the jury once it is admitted) to "admissibility" (of the expert evidence at the outset), the Note naturally suggests that trial judges should conduct an evidentiary analysis. Yet that contravenes how the Committee Note says the Rule should be applied. While the proposed amendment to the Rule expressly espouses that a preponderance of the "evidence" must be demonstrated, the Comment suggests that the proponent need not present "evidence" but "information" for the trial judge's consideration. For instance, the Note explains that the amendment "is not meant to indicate that the ***information*** presented to the judge at a Rule 104(a) hearing must meet the rules of admissibility. It simply 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 satisfied more likely than not."

The contradiction between the text of the Rule and Committee 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 under Rule 702. For instance, Rule 702, as proposed, would contradict Rule 703. Under Rule 703, experts may base their opinions on information that is not even admissible. *See, e.g.,* F.R.E. 703 ("If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted"). Yet by holding a proponent of expert

[1] All emphases are supplied unless otherwise indicated.

[2] Notably, the Rules of Evidence do not apply to the court's determination on a preliminary questions of fact governing admissibility under Rule 104(a). *See* F.R.E. 1101(d)(1).

testimony to presenting only "evidence", that advocate would expressly be limited in the type of information that could be used to show that the expert's methodology and opinion are reliable.

The Proposed Note states that "the amendment is simply intended to clarify that Rule 104(a)'s requirement that a court must determine admissibility by a preponderance applies to expert opinions under Rule 702." Yet by expressly engrafting a burden of proof onto only Rule 702, this Committee risks that the bench and bar will improperly assume and argue that there is a new standard other than Rule 104, which applies broadly to all other evidence rules, to assess scientific evidence in particular. Instead of amending Rule 702, there are many different approaches, such as offering further education to trial judges, to address the six percent of opinions about which others have raised concerns.

The reality is that a "more likely than not standard" is the polestar that judges apply to nearly all evidentiary issues — both mundane and complex — in every trial. There is no reason to distinguish one Rule of Evidence from all others by injecting an express burden of proof that expressly hamstrings the information that the proponent may use to show how an expert's testimony is helpful and reliable.

PROPOSED AMENDMENT #2: EMPHASIZING THE COURT'S GATEKEEPING ROLE OVER THE EXPERT'S ULTIMATE OPINION UNDER FRE 702(d)

The Committee's proposal to amend Rule 702(d) to emphasize that a trial judge must exercise its gatekeeping authority to evaluate whether the expert's ultimate opinion reflects a reliable application of his or her methodology is similarly misguided and unnecessary. The Committee explains that this amendment is "essential" because "jurors may be unable" to "evaluate meaningfully the reliability of scientific and other methods underlying expert opinion" and "assess the conclusions of an expert that go beyond what the expert's basis and methodology may reliably support." Not only do these reasons devalue and demean the historic role of jurors for deciding outcomes in both criminal and civil disputes, but they also have the unintended potential for causing the court to mistakenly believe that it, not the jury, must decide the correctness of scientific evidence, which invades the jury's province and decision-making role. A hallmark of our civil justice system is the recognition that the collective wisdom of a jury is superior to the perspective of any single individual. As Justice Stephen Breyer has said, "[a]ny effort to bring better science into the courtroom must respect the jury's constitutionally specified role—even if doing so means that, from a scientific perspective, an incorrect result is sometimes produced." Justice Stephen Breyer, *Reference Manual on Scientific Evidence*, at 5 (3d Ed. 2011).

Indeed, the current Rule and 2000 Committee Note already address the stated problem that the proposed amendment seeks to fix. Both the Rule and 2000 Committee Note emphasize that the trial judge must exercise its gatekeeping authority to the expert's ultimate opinion, as well as his or her methodology. The 2000 Committee Note codifies the Court's guidance in *General Elec.*

v. Joiner, 522 U.S. 136, 146 (1997) that the trial judge should consider "whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion."[3]

Besides semantics, there is little difference between the text of Rule 702(d)'s proposed amendment that "the expert's opinion reflects a reliable application of" from its current form that "the expert has reliably applied" the principles and methods to the facts of the case. But the import of that revision risks undermining the instruction in the Committee Note "that nothing in the amendment requires the court to nitpick an expert's opinion in order to reach a perfect expression of what the basis and methodology can support." The amendment risks transforming *Daubert* hearings into mini-trials whereby courts, contrary to the scientific method, review each scientific study individually for whether it reliably supports the ultimate conclusion being advocated or opposed. *See* Margaret Berger, *Reference Manual on Scientific Evidence*, at 20 (3d Ed. 2011). Judges, who are not scientists and who "lack the scientific training that might facilitate the evaluation of scientific claims" are not qualified to evaluate the correctness of the expert's conclusions. Justice Stephen Breyer, *Reference Manual on Scientific Evidence*, at 4 (3d Ed. 2011). But they can, and already do, evaluate whether "there is simply too great an analytical gap between the data and the opinion proffered." *Joiner*, 522 U.S. at 146.

The Committee Note explains that the amendment to Rule 702(d) "is especially pertinent to the testimony of forensic experts in both criminal and civil cases." Besides amending Rule 702(d), which applies to the opinions of all experts in all disciplines, further education may be provided or the forensics chapter of the *Reference Manual on Scientific Evidence* may be supplemented to provide trial judges with guidance to prevent forensic experts from providing "assertions of absolute or one hundred percent certainty … if the methodology is subjective and thus potentially subject to error."

In sum, this Committee should refrain from enacting the proposed amendments to the text of Rule 702 and the Committee Note. The proposed revisions misinterpret Supreme Court precedent and seek to address concerns already covered by the existing Rule and 2000 Committee Note.

Thank you for the opportunity to address this Committee.

Respectfully Submitted,

Jared Placitella

JARED M. PLACITELLA, ESQ.

[3] *See also, e.g.,* F.R.E. 702, 2000 Committee Note ("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 R.R. Yard PCB Litig*., 35 F.3d 717, 745 (3d 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**.").

TAB 17

RossbachLawPC

William A. Rossbach, Attorney at Law
401 North Washington Street
P.O.Box 8988, Hellgate Station
Missoula MT 59807-8988

Rossbach Law, P.C.
406-543-5156 | office
406-728-8878 | fax
bill@rossbachlaw.com

Michelle Netzer, Paralegal
Tena Bova, Legal Assistant

January 14, 2022

Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, DC 20544
RulesCommittee_Secretary@ao.uscourts.gov

Re: Proposed Rulemaking on Federal Rule of Evidence 702
Summary Outline of Testimony at January 21, 2022 Hearing

Dear Members of the Committee on Rules of Practice and Procedure:

I am a trial lawyer with more than 40 years' experience litigating exclusively plaintiffs' cases involving complex medical, scientific, and engineering issues. Every such case requires presenting and disputing expert evidence.

I am admitted in four United States District Courts, six Courts of Appeal and the Supreme Court. I have served on the boards of several national and state trial lawyers' organizations. Most recently, I became member of the Board of Advisors of IAALS after serving on panels at the IAALS Rule One Symposium on the 2015 federal rule discovery amendments. I have also been nominated and elected by my peers to membership in the American Board of Trial Advocates. My testimony at the hearing is not as a representative of any organization.

Due to the constraints of time and the presence of other witnesses from the plaintiffs' bar at the hearing, I will limit my testimony to several key errors that are made repeatedly in the submissions by a number of defense bar organizations. I also will propose some edits of the proposed Rule and the proposed Committee Note. If needed, I may provide a more detailed letter after the hearing.

- **The Lawyers for Civil Justice "Study" has no value and itself is "Junk Science."**

  There is a total absence of value in what I call the "word search" study of 1059 cases involving expert admissibility done by Lawyers for Civil Justice and relied on by a number of the defense bar comments. This "research" is little more than doing word searches in a digital caselaw database, looking for the terms "preponderance of the evidence," "burden of proof," and "presumption of admissibility."

The study is thus largely just counting up numbers of cases with or without certain "magic words." Except in a few limited cases in the Appendix, the LCJ study provides little analysis of how or why those words were used and what the ultimate decision on admissibility was. It does not describe the information relied on by the court, or how it used any of those "magic words."

That some cases did not use the magic words does not mean that the court erred or did not understand the quantum of proof required for admissibility or what type of information it could rely on.

The information and the methods used in this study are thus unreliable. It cannot support the conclusion that any or all of these courts are wrong, that an express preponderance standard is required in Rule 702, or that express preclusion of any presumptions is needed. Indeed, if a lawyer tried to provide this "study" as the basis for admissibility of an expert opinion, it would plainly not meet the requirements of Rule 702. It is meaningless.

- **The Committee Note should not contain any direct or indirect criticisms of federal courts or jurors.**

  In most of the defense bar comments, there are attacks on federal courts for wrong decisions. Unfortunately, those attacks are echoed in criticisms of courts that have found their way into the proposed Committee Note. I believe it is inappropriate in a Committee Note to directly or indirectly criticize specific courts or jurors for making very difficult and complex scientific conclusions. As one commentator noted, a Committee Note should not directly or indirectly make claims that a particular decision is misguided or wrong. Allowing inclusion of detailed criticisms of individual cases into the Note -- without detailed review and description of the transcripts and information the court had before it -- would set a dangerous precedent and greatly reduce the value and neutral credibility of the Note.

- **Any amendment to Rule 702 must be consistent with Evidence Rule 104 and *Bourjaily v. United States*, 483 U.S. 171 (1987) and not cause confusion by using the phrase "preponderance of <u>evidence</u>" instead of the more correct phrase "preponderance of <u>information.</u>"**

  Rule 702 should not be amended without consideration of the clear and express language of Evidence Rule 104 and the *Bourjaily* decision which is cited in the Committee Note. Defense bar claims of problems with Rule 702 and their demands for changes in Rule 702 are inconsistent with the plain language of Rule 104 and the holding *in Bourjaily*.

In *Bourjaily,* the Court had to answer three questions regarding the admission of hearsay statements in a criminal conspiracy case under Rule 801. The first two are relevant here:

> ...(1) whether the court must determine by independent evidence that the conspiracy existed, and that the defendant and the declarant were members of this conspiracy; (2) the quantum of proof on which such determinations must be based.... 483 U.S. 173.

To answer the first question, the Court relied on Federal Rule of Evidence 104(a) that provides: "Preliminary questions concerning . . . the admissibility of evidence shall be determined by the court." In *Bourjaily,* the preliminary questions in that criminal case were whether there was a conspiracy and whether the defendant participated. *F.R.E 801.* Likewise, there are preliminary questions in determining the admissibility of expert testimony under the proposed Rule 702 that are spelled out explicitly in the three reliability-based sections of the Rule. Because the quantum of proof required to satisfy the preliminary questions was not spelled out in either Rule 104 or 702, the Court had to decide that.

Equally important for our purposes here, the Court made clear that there was an important distinction between the trial court's role in determining the preliminary questions of expert admissibility and the fact finder's role in deciding the ultimate question of who wins or loses on the merits. As I highlight here, the Court described the preponderance standard as "preponderance of proof." Although the Court later confuses this by also using the term "preponderance of evidence," the critical language in the quote below shows that the Court knew the difference; that proof does not become "evidence" that can be placed before the jury until it satisfies the technical requirements of the evidentiary Rules:

> We have traditionally required that these matters be established by a ***preponderance of proof. Evidence is placed before the jury when it satisfies the technical requirements of the evidentiary Rules,*** which embody certain legal and policy determinations. The inquiry made by a court concerned with these matters is not whether the proponent of the evidence wins or loses his case on the merits, but whether the evidentiary Rules have been satisfied. ***Thus, the evidentiary standard is unrelated to the burden of proof on the substantive issue.*** [emphasis added] 483 U.S. 175.

Rule 104 also provides that: "In making its determination [of the preliminary questions] it is not bound by the rules of evidence except those with respect to privileges." The Supreme Court concluded that Rule 104:

> … appears to allow the court to make the preliminary factual determinations … by considering any evidence it wishes, unhindered by considerations of admissibility. 483 U. S. 178

Although it is confusing for the Court to use the term preponderance of the evidence in the decision which implies that the rules of evidence would apply to the information the court can rely on, Rule 104 expressly says not. Again, in the above quote the Court plainly understands that the trial court in deciding the preliminary question of admissibility does not have to rely on information that is admissible under the evidence rules, that there is a difference between information which is admissible as evidence and inadmissible information that can be used in making the preliminary determination about evidentiary admissibility.

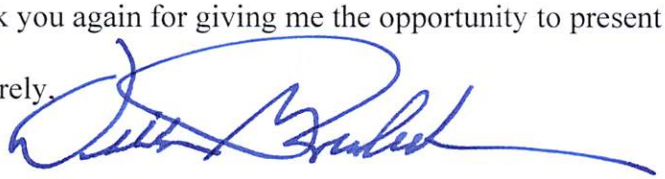
The proposed Committee Note acknowledges this distinction and implicitly recognizes that when the proposed rule uses the term preponderance of the evidence it is referring in fact to a preponderance of information.

> The amendment's reference to "a preponderance of the evidence" is not meant to indicate that the information presented to the judge at a Rule 104(a) hearing must meet the rules of admissibility. It simply 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 satisfied more likely than not.

Accordingly, that language in the Note requires emphasis. The use of the term "preponderance of evidence" instead of "preponderance of information" to describe what the court may rely on to decide the preliminary requirements for admissibility of Rule 702 expert opinions will lead to more confusion between what information that can be used to determine the preliminary question of admissibility without being admissible as evidence and what information becomes "evidence" after it is admitted. While I do not necessarily agree that an express preponderance standard is required in Rule 702, given Rule 104 and *Bourjaily*, I urge replacement of the term "preponderance of the evidence" in the proposed rule amendment with "preponderance of information."

Thank you again for giving me the opportunity to present my comments at the hearing.

Sincerely,



William A. Rossbach

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TAB 18

January 14, 2022

Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, D.C. 20544

Re: Testimony on the Proposed Amendments to Federal Rule of Evidence 702, January 21, 2022

Dear Committee Members:

My name is Tom Sheehan, and I am a lawyer and an epidemiologist that for decades has worked at the intersection of law and science, often in connection with threshold questions of the admissibility of expert opinions. Thank you for the opportunity to speak with you about the proposed amendments to FRE 702. I would also like to thank the Committee for all the work it has done to address this important topic. Your work has been noticed and appreciated across the bar, as is evidenced by the number of speakers today and the number of comments submitted to the Committee.

As the Committee has noted, FRE 702 was last amended in 2000, and numerous law review articles and commentaries published after the 2000 amendments have long recognized that many courts have struggled to understand and apply the tenets embodied in the Rule. In fact, the current draft Committee Note emphasizes that:

"…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. These rulings are an incorrect application of Rules 702 and 104(a)…"

The natural question is: what leads judges to incorrectly apply Rule 702 on critical questions relating to the admissibility of expert testimony? And if we can answer that question, the follow-up question is: what can the Committee do to help?

Regarding the first question, there is now a wealth of data and analysis that has been performed by Committee members, academics, and front line members of the bar. I will not attempt to summarize all those data today, but I've reviewed it as I am sure you all have, and suffice it to say it underscores a number of issues: (1) there is a widespread problem with the application of Rule 702; (2) that problem is driven by repeated misstatements of what the rule requires, and (3) those misstatements derive from a fundamental misunderstanding of what the judicial gatekeeping inquiry mandates.

To be clear, the data that have been gathered over the years are not cherry-picked examples of where someone substantively disagreed with a courts' Rule 702 decision. I was a co-author of a note submitted to the Committee that analyzed recent MDL Rule 702 decisions (attached). What my co-authors and I found was that the problem was one of root to branches. MDL Rule 702 decisions affect thousands, sometimes tens of thousands or even hundreds of thousands of cases, and they have a ripple effect on how judges understand Rule 702. MDL judges are highly qualified jurists, 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 gatekeeping inquiry under Rule 702, it gets traction. It also highlights a fundamental misunderstanding about the reliability inquiry under Rule 702: that "methodology" is an abstract concept only loosely connected to the underlying facts. On the contrary, is the gatekeeping role to ensure that all the steps of purportedly reliable methodology have been reliably applied to the existing facts and data. This apparent misunderstanding about, and subsequent misapplication of, Rule 702, has wide-ranging and potentially profound impacts on companies, doctors, the practice of medicine, the availability of therapeutic options for patients, and on the scientific community. This is not just an academic discussion; Rule 702 decisions truly have effects well beyond the courtroom.

So getting back to my two questions, if there is a problem that involves a misunderstanding of Rule 702 (which there clearly appears to be), what can the Committee do? I would submit that amendments work. Amendments prompt judges and lawyers to re-energize their focus, revisit what they thought they knew, and carefully consider the rationale underlying any changes to Rule 702. The proposed amendments to Rule 702 may be modest, but they will help. In fact, as some have suggested in comments to the Committee, adding the language "if the court determines" to the Rule would provide unambiguous clarity to the court's gatekeeping role. And that's the whole point: to help to bring clarity to the steps required to be undertaken by judges to enforce Rule 702; to bring clarity that the burden of proving admissibility lies with the proffering party; and to bring clarity that Rule 702 stands on its own and is not a codification of pre-2000 case law. Such proposed changes, and an accompanying note explaining the rationale for the changes, and illustrating where there has been incorrect application of Rule 702, will go a long way to providing much needed clarity to help judges discharge their gatekeeping role, and will help ensure consistent and uniform application of Rule 702 across the federal judiciary.

Thank you,

Tom Sheehan, J.D., M.S.

Shook, Hardy and Bacon LLP

Rebecca A. Womeldorf, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, D.C. 20544

June 9, 2020

Re: Amending Federal Rule of Evidence 702 - A Review of Gatekeeping Practices in Multidistrict Litigation

Dear Ms. Womeldorf:

The Advisory Committee on Evidence Rules is considering an amendment to Federal Rule of Evidence 702 and a Committee Note to clarify that problems with the basis of an expert's opinion or the application of an expert's methodology are threshold issues of admissibility.[1] This letter addresses confusion among some federal courts as to the proper application of Rule 702 in the context of high-stakes Multidistrict Litigation cases ("MDLs"). As attorneys who frequently deal with Rule 702-related issues in mass tort MDLs, we believe this perspective may be helpful to the Advisory Committee.

Our review of twenty-seven recent decisions from MDLs in the pharmaceutical, medical device, and chemical exposure fields demonstrates the need for Advisory Committee action on Rule 702. Courts in these cases frequently dismiss problems with an expert's factual basis or applied methodology as relating to the weight of the evidence rather than its admissibility. Further, differences in the application of Rule 702 have split MDL courts on substantive legal questions. To prevent clogging the federal system with meritless claims based on unreliable opinion testimony and undermining

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[1] *See* Daniel Capra, *Memorandum to Rule 702 Subcommittee re: Rule 702(b) and (d) – Weight and Admissibility Questions*, at 1 (Oct. 1, 2018) (Agenda Book, Advisory Committee on Evidence Rules (Oct. 19, 2018, meeting) at 171); *see also* David E. Bernstein & Eric G. Lasker, *Defending* Daubert*: It's Time to Amend Federal Rule of Evidence 702*, 57 WM. & MARY L. REV. 1, 30, 33 (2015).

the goal of uniformity that justifies use of the MDL process, we urge the Advisory Committee to draft an amendment to Rule 702 and a Committee Note expressly stating that an expert's factual basis and application of methodology are matters of admissibility, rather than weight.

I. THE MDL PERSPECTIVE ON RULE 702.

We elected to focus on MDLs for several reasons. The first is the sheer impact of MDL decisions. Rulings in MDLs affect hundreds, and sometimes thousands, of individual cases. As of the end of Fiscal Year 2019, more than 130,000 individual actions were pending in MDL matters.[2] Excluding prisoner and social security cases, MDLs make up a majority of the pending civil docket in federal courts.[3] MDLs are a pervasive means of litigation in federal court.

Given the number of individual cases, the monetary stakes of MDL rulings can be staggering. In large MDLs, total recoveries can measure in the billions of dollars.[4] Defendants threatened with potential MDL liability risk adverse publicity and reputational harm, fear among consumers, and reticence from physicians worried about their own liability. These concerns can lead to the unavailability of products that may

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[2] *See* United States Judicial Panel on Multidistrict Litigation, *Statistical Analysis of Multidistrict Litigation Under 28 U.S.C. § 1407 Fiscal Year 2019*, at 5 (2020), https://www.jpml.uscourts.gov/sites/jpml/files/JPML_Statistical_Analysis_of_Multidistrict_Litigation-FY-2019_0.pdf.

[3] Bloch Judicial Institute, Duke Law School, *Guidelines and Best Practices for Large and Mass-Tort MDLs*, at vi (2d ed. Sept. 2018).

[4] *See* Elizabeth Chamblee Burch, *Judging Multidistrict Litigation*, 90 N.Y.U. L. REV. 71, 73 n.1 (2015).

be important to public health.[5] Other MDL defendants face bankruptcy.[6] Nearly all experience tremendous pressure to settle: "An MDL judge holds the power, with a single decision, to dramatically recast the risk of liability in tens, hundreds, or even thousands of cases at a time," leaving "the painful choice of bearing the risk and expense of trial or succumbing to the pressures to settle."[7] These institutional incentives are amplified by the absence of a practical method for appellate review of district court decisions.[8]

Because of the importance of MDL decisions, Rule 702 issues are more likely to be comprehensively and capably presented and argued by both sides. Similarly, courts are more likely to focus on these matters and provide thorough analyses. If courts are failing to properly apply Rule 702 in MDLs, they are likely failing to do so elsewhere. In this regard, MDL decisions can have a domino effect. Because of their importance, MDL decisions on Rule 702 are frequently cited in both MDL and non-MDL cases

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[5] *See* Joseph Sanders, *The Bendectin Litigation: A Case Study in the Life Cycle of Mass Torts*, 43 HASTINGS L.J. 301, 319, 348, 364 (1992) (noting that the drug Bendectin was pulled from the market following the assertion of MDL claims despite an eventual "scientific consensus that if Bendectin has any teratogenic effects they are virtually undetectable").
[6] *See* Michael Higgins, Mass Tort Makeover? ABA J. Nov. 1998, at 52, 54.
[7] Andrew S. Pollis, *The Need for Non-Discretionary Interlocutory Appellate Review in Multidistrict Litigation*, 79 FORDHAM L. REV. 1643, 1670 (2011) (internal quotation marks omitted); *see In re Gen. Motors LLC Ignition Switch Litig.*, 2019 WL 6827277, at *14 (S.D.N.Y. Dec. 12, 2019) (noting that "the vast majority of MDL cases are, in fact, resolved by settlement . . . due, at least in part, to the sheer magnitude of the risk, in terms of dollar value, of trials").
[8] *See* U.S. Chamber, Institute for Legal Reform, *MDL Imbalance: Why Defendants Need Timely Access to Interlocutory Review* 1 (April 2019) ("Defendants faced with unfavorable dispositive motion rulings that they know will not be addressed by an appellate court for years often feel pressured to settle the hundreds or thousands of claims in an MDL proceeding, rather than incur massive additional litigation expenses and roll the dice on costly trials.").

across jurisdictions.[9] Accordingly, an incorrect application of Rule 702 is more likely to be propagated through MDL decisions.

For many of the same reasons, we concentrated on the portions of MDL decisions that consider the reliability of "general causation" opinions in drug, medical device, and chemical exposure tort cases.[10] General causation decisions typically affect more cases and have more overall impact than specific causation decisions. Experts providing such testimony often rely on similar methodologies, analyses of the Bradford Hill or other causal criteria,[11] in formulating their opinions. Accordingly, the general causation analysis—as its name suggests—is more generalizable between cases of this sort, providing fertile ground for comparison among MDL courts.

We considered twenty-seven most recent decisions from seventeen MDLs to assess how courts in those cases are applying Rule 702. They meet the following criteria: (1) MDL mass tort cases; (2) from the last eight years;[12] (3) concerning

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[9] For example, *In re Fosamax Prods. Liab. Litig.*, 645 F. Supp. 2d 164 (S.D.N.Y. 2009), has been cited in 173 subsequent cases, including district court decisions in every regional circuit.

[10] The general causation question is whether a product is capable of causing a medical problem, as opposed to the specific causation question of whether a product caused the problem in a particular plaintiff. *See, e.g., Goebel v. Denver & Rio Grande W.R.R. Co.*, 346 F.3d 987, 990 (10th Cir. 2003).

[11] These nine criteria for assessing whether a causal relationship exists were first described in a famed epidemiological lecture. *See* Austin Bradford Hill, *The Environment and Disease: Association or Causation?*, 58 PROCEEDINGS OF THE ROYAL SOCIETY OF MEDICINE 205 (1965).

[12] We did not include cases that reconsider or review rulings that were initially made more than eight years ago. *See, e.g., In re Denture Cream Prods. Liab. Litig.*, 2015 WL 392021 (S.D. Fla. Jan. 28, 2015), *aff'd, Jones v. SmithKline Beecham*, 652 F. App'x 848 (11th Cir. 2016) (conducting updated analysis of general causation testimony following *In re Denture Cream Prods. Liab. Litig.*, 795 F. Supp. 2d 1345 (S.D. Fla. 2011)). Similarly. we did not separately analyze cases that merely adopt prior reasoning. *See, e.g., In re Actos*

pharmaceuticals, medical devices, or chemical exposure; and (4) regarding the admissibility of general causation expert opinion testimony.[13]

(Pioglitazone) Prods. Liab. Litig., 2014 WL 108923, at *6 (W.D. La. Jan. 8, 2014) ("[T]his Court adopts and incorporates rulings as to general causation found in [two prior decisions] to address Defendants' 'core arguments' as to general causation.").

[13] The decisions we have considered are: *In re Abilify (Aripiprazole) Prods. Liab. Litig.*, 299 F. Supp. 3d 1291 (N.D. Fla. 2018); *In re Actos (Pioglitazone) Prods. Liab. Litig.*, 2013 WL 6796461 (W.D. La. Dec. 19, 2013); *In re Actos (Pioglitazone) Prods. Liab. Litig.*, 2014 WL 60324 (W.D. La. Jan. 7, 2014); *In re Bair Hugger Forced Air Warming Devices Prods. Liab. Litig.*, 2017 WL 6397721 (D. Minn. Dec. 13, 2017); *In re Bair Hugger Forced Air Warming Devices Prods. Liab. Litig.*, 2019 WL 4394812 (D. Minn. July 31, 2019); *In re Celexa & Lexapro Prods. Liab. Litig.*, 927 F. Supp. 2d 758 (E.D. Mo. 2013); *In re Chantix (Varenicline) Prods. Liab. Litig.*, 889 F. Supp. 2d 1272 (N.D. Ala. 2012); *In re Fosamax (Alendronate Sodium) Prods. Liab. Litig.*, 2013 WL 1558690 (D.N.J. Apr. 10, 2013); *In re Johnson & Johnson Talcum Powder Prods. Marketing, Sales Practices & Prods. Litig.*, No. 3:16-MD-2738(FLW) (D.N.J. Apr. 27, 2020); *In re Lipitor (Atorvastatin Calcium) Marketing, Sales Practices & Prods. Liab. Litig.*, 145 F. Supp. 3d 573 (D.S.C. 2015); *In re Lipitor (Atorvastatin Calcium) Marketing, Sales Practices & Prods. Liab. Litig.*, 174 F. Supp. 3d 911 (D.S.C. 2016); *In re Lipitor (Atorvastatin Calcium) Marketing, Sales Practices & Prods. Liab. Litig.*, 892 F.3d 624 (4th Cir. 2018); *In re Mirena IUD Prods. Liab. Litig.*, 169 F. Supp. 3d 396 (S.D.N.Y. 2016); *In re Mirena IUD Prods. Liab. Litig.*, 713 F. App'x 11 (2d Cir. 2017); *In re Mirena IUS Levonorgestrel-Related Prods. Liab. Litig. (No. II)*, 341 F. Supp. 3d 213 (S.D.N.Y. 2018); *In re Nexium (Esomeprazole) Prods. Liab. Litig.*, 2014 WL 5313871 (C.D. Cal. Sept. 30, 2014); *In re Nexium (Esomeprazole) Prods. Liab. Litig.*, 662 F. App'x 528 (9th Cir. 2016); *In re Prempro Prods. Liab. Litig.*, 2012 WL 13033298 (E.D. Ark. Apr. 11, 2012); *In re Prempro Prods. Liab. Litig.*, 2012 WL 13033302 (E.D. Ark. Apr. 19, 2012); *In re Roundup Prods. Liab. Litig.*, 390 F. Supp. 3d 1102 (N.D. Cal. 2018); *In re Taxotere (Docetaxel) Prods. Liab. Litig.*, 2019 WL 3997122 (E.D. La. Aug. 23, 2019); *In re Testosterone Replacement Therapy Prods. Liab. Litig.*, 2017 WL 1833173 (N.D. Ill. May 8, 2017); *In re Testosterone Replacement Therapy Prods. Liab. Litig.*, 2018 WL 4030585 (N.D. Ill. Aug. 23, 2018); *In re Viagra (Sildenafil Citrate) & Cialis (Tadlafil) Prods. Liab. Litig.*, 424 F. Supp. 3d 781 (N.D. Cal. Jan. 13. 2020); *In re Zoloft*

II. MDL DECISIONS FREQUENTLY HOLD THAT RELIABILITY ISSUES RELATE TO WEIGHT RATHER THAN ADMISSIBILITY.

Our review of these important MDL decisions revealed some troubling trends. Many courts mischaracterize the Rule 702 standard, indicating insufficient guidance from the Rule and uncertainty about the Rule's meaning. Even in cases that correctly state the standard, some courts fail to apply it as intended. Although many MDL decisions properly considered whether a proffered expert had a sufficient factual basis for his or her opinion and whether the expert reliably applied his or her methodology, we also found numerous instances in which courts failed to conduct these inquiries.

A. Overview and Background.

Judges are not scientists. Faced with competing accounts of confidence intervals, p-values, or confounding variables, judges may be all too tempted to simply throw up their hands and send the matter to a jury. Indeed, there is no shortage of cases repeating the refrain that any underlying problems with a proposed expert's testimony are fodder for cross-examination at trial and can be weighed by the trier of fact. This impulse to shift responsibility is understandable, but misguided. If federal judges have trouble sorting good science from bad, why would lay juries fare better? As Justice Breyer has written, "neither the difficulty of the task nor any comparative lack of expertise can excuse the judge from exercising the 'gatekeeper' duties that the Federal Rules of Evidence impose."[14]

One core purpose of the Federal Rules of Evidence is to provide clear guidance to federal judges. The drafters of the 2000 amendment to Rule 702 explained that the proponent of expert testimony "has the burden of establishing that the pertinent admissibility requirements are met by a preponderance of the evidence" under Rule

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(Sertraline Hydrochloride) Prods. Liab. Litig., 2015 WL 7776911 (E.D. Pa. Dec. 2, 2015); *In re Zoloft (Sertraline Hydrochloride) Prods. Liab. Litig.*, 26 F. Supp. 3d 449 (E.D. Pa. 2014); *In re Zoloft (Sertraline Hydrochloride) Prods. Liab. Litig.*, 858 F.3d 787 (3d Cir. 2017).

[14] *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 148 (1997) (Breyer, J., concurring).

104(a).[15] They believed "[t]he amendment makes clear that the sufficiency of the basis of an expert's testimony is to be decided under Rule 702."[16] And they noted that "[t]he 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."[17]

Despite this ostensible clarity, several Circuits have held that courts cannot review the factual basis of an expert's testimony.[18] Others have concluded that the misapplication of an expert's methodology is an issue for the jury.[19] The Advisory Committee has taken note of these decisions, in which "courts appear to have not read the Rule as it is intended."[20] As described in an influential article by David Bernstein and Eric Lasker, "[m]any courts continue to resist the judiciary's proper gatekeeping

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[15] Fed. R. Evid. 702 advisory committee's note to 2000 amendment (citing *Bourjaily v. United States*, 483 U.S. 171 (1987)). The Supreme Court mandated this standard in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 592 & n.10 (1993).
[16] Fed. R. Evid. 702 advisory committee's note to 2000 amendment.
[17] *Id.* (citing *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 745 (3d Cir. 1994)).
[18] *See, e.g., Manpower, Inc. v. Ins. Co. of Pa.*, 732 F.3d 796, 806 (7th Cir. 2013) ("The soundness of the factual underpinnings of the expert's analysis and the correctness of the expert's conclusions based on that analysis are factual matters to be determined by the trier of fact, or, where appropriate, on summary judgment." (quoting *Smith v. Ford Motor Co.*, 215 F.3d 713, 718 (7th Cir. 2000))); *Milward v. Acuity Specialty Prods. Grp.*, 639 F.3d 11, 22 (1st Cir. 2011) (same).
[19] *See, e.g., City of Pomona v. SQM N. Am. Corp.*, 750 F.3d 1036, 1048 (9th Cir. 2014) ("[O]nly a faulty methodology or theory, as opposed to imperfect execution of laboratory techniques, is a valid basis to exclude expert testimony."); *United States v. Shea*, 211 F.3d 658, 668 (1st Cir. 2000) ("[A]ny flaws in [an expert]'s application of an otherwise reliable methodology went to weight and credibility and not to admissibility.").
[20] *See* Capra, *supra* note 1, at 1 (citing Bernstein, *supra* note 1).

role, either by ignoring Rule 702's mandate altogether or by aggressively reinterpreting the Rule's provisions."[21]

Such misunderstanding regarding the meaning and application of Rule 702 is disconcerting. Excluding unreliable expert testimony "is particularly important considering the aura of authority experts often exude, which can lead juries to give more weight to their testimony."[22] If courts do not fulfill their gatekeeping role, "expert testimony may be assigned talismanic significance in the eyes of lay jurors."[23] This is, of course, the danger that Rule 702 seeks to address: "for the very reason that an expert is needed (because lay jurors need assistance) the jury may well be unable to figure out whether the expert is providing real information or junk."[24]

B. MDL Decisions Frequently Misstate the Rule 702 Standard.

Uncertainty among some federal courts regarding Rule 702's meaning leads to problems in its application in the MDL context. In some cases, MDL courts hold directly and in broad terms that required findings under Rule 702 relate to weight rather than admissibility. Such rulings clearly indicate a fundamental misunderstanding of the Rule.

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[21] Bernstein & Lasker, *supra* note 1, at 48. Other scholars have reached the same conclusion. *See, e.g.*, Brandon L. Garret & M. Chris Fabricant, *The Myth of the Reliability Test*, 86 FORDHAM L. REV. 1559, 1564 (2018) (noting the "reliability language" of Rule 702 "has largely been ignored by state and federal judges" and that "[m]ore forceful language might make the importance of assessing reliability more salient to judges, perhaps with more detailed accompanying guidance in Advisory Committee notes").

[22] *Elsayed Mukhtar v. Cal. State Univ., Hayward*, 299 F.3d 1053, 1063-64 (9th Cir. 2002), *amended*, 319 F.3d 1073 (9th Cir. 2003).

[23] *United States v. Frazier*, 387 F.3d 1244, 1263 (11th Cir. 2004).

[24] Daniel J. Capra, *Memorandum to Advisory Committee on Evidence Rules re: Possible Amendment to Rule 702*, at 11 (Oct. 1, 2019) (Agenda Book, Advisory Committee on Evidence Rules (Oct. 25, 2019, meeting) at 131).

In the *Nexium* MDL, for example, the district court announced that under Rule 702, "the factual basis of an expert opinion goes to the credibility of the testimony, not the admissibility, and it is up to the opposing party to examine the factual basis for the opinion in cross-examination."[25] In the *Bair Hugger* case, the court stated that "generally, the credibility of an expert's basis goes to weight."[26] And in the *Prempro* MDL, the court read Rule 702 to provide that "in most cases, objections to the inadequacies of a study are more appropriately considered an objection going to the weight of the evidence rather than its admissibility."[27]

Similarly, in the *Testosterone Replacement Therapy* MDL, the court understood Rule 702 as indicating that "[t]he soundness of the factual underpinnings of the expert's analysis and the correctness of the expert's conclusions based on that analysis are factual matters to be determined by the jury."[28] The *Talcum Powder* MDL also relied on this quotation, and held that disputes regarding study results and trends "cannot be resolved in the context of this *Daubert* motion" because its review "is only confined to whether [an expert's] methodologies in interpreting the studies are reliable."[29] In the same decision, the court stated that "disagreement with the methods used by an expert is a question that goes more to the weight of the evidence than to reliability for *Daubert* purposes" and that the court's role is "simply to evaluate whether the methodology

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[25] *In re Nexium*, 2014 WL 5313871, at *1 (quoting *Hangarter v. Provident Life & Accident Ins. Co.*, 373 F.3d 998, 1017 n.14 (9th Cir. 2004)).
[26] *In re Bair Hugger Forced Air Warming Devices*, 2017 WL 6397721, at *3.
[27] *In re Prempro*, 2012 WL 13033298, at *3 (quoting *Hemmings v. Tidyman's Inc.*, 285 F.3d 1174, 1188 (9th Cir. 2002)).
[28] *In re Testosterone Replacement Therapy*, 2017 WL 1833173, at *5 (quoting *Smith*, 215 F.3d at 718).
[29] *In re Johnson & Johnson Talcum Powder*, No. 3:16-MD-2738(FLW), Slip Op. at 79 (quoting *Smith*, 215 F.3d at 718); 126.

used by the expert is reliable, *i.e.*, whether, when correctly employed, that methodology leads to testimony helpful to the trier of fact."[30]

In the *Chantix* decision, the court also stated that "[t]he soundness of the factual underpinnings of the expert's analysis and the correctness of the expert's conclusions based on that analysis are factual matters to be determined by the jury"[31] and emphasized that "the factual basis of an expert opinion is assessed by the jury."[32] Importantly, the Chantix MDL followed an FDA-required black box warning regarding potential risks identified through adverse event reports (uncontrolled and often unverified reports from the public and health professionals). After the district court denied defendant's motion to exclude general causation experts, the litigation settled for approximately $300 million.[33] Subsequently, results from a randomized controlled trial (the gold standard for determining scientific causation) did not show a significantly increased risk of the alleged side effects with the drug and the FDA removed the black box warning from the Chantix label.[34]

MDL decisions also often rely on Circuit Court opinions that demonstrate similar confusion regarding the scope of Rule 702 and thus include analogous, incorrect statements when discussing general standards. For example, the *Roundup* decision cited repeatedly to *City of Pomona v. SQM North America Corp.*;[35] the *Abilify* decision

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[30] *Id.* at 46 (quoting *In re Diet Drugs Prods. Liab. Litig.*, 2000 WL 962545, at *13 (E.D. Pa. June 28, 2000), and *Walker v. Gordon*, 46 F. App'x 691, 695 (3d Cir. 2002)).
[31] *In re Chantix*, 889 F. Supp. 2d at 1286 (quoting *Tucker v. SmithKline Beecham Corp.*, 701 F. Supp. 2d 1040, 1055 (S.D. Ind. 2010), in turn quoting *Smith*, 215 F.3d at 718).
[32] *Id.* at 1297 (citing *Larson v. Kempker*, 414 F.3d 936, 941 (8th Cir. 2005)).
[33] *See* Jeff Lingwall et al., *The Imitation Game: Structural Asymmetry in Multidistrict Litigation*, 87 MISS. L.J. 131, 158 n.160 (2018).
[34] Jeffrey Chasnow & Geoffrey Levitt, *Off-Label Communications: The Prodigal Returns*, 73 FOOD & DRUG L.J. 257, 269 (2018); Natalie Grover, *FDA Drops Black Box Warning on Pfizer's Anti-Smoking Drug*, REUTERS (Dec. 16, 2016).
[35] *In re Roundup*, 390 F. Supp. 3d at 1113, 1141, 1142 (citing *City of Pomona*, 750 F.3d at 1043-49, 1044).

relied on *Quiet Tech. DC-8, Inc. v. Hurel-Dubois UK Ltd.*;[36] and both the *Taxotere* and *Fosamax* cases rested on *Milward v. Acuity Specialty Products Group, Inc.*[37] All three of these Circuit Court rulings were brought to the attention of the Rule 702 Subcommittee by Committee Reporter Daniel Capra as likely misunderstanding the required analysis under the current iteration of Rule 702.[38]

Further, a significant proportion of MDL decisions rely—whether directly or indirectly—on case law that predates the 2000 amendment to Rule 702, or even the *Daubert* decision.[39] Reliance on these older cases is inconsistent with the Rules Enabling Act[40] and suggests that amending the Rule to reinforce the impact of the 2000 amendment is warranted. As the court in the *Viagra and Cialis* MDL recently noted, although issues concerning expert testimony are often referred to as *Daubert* matters,

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[36] *In re Abilify*, 299 F. Supp. 3d at 1305 (quoting *Quiet Tech. DC-8, Inc. v. Hurel-Dubois UK Ltd.*, 326 F.3d 1333, 1341 (11th Cir. 2003)).
[37] *In re Taxotere*, 2019 WL 3997122, at *6 n.34 (citing *Milward*, 639 F.3d at 17-22); *In re Fosamax*, 2013 WL 1558690, at *4, *6 (citing *Milward*, 639 F.3d at 15).
[38] Capra, *supra* note 1, at 5-7 (discussing *Milward*) 12-13 (discussing *City of Pomona*), and 15-16 (discussing *Quiet Tech.*).
[39] *See In re Lipitor*, 892 F.3d at 632 (quoting *Westberry v. Gislaved Gummi AB*, 178 F.3d 257, 261 (4th Cir. 1999)); *In re Zoloft*, 858 F.3d at 792-93 (quoting *In re TMI Litig.*, 193 F.3d 613, 665 (3d Cir. 1999), *amended*, 199 F.3d 158 (3d Cir. 2000)); *In re Testosterone Replacement Therapy*, 2017 WL 1833173, at *12 (quoting *Lust v. Merrell Dow Pharm., Inc.*, 89 F.3d 594, 597 (9th Cir. 1996)); *In re Abilify*, 299 F. Supp. 3d at 1318 (quoting *Bazemore v. Friday*, 478 U.S. 385, 400 (1986)); *In re Lipitor*, 174 F. Supp. 3d at 920 (quoting *Westberry*, 178 F.3d at 261); *In re Lipitor*, 145 F. Supp. 3d at 920 (quoting *Westberry*, 178 F.3d at 261); *In re Zoloft*, 2015 WL 7776911, at *3 (citing *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d at 745, and *Holbrook v. Lykes Bros. S.S. Co.*, 80 F.3d 777, 784 (3d Cir. 1996)).
[40] *See* 28 U.S.C. § 2072(b) ("All laws in conflict with" duly enacted Rules of Evidence "shall be of no further force or effect after such rules have taken effect").

"the governing rule is set out in Rule 702" which "was amended in 2000, seven years after *Daubert* was decided . . . and the amended rule superseded any other law."[41]

C. MDL Decisions Frequently Fail to Apply the Rule 702 Standard as Intended.

In addition to misconstruing Rule 702, many MDL courts dismiss numerous arguments challenging the reliability of expert testimony as going to weight rather than admissibility. For example, in the *Prempro* MDL, the district court accepted that defendants raised "several interesting questions regarding the experts' findings."[42] It asked:

> Why does it appear that one expert lifted her report from another expert? Why does one of Plaintiffs' experts criticize observational studies as potentially misleading but rely on them in the expert report? Why does one of Plaintiffs' experts say it is not appropriate to differentiate receptor status, but other experts say it is appropriate? Why were studies cited in the expert reports that did not support the expert's position?[43]

Nevertheless, the court dispatched these concerns collectively, holding without significant analysis that "all of these points go to credibility, not admissibility."[44] Similarly, the court declined to consider the argument that experts had disregarded differences in drug formulations by noting that the experts "attempted to explain why the differences in formulation were irrelevant" and thus the "jury can determine whether they believe" the proffered reasoning.[45] This deference to "attempted" explanations is plainly not an independent analysis of reliability required by Rule 702, indicating uncertainty about the scope of gatekeeping mandated by the Rule. The

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[41] *In re Viagra & Cialis*, 424 F. Supp. 3d at 788-89.
[42] *In re Prempro*, 2012 WL 13033298, at *4.
[43] *Id.*
[44] *Id.*
[45] *Id.* at *3.

defendants eventually settled thousands of claims in this MDL, probably for more than $1 billion.[46]

A decision in the *Taxotere* MDL likewise demonstrates misapprehension of Rule 702 and the Rule's requirements to independently assess reliability of the proffered opinion. There, the court simply accepted the expert's "personal judgment in deciding what articles to review and include in her analysis."[47] In assessing an expert's consideration of the Bradford Hill criteria, the court held that if "an expert cannot articulate support for a particular factor, this goes to the weight of the expert's opinion, not its admissibility."[48] The court further held that issues with a study's use of overbroad terms to search an FDA database, consideration of studies evaluating medical problems other than the one at issue in the case, and lack of statistically significant results in individual studies were matters that went to weight rather than admissibility.[49]

The *Testosterone Replacement Therapy* MDL provides yet another example. There, the court concluded that Rule 702 did not require an analysis of epidemiological literature underlying the experts' opinions, summarily ruling that larger, more recent studies undercutting plaintiffs' experts' conclusions were "no more authoritative than plaintiffs' argument" and thus "the studies' 'merits and demerits . . . can be explored at trial.'"[50] Although the *Daubert* opinion itself identifies testability and known error rate

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[46] *See* Jordan A. Marzzacco, *A Dose of Reality: The Deadly Truth About Federal Preemption of Generic Drug Manufacturer Liability*, 24 WIDENER L.J. 355, 379 & n.160 (2015).
[47] *In re Taxotere*, 2019 WL 3997122, at *6.
[48] *Id. Cf. In re Zoloft*, 858 F.3d at 796 ("To ensure that the Bradford Hill/weight of the evidence criteria is truly a methodology, rather than a mere conclusion-oriented selection process there must be a scientific method of weighting that is used and explained." (quotation and alteration omitted)).
[49] *In re Taxotere*, 2019 WL 3997122, at *4-5.
[50] *In re Testosterone Replacement Therapy*, 2018 WL 4030585, at *2 (quoting *Schultz v. Akzo Nobel Paints, LLC*, 721 F.3d 426, 433 (7th Cir. 2013) (alteration in original)).

as factors pertinent to admissibility,[51] the court stated that an "expert's inability to quantify the cardiovascular risk he finds" was "an issue affecting the weight to be accorded to his analysis, not its admissibility."[52] It further ruled that criticisms directed toward an expert's use of a "totality-of-the-evidence methodology" unmoored from any particular discipline "bear on the weight, rather than the admissibility" of opinion testimony.[53] The final defendant in that MDL settled after juries in two cases awarded $140 million and $150 million in punitive damages (both awards were later vacated).[54]

Even in cases in which the court generally conducted an appropriate Rule 702 analysis, we find comments suggesting reluctance to assess reliability. For example, in the *Mirena IUD* MDL, the court "expresse[d] no opinion on the validity of" a study, noting that "because the parties so vehemently disagree on its credibility, it is a suitable topic for cross-examination before a jury."[55] In the *Lipitor* MDL, the court provided a cursory evaluation of various studies, stating that arguments indicating an expert misapplied the Bradford Hill criteria were "a matter for cross-examination, not exclusion."[56] And in the *Zoloft* litigation, the Third Circuit affirmed the exclusion of a particular expert, but cautioned that several problems identified by the district court—including reliance on studies with overlapping populations and drawing conclusions from a study opposite those reached by its authors—were "inquiries . . . more appropriately left to the jury."[57] This reluctance to engage with reliability questions suggests that some courts are not clear about their gatekeeping responsibilities under Rule 702.

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[51] 509 U.S. at 593-94.
[52] *In re Testosterone Replacement Therapy*, 2018 WL 4030585, at *3.
[53] *Id.* at *4.
[54] Alexia Elejalde-Ruiz, *AbbVie Nears Settlement in Thousands of Lawsuits Alleging Harm by Testosterone Drug AndroGel*, CHICAGO TRIBUNE (Sept. 18, 2018).
[55] *In re Mirena*, 169 F. Supp. 3d at 419.
[56] *In re Lipitor*, 174 F. Supp. 3d at 921, 922.
[57] *In re Zoloft*, 858 F.3d at 800.

D. MDL Decisions Frequently Lack Clarity Regarding the Rule 702 Standard.

As Professor Capra has previously noted, it can be difficult to determine whether a court is actually applying an incorrect test when it states that a certain argument goes to weight rather than admissibility.[58] This problem is exacerbated by a lack of clarity in many decisions we considered. District courts must find that the three reliability factors are established by a preponderance of the evidence under Rule 104(a).[59] This analysis should be distinguished from inquiries under Rule 104(b), which merely require evidence "sufficient to support a finding" of the proposition urged.[60] Thus, Rule 104(a) requires a finding that expert testimony is more likely than not based on sufficient facts or data, is the product of reliable principles and methods, and that the expert has reliably applied those principles and methods to the facts of the case.[61] Under Rule 104(b), in contrast, the question would be only whether a reasonable person could make those three findings.[62]

Few courts are clear about these distinctions, which indicates a need to clarify Rule 702. Nearly half of the decisions we reviewed do not reference the preponderance standard at all.[63] In decisions that do so, other language muddies the water. For

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[58] Capra, *supra* note 1, at 2 ("A ruling that some disputes are questions of weight is not necessarily a misapplication of Rule 702/104(a) . . . because even under 104(a) there are disputes that will go to weight and not admissibility.").
[59] *Daubert*, 509 U.S. at 592 n.10; Fed. R. Evid. 702 advisory committee's note to 2000 amendment.
[60] Fed. R. Evid. 104(b).
[61] Fed. R. Evid. 702(b), (c), (d).
[62] *See* Capra, *supra* note 1, at 3.
[63] *In re Lipitor*, 892 F.3d 624; *In re Zoloft*, 858 F.3d 787; *In re Mirena*, 713 F. App'x 11; *In re Nexium*, 662 F. App'x 528; *In re Viagra & Cialis*, 424 F. Supp. 3d 781; *In re Bair Hugger Forced Air Warming Devices*, 2019 WL 4394812; *In re Testosterone Replacement Therapy*, 2018 WL 4030585; *In re Bair Hugger Forced Air Warming Devices*, 2017 WL 6397721; *In re*

example, two decisions in the *Actos* MDL directly cite Rule 104(a) as the controlling standard—a rare occurrence in our sample.[64] But these decisions repeatedly referred to plaintiffs' burden as making a "prima facie" showing of reliability,[65] which is language one would expect in the Rule 104(b) context.[66] Such language indicates that this court did not appreciate the actual requirements of Rule 702.

Despite these interpretational difficulties, the MDL decisions we examined reveal a clear problem. Many MDL courts, whether explicitly or implicitly, have misinterpreted Rule 702 and failed to fulfill their duty to ensure expert testimony has a sufficient basis and is the result of a methodology reliably applied.

III. THE LACK OF UNIFORMITY IN MDL DECISIONS RESULTS IN SUBSTANTIVE DIVISIONS ON CORE ISSUES RELATING TO THE RELIABILITY OF GENERAL CAUSATION OPINIONS.

In the foregoing discussion, we highlight those MDL decisions that have diverged most clearly from the intent of Rule 702. This is not to suggest that all courts share the same misapprehensions regarding the Rule's requirements as to weight and admissibility. In some of the decisions we reviewed, courts appropriately engage with the scientific literature and the methodology underlying a proposed expert's opinion. But differences in MDL courts' application of Rule 702 should give us pause. These differences have led courts to split on important questions.

Zoloft, 2015 WL 7776911; *In re Nexium*, 2014 WL 5313871; *In re Celexa*, 927 F. Supp. 2d 758; *In re Chantix*, 889 F. Supp. 2d 1271.

[64] *In re Actos*, 2014 WL 60324, at *1; *In re Actos*, 2013 WL 6796461, at *2.

[65] *In re Actos*, 2014 WL 60324, at *3, *5, *9; *In re Actos*, 2013 WL 6796461, at *4, *7, *10.

[66] *See United States v. Enright*, 579 F.2d 980, 984-5 (6th Cir. 1978) (describing "the language of 104(b) as a classic restatement of the Prima facie test" and noting that "[a] determination under 104(a) is more demanding than a Prima facie test and calls for the exercise of judicial fact-finding responsibilities by the trial judge").

A. Differing Approaches to Rule 702 Lead to Different Results.

In the *Roundup* MDL, the district court was frank about the problem of divergent approaches to Rule 702. It concluded the scientific "evidence, viewed in its totality, seems too equivocal to support any firm conclusion" on general causation.[67] But it nevertheless admitted opinion testimony supporting plaintiffs' general causation theory.[68] The court stressed that in the Ninth Circuit, Rule 702 has been interpreted to mean that "weaknesses in an unpersuasive expert opinion can be exposed at trial, through cross-examination or testimony by opposing experts," which "has resulted in slightly more room for deference to experts in close cases than might be appropriate in some other Circuits."[69]

The *Roundup* court acknowledged that inter-Circuit differences on Rule 702 "could matter in close cases."[70] And the impact of those inter-Circuit differences could be enormous in the *Roundup* MDL. Some observers have estimated a likely settlement amount in the range of $10 billion.[71]

A set of two decisions from the *Bair Hugger* MDL further demonstrates how misunderstanding of Rule 702 can lead to different results. In an initial decision on the admissibility of testimony from several plaintiffs' experts, the district court apparently read Rule 702 as requiring only a superficial appraisal of their factual bases and methodologies.[72] It indicated expert testimony could be excluded only if "so fundamentally unsupported that it can offer no assistance to the jury."[73] And the court

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[67] *In re Roundup*, 390 F. Supp. 3d at 1109.
[68] *Id.*
[69] *Id.* at 1109, 1113.
[70] *Id.* at 1113.
[71] Jef Feeley et al., *Bayer Proposes Paying $8 Billion to Settle Roundup Cancer Claims*, BLOOMBERG (Aug. 9, 2019).
[72] *In re Bair Hugger Forced Air Warming Devices*, 2017 WL 6397721, at *2-6.
[73] *Id.* at *2 (quoting *Children's Broad. Corp. v. Walt Disney Co.*, 357 F.3d 860, 865 (8th Cir. 2004)).

stated that the credibility of an expert's basis, the need to conduct more thorough testing, and bias in conducting a scientific literature review were issues that went to weight rather than admissibility.[74]

After the jury returned a verdict in defendants' favor in a bellwether trial, the court addressed a renewed motion to exclude the same experts.[75] Despite plaintiffs' insistence that "the factual basis of an expert opinion goes to the credibility of the testimony, not the admissibility," the court admirably reconsidered its prior decision.[76] It rejected an expert who did "not have any basis" for his assertions and had "drifted from the factual realities of his test."[77] After conducting a thorough, if belated, evaluation of the scientific literature and case law concerning Rule 702, the court found "too great an analytical gap between the evidence and the expert's conclusions," and excluded the testimony it had previously ruled admissible.[78]

B. Differing Approaches to Rule 702 Lead Courts to Split on Recurring Substantive Issues.

Variations in the application of Rule 702 impact the broader contours of the law, in addition to the outcomes of particular cases. In considering general causation in these matters, we see the same issues arise again and again. Yet courts have not been able to reach a consensus on some common questions. This discord, driven in large measure by some courts' misunderstanding of Rule 702's requirements, engenders uncertainty regarding the resolution of perennial general causation questions.

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[74] *Id.* at *3, *4, *6.
[75] *In re Bair Hugger Forced Air Warming Devices,* 2019 WL 4394812, at *2-3.
[76] *Id.* at *5 (quoting *Bonner v. ISP Techs., Inc.*, 259 F.3d 924, 929 (8th Cir. 2001)), *11.
[77] *Id.* at *7, *9.
[78] *Id.* at *20. This result also highlights the importance of hearing live testimony from proffered experts. The court's prior ruling followed only briefing and oral argument. *In re Bair Hugger Forced Air Warming Devices,* 2017 WL 6397721, at *1.

Courts attempting to apply Rule 702 have reached different conclusions as to the reliability of non-statistically significant, "trending" data. Some courts have permitted experts to rely on such data in support of their general causation conclusions.[79] However, other courts have held that the "novel technique of drawing conclusions by examining 'trends' (often statistically non-significant) across selected studies" is "not scientifically sound."[80]

Many of the proposed experts in the cases we reviewed purport to engage in a Bradford Hill causation analysis. Several courts have recognized that although a statistically significant association is not always required to show causation, it is a necessary first step in applying the Bradford Hill criteria: "the analysis requires a statistician to find a statistically significant association at step one before moving on to apply the factors at step two."[81] Other decisions, however, have rejected the necessity of statistical significance at step one of the Bradford Hill analysis.[82]

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[79] *See In re Testosterone Replacement Therapy*, 2018 WL 4030585, at *3 (allowing an expert to rely on observational studies that "show only 'trends'"); *In re Prempro*, 2012 WL 13033298, at *3 (permitting testimony from an expert who "explained that the studies that lacked statistical significance still revealed a 'trend for association'").

[80] *In re Zoloft*, 26 F. Supp. 3d at 465; *see also In re Abilify*, 299 F. Supp. 3d at 1367 (holding an expert's "five statistically insignificant findings from the clinical trials, and also his characterization of those findings as a trend, must be excluded as unreliable").

[81] *In re Lipitor*, 892 F.3d at 642; *see also In re Mirena (No. II)*, 341 F. Supp. 3d at 265 ("[A]bsent [a demonstrated epidemiological] association, there is no basis to apply the Bradford Hill criteria.").

[82] *See In re Zoloft*, 858 F.3d at 794 n.35 (emphasizing that the lower court declined to hold that "the Bradford-Hill criteria should only be applied after an association is well established"); *In re Testosterone Replacement Therapy*, 2017 WL 1833173, at *9 (rejecting defendant's argument that application of the Bradford Hill criteria requires "an association between the drug at issue and the alleged injury, based on epidemiological studies showing an association that is statistically significant").

We also find substantial disagreement among courts on the degree to which proposed experts may "reinterpret" studies conducted by others to reach conclusions opposite of those made by the studies' authors. Some courts have recognized that if "an expert relies on the studies of others, he must not exceed the limitations the authors themselves place on the study."[83] Without detailed analysis, other courts have misread Rule 702 as permitting the contrary conclusion.[84]

Finally, MDL courts have differed on the role of studies dealing with drugs other than those at issue in a case. Some courts hold that such studies are generally of limited value in determining causation.[85] Yet other MDL decisions have struggled to grasp the requirements of Rule 702 and uncritically permitted experts to rely on such evidence.[86]

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[83] *In re Mirena (No. II),* 341 F. Supp. 3d at 241 (quoting *In re Accutane Prods. Liab. Litig.,* 2009 WL 2496444, at *2 (M.D. Fla. Aug. 11, 2009), *aff'd,* 378 F. App'x 929 (11th Cir. 2010)); *In re Mirena,* 169 F. Supp. 3d at 452 (same); *see also In re Lipitor,* 145 F. Supp. 3d at 593 (holding an expert generally cannot "conduct his own 'reanalysis' solely for the purposes of litigation and testify that the data support a conclusion opposite that of the studies' authors in a peer-reviewed publication").

[84] *See In re Zoloft,* 858 F.3d at 800 (finding no problem with the fact that "in his reanalysis [an expert] drew a different conclusion from a study than its authors did"); *In re Celexa,* 927 F. Supp. 2d at 765 ("There is no requirement that [an expert] reach the same conclusion as [a study's author] just because he relied on [the author's] data.").

[85] *See In re Mirena (No. II),* 341 F. Supp. 3d at 288 ("[C]ourts regularly exclude expert opinions built on analogies to different chemical compounds than the one at issue."); *In re Abilify,* 299 F. Supp. 3d at 1311 (ruling that "extrapolations from drugs within the same class may not support an expert opinion on general causation unless other reliable scientific evidence establishes the validity of the analogy").

[86] *See In re Celexa,* 927 F. Supp. 2d at 762-63 (permitting expert testimony based on an "analysis of studies relating to SSRIs generally, not Celexa and Lexapro specifically"); *In re Prempro,* 2012 WL 13033302, at *4 (rejecting the concern that "if you lump all hormone therapy formulations together, you may mistakenly attribute a risk to all hormone therapy when only some have that risk" by simply quoting an expert's *ipse dixit*, "Oh, I

C. Lack of Uniformity Among MDL Courts is Problematic.

These MDL decisions show that misunderstanding of Rule 702 results in inconsistent outcomes and disagreement on basic questions related to the reliability of general causation opinions. Such differences encourage forum-shopping, undermine confidence in the courts, and diminish the value of the MDL process.

Although a lack of uniformity in cases on a Federal Rule of Evidence is always cause for concern, the foregoing disagreements are particularly troubling in the MDL context. A core purpose of the MDL process is to promote uniformity.[87] Further, structural features of MDLs make it more difficult for appellate review to serve as a meaningful tool to address conflicting decisions.

Rule 702 decisions by district courts in MDLs—particularly those permitting expert testimony—are largely insulated from review. This is because there is no practical mechanism for appealing such rulings.[88] When an MDL decision misstates the law, an aggrieved party faces "an expensive and risky trial conducted under the wrong legal standard" with the potential for liability multiplied by the number of aggregated claims.[89] Because a decision allowing an expert to testify is not subject to interlocutory review, "the lack of an immediate appellate safety valve ensures that the claimed legal

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don't think that's true at all"). Relatedly, courts have permitted experts to analogize between different types of illnesses. *See, e.g., In re Johnson & Johnson Talcum Powder*, No. 3:16-MD-2738(FLW), Slip Op. at 89 n.39 ("[W]hile there are no studies linking these specific metals to ovarian cancer, . . . these metals have been linked to [other] specific types of cancer.").

[87] *See* Abbe R. Gluck, *Unorthodox Civil Procedure: Modern Multidistrict Litigation's Place in the Textbook Understandings of Procedure*, 165 U. PENN. L. REV. 1669, 1682 (2017) ("One of the main problems MDLs aim to solve is therefore horizontal federal duplication and disuniformity.").

[88] *See id.* at 1706 (noting that "the inability for error correction relating to pretrial rulings . . . can have enormous significance for many litigants").

[89] Pollis, *supra* note 7, at 1668.

errors will be repeated in multiple trials in the MDL proceeding."[90] These factors make it far less likely that a party will push on to trial and appeal following an adverse ruling.

Accordingly, few MDL decisions considering Rule 702 issues are ever appealed.[91] And to the extent that Rule 702 issues reach the Courts of Appeals from MDLs, they are highly asymmetrical. Of the decisions we reviewed, only four were appellate rulings, all of which considered district courts' exclusion of expert testimony.[92] Appellate review under current law is thus unlikely to resolve the lack of uniformity we have identified.[93]

IV. THE ADVISORY COMMITTEE SHOULD AMEND RULE 702.

In light of the problems we have identified in some MDL courts' application of Rule 702's core requirements, we urge the Advisory Committee to act. The Committee has considered an amendment to the introductory language of Rule 702 clarifying that "the court must find the following requirements to be established by a preponderance

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[90] U.S. Chamber, Institute for Legal Reform, *supra* note 8, at 9.

[91] Although parties can pursue interlocutory review under 28 U.S.C. § 1292(b), that option has largely proven illusory. A review of 127 mass tort MDL proceedings found no instances in which a court granted a defendant's request for certification of a ruling potentially dispositive of a large number of claims. Letter from John H. Beisner to Rebecca A. Womeldorf 2 (Nov. 21, 2018), https://www.uscourts.gov/sites/default/files/18-cv-bb-suggestion_beisner_0.pdf.

[92] *In re Lipitor*, 892 F.3d at 629 (appeal by plaintiffs from decision excluding expert testimony); *In re Mirena IUD*, 713 F. App'x at 13 (same); *In re Zoloft*, 858 F.3d at 789 (same); *In re Nexium*, 662 F. App'x at 529 (same).

[93] Legislative and rules-based solutions expanding interlocutory review for certain types of MDL decisions have been proposed. *See* The Fairness in Class Action Litigation Act, H.R. 985, 115th Cong. § 105 (2017) (proposed amendment to 28 U.S.C. § 1407); Agenda Book, Advisory Committee on Civil Rules (Apr. 2-3, 2019, meeting) at 212-13 (MDL Subcommittee Report considering amending rules to permit interlocutory review of some MDL decisions).

of the evidence."[94] Our review demonstrates that such clarification is necessary. A specific amendment and an accompanying Committee Note detailing the rationale for the amendment would clarify the courts' gatekeeping responsibilities and encourage them to apply Rule 702 as intended. Similarly, including language specifying that Rule 702's requirements are mandatory and specifically identifying the preponderance standard will focus the courts on their gatekeeping role.

We also support amending the Rule and adding a Committee Note to highlight that an expert's factual basis and applied methods are matters that go to admissibility rather than weight. Specifically, we encourage inclusion of the following proposed language in a Committee Note:

> Unfortunately many courts have held or declared that the critical questions of the sufficiency of an expert's basis, and the application of the expert's methodology, are generally questions of weight and not admissibility. These rulings are an incorrect application of Rules 702 and 104(a).[95]

In addition, we recommend that the Advisory Committee identify the types of rote language that often accompany misapplications of Rule 702. Examples of such language, indicating that an expert's factual basis or application of methodology are matters of weight rather than admissibility, have already been cited to the Committee by Professor Capra.[96] A Note that identifies with particularity the type of problematic analysis the Committee has in mind will best aid courts in applying Rule 702. Regardless of whether the introductory language of Rule 702 is amended, such a

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[94] Capra, *supra* note 1, at 26.
[95] Capra, *supra* note 24, at 34.
[96] *See* Capra, *supra* note 1, at 6, 12-13, 15-16.

Committee Note will encourage courts to make the required reliability findings before permitting an expert to testify.[97]

As the Supreme Court warned in *Daubert*, "[e]xpert evidence can be both powerful and quite misleading because of the difficulty in evaluating it."[98] Permitting junk science in the courtroom invites verdicts based on inadequate or non-existent supporting science. For this reason, courts cannot delegate to juries their gatekeeping duties. Yet recent MDL decisions suggest that some courts may not be sufficiently guided by Rule 702, leading to a misunderstanding of its essential provisions. Advisory Committee action is needed to correct this misunderstanding and provide courts and parties alike with much needed predictability in the application of Rule 702.

Sincerely,

Thomas J. Sheehan
Partner
Phillips Lytle LLP
One Canalside
125 Main Street
Buffalo, NY 14203
(716) 847-8341
tsheehan@phillipslytle.com

Eva Canaan
Partner
King & Spalding LLP
1185 Avenue of the Americas
34th Floor
New York, NY 10036
(212) 790-5351
ecanaan@kslaw.com

Joshua Glasgow
Special Counsel
Phillips Lytle LLP
One Canalside
125 Main Street
Buffalo, NY 14203
(716) 847-5465
jglasgow@phillipslytle.com

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[97] A Committee Note to this effect could be added if Rule 702 is amended to include a new subdivision on "overstatement" of expert opinions, which the Advisory Committee is also considering. *See* Capra, *supra* note 24, at 31.

[98] 505 U.S. at 595 (quotation omitted).

TAB 19

From: Gerson H. Smoger
To: RulesCommittee Secretary
Subject: Email regarding testimony before the Federal Rules of Evidence Committee
Date: Friday, January 14, 2022 11:50:57 AM

For the upcoming hearing, as appropriate, I am hoping to comment on some of the suggestions and underlying reasoning offered by the WLF, LCJ, IADC, FDCC, Evans, Fears & Schuttert, the Coalition of Litigation Justice, Inc., and Thompson Hine LLP in their recent submissions. This would likely include what I believe to be their unfair derogation of the capability of courts and their purposeful preponderance analysis.

Thank you so much in advance,

Gerson Smoger, J.D., Ph.D.
Smoger & Associates, P.C.
Gerson@texasinjurylaw.com
510-531-4529
214-243-5297

TAB 20

Proposed Statement of Navan Ward
President, American Association for Justice

While AAJ appreciates the removal of 702(e) from the rule text, we remained concerned about the proposed changes to the rule. The real elephant in the room—the one that no one wants to acknowledge—is that if plaintiff's expert witnesses are stricken, the claims may not proceed, while the converse is not true for the defense bar. The question remains whether the proposed amendment will change how courts qualify experts or simply result in confusion. AAJ is concerned that the changes sought will not be recognized by the judges who need a correction, but that the proposed amendment may unnecessarily limit the admissibility of plaintiffs' experts.

I. AAJ opposes the addition of a "preponderance" standard to the rule.

AAJ recommends that:

1) textual changes adding references to "a court finds" or "a court demonstrates" are not added back to the text of the rule; and
2) that the word "information" be used instead of the word "evidence" (so the phrase reads, "preponderance of the information").

The proposed text would read:

if the proponent has demonstrated by a preponderance of the ~~evidence~~ information that:

A. AAJ opposes adding back textual language on "the courts."

- The Advisory Committee was right to remove the language on the courts. Changing the proposed text back to "the court demonstrates" or the "court finds" will create further confusion on what the judge is supposed to do.
- For the same reasons, the language in the note should say "preponderance of information".
  - The Committee Note concedes this point, at the end of two-and-a-half pages of commentary: the actual standard is a preponderance "of the information presented" regardless of "the rules of admissibility."
  - This is because as it is currently worded, the amendment inserts directly into Rule 702 the Rule 104 standard for how the trial court is to address two preliminary questions: "whether a[n expert] witness is qualified" and "whether [expert opinion] evidence is admissible."
  - Contrary to Rule 104, the draft amendment implies that the trial judge is bound by the rules of evidence in addressing those preliminary questions. That contravenes the plain text of Rule 104: "In so deciding, the court is not bound by the rules of evidence."
  - The Committee Note asserts that federal judges have been confused and mistaken about Rule 702, and that the purpose of the draft amendment is to rectify that. Judges may now incorrectly believe that they are required to adjudicate the correctness of the expert's opinion. That some judges might read "evidence" to mean they are now required to supplant the role of the jury. AAJ is equally concerned about the potential for mischief by parties who knowingly argue such a legally incorrect approach.
  - It is not until the very end of the Committee Note that it is made clear that "evidence" does not actually mean evidence, but instead means information:

> "The amendment's reference to "a preponderance of the evidence" is not meant to indicate that the information presented to the judge at a Rule 104(a) hearing must meet the rules of

admissibility. It simply 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 satisfied more likely than not."

- AAJ agrees that this explanation in the Committee Note is accurate and should be reflected in the text of the Rule. Otherwise, a court will be left to reconcile the use of "evidence" with "information presented" and consider why two different phrases are being used. A court may incorrectly infer that it must sit in the place of a jury. That is not the purpose of the Evidence Committee's proposed changes to Rule 702.

- AAJ is also concerned that an inaccurate rendering of the text of Rule 702, even though it is eventually clarified in the Committee Note, could also cause confusion and errors in state courts which, at times, adopt only the wording of a federal rule and not the clarifying commentary. Over the decades since adoption, the Federal Rules of Evidence have served as the principal model for many state rules of evidence.

    - States that do not adopt notes or commentary are: ID, LA, MI, MA, MT, NE, NH, NC, OR, RI, SD, TN, TX, WI, WY

II. AAJ recommends several changes to the Committee Notes.

AAJ's public comment will go into additional detail, but there are two particular changes that AAJ wants to bring to the Advisory Committee's attention:

A. **There is no need to diminish the role of jurors.** If the entire premise for changing Rule 702 is that some courts, meaning some judges, are getting it wrong, then any negative reference to jurors can be removed without changing the meaning of the Committee Note. Thus, AAJ strongly recommends removing the following:

> "Judicial gatekeeping is essential because just as jurors may be unable to evaluate meaningfully the reliability of scientific and other methods underlying expert opinion, jurors may also be unable to assess the conclusions of an expert that go beyond what the expert's basis and methodology may reliably support."

AAJ also recommends substituting the following:

> "Judicial gatekeeping is essential because it is the judge's job to evaluate the reliability of scientific and other methods underlying expert opinions and determine that the expert's basis and methodology are reliability applied. However, it remains the role of the jury to decide the correctness of the expert's opinion."

B. **There is no need to slam the courts for getting it wrong.** Judges will fail to recognize themselves and frankly, the scolding tone is unbecoming. While LCJ suggests reverting to stronger language scolding the courts for getting it wrong, AAJ completely disagrees, noting that most people respond better to clear direction rather than being called out in a public document.

TAB 21

WARSHAUER LAW GROUP
A PROFESSIONAL CORPORATION OF TRIAL LAWYERS

Jasper V. Abbott *
Michael E. Pérez
Trent S. Shuping
Lyle Griffin Warshauer †
Michael J. Warshauer ◇

*also admitted in OK
†also admitted in AL & TN
◇also admitted in TN

2740 Bert Adams Road
Atlanta, Georgia 30339

Telephone: 404.892.4900
Fax: 404.892.1020
warlawgroup.com

Rebecca A. Womeldorf, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, DC 20544
RulesCommittee_Secretary@ao.uscourts.gov

Re: Proposed Rulemaking on Federal Rule of Evidence 702
Dear Ms. Womeldorf:

Re: Testimonial Comments for the January 21, 2022 Hearing on Proposed Amendments to Evidence Rule 702

Dear MS. Womeldorf:

I am a plaintiff's lawyer. An outline of the comments I hope to provide when I testify about Rule 702 is attached. After my testimony, I expect to file a formal comment.

Sincerely,

Michael J. Warshauer

Enclosure

OUTLINE OF TESTIMONY FOR MICHAEL J. WARSHAUER

I. INTRODUCTORY REMARKS AND BACKGROUND

A. NAME

B. DESCRIPTION OF MY PRACTICE – Represent plaintiffs in one off product liability, transportation (trucks and trains) and malpractice actions.

C. DAUBERT/702 EXPERIENCE

i. Lead counsel in Joiner.

ii. Briefed and Argued over 100 Daubert motions in state and federal courts in multiple jurisdictions at trial and appellate levels.

II. DISCUSSION OF PROPOSED CHANGES TO RULE 702 FOCUSING ON THE EFFECT OF ADDING THE PHRASE "PREPONDERANCE OF THE EVIDENCE."

A. Proponents of change offer one-sided data.

i. Complaints about improper admission should be given less weight than creating the potential for more improper exclusions.

a. Admissions can be fixed.

b. Exclusions are case killers and cannot be fixed.

B. Seventh Amendment actually matters.

i. Jurors are fact finders not judges

ii. The proposed amendment encourages judges to encroach on the jury's duty in a manner not heretofore allowed.

C. Proposed changes will increase costs, time, court delays, and make access to justice too expensive and time consuming for many just cases.

D. Rule 702 is a gate not a fence. The proposed change shifts the focus from protecting jurors from genuine junk to making the trial judge the fact finder.

III. A BETTER ALTERNATIVE, IF CHANGE MUST HAPPEN, IS TO INCLUDE "PREPONDERANCE OF ALL AVAILABLE INFORMATION."

A. Makes the judge's task more clearly one of gate keeping as opposed to fact finding.

B. Recognizes that Rule 702 must be considered with Rule 703.

C. Avoids the potential for judges to treat 702 inquiries as they do 56 inquiries.

D. The language that directs courts will be in the body of the rule instead of in comments that are not always incorporated into state versions of the rules of evidence.

IV. COMMENT ON THE TESTIMONY OF THOSE WHO HAVE TESTIFIED BEFORE ME IF NECESSARY TO REBUT AN ARGUMENT OR CORRECT A FACT.