

## RULE 702 SUSTAINABILITY

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### IN THIS ISSUE

*The recent amendments to Federal Rule 702 provide defense counsel with a powerful new weapon against the types of unreliable expert testimony that fuels the Plaintiff bar's litigation war machine. To wield this weapon most efficiently, however, defense counsel need to come armed not only with the new language of the Rule but with the further guidance provided in the Advisory Committee note and underlying working papers, which make clear that most of the plaintiffs favorite Daubert case law over the past 40 years is both wrongly decided and, now, overruled.*

## Take Our Advice: How to Make the Most of the Forthcoming Rule 702 Amendments

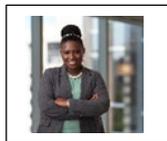
### ABOUT THE AUTHORS



**Eric Lasker** is a partner at Hollingsworth LLP, where he specializes in the defense of complex toxic torts, environmental, and pharmaceutical products liability litigation. Along with George Mason University law professor David Bernstein, Mr. Lasker authored "Defending *Daubert*: It's Time to Amend Federal Rule of Evidence 702," 57:1 *William & Mary L. Rev.* (2015), which triggered the FRE Advisory Committee review of the text of Rule 702. At the Committee's invitation, Mr. Lasker participated as the sole outside defense counsel in a 2018 roundtable discussion on a potential amendment to Rule 702, and he also testified before the Committee in 2022 in support of the amendment. Mr. Lasker is the Chair of the IADC Rule 702 Sustainability Committee. He can be reached at [elasker@hollingsworthllp.com](mailto:elasker@hollingsworthllp.com).



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### ABOUT THE COMMITTEE

The Rule 702 Sustainability Committee works in coordination with other defense groups to support the Rule 702 amendments. Learn more about the Committee at [www.iadclaw.org](http://www.iadclaw.org). To contribute a newsletter article or become involved in the committee, contact:



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## Introduction

On December 1, 2023, Federal Rule of Evidence 702 will be amended for the first time in twenty-three years to address what the Advisory Committee on Evidence Rules (“Advisory Committee”) identified as widespread recalcitrance by many federal courts to correctly fulfilling their gatekeeping responsibility against unreliable expert evidence in the courtroom. The language of the Rule is being amended in two keys respects: First, Rule 702 will now include express language requiring the court to hold the proponent of expert testimony to the preponderance of the evidence standard in establishing each of the four elements of the Rule 702 admissibility standard.<sup>1</sup> Second, the amended Rule clarifies that the court must evaluate not only the reliability of the underlying facts and methodologies used by the expert but also whether the expert reliably applies his or her methodology to the facts of the case.<sup>2</sup>

The new language will provide a strong foundation for a more stringent application of Rule 702 than has been followed by many courts in the past. Importantly, however, practitioners challenging unreliable expert testimony should look as well to the

Advisory Committee Note explaining the amendments and to the eight years of Committee deliberations,<sup>3</sup> as further guides to the proper application of the new rule. Committee Notes and deliberations are accorded great weight in rule interpretation, and they provide important further instruction here as to the types of mistakes that courts have made in the past in admitting improper expert testimony into the courtroom. The interpretive materials also highlight specific flawed Rule 702 opinions that have enjoyed significant influence in the past but that have now been definitively overruled with the 2023 amendments.

This article focuses on the key findings in the Advisory Committee Note and deliberations and their significance in the proper interpretation and application of the amended Rule 702.

### **I. Advisory Committee Notes and Deliberations Are Afforded Great Weight.**

The Advisory Committee’s evaluation of Rule 702 began in 2015 with a law review article calling for an amendment to the Rule in response to a significant body of case law

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<sup>1</sup> The introductory paragraph to Rule 702 has been amended (as underscore) to state: “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 proponent demonstrates to the court that it is more likely than not that:”

<sup>2</sup> Amended Rule 702 (as underscore) provides: “(d) the ~~expert has reliably applied~~ expert’s opinion reflects a reliable application of the principles and methods to the facts of the case.”

<sup>3</sup> The Advisory Committee deliberations are set forth in agenda books, briefing books, meeting minutes, legal memorandum, and publications by Advisory Committee members.

that had failed to properly apply the Rule as it had been amended in 2000 following the United States Supreme Court's *Daubert* trilogy.<sup>4</sup> In its 2000 amendments, the Advisory Committee had sought to resolve conflicts in the courts about the proper meaning of *Daubert* by codifying a "more rigorous and structured approach" to the scrutiny of expert testimony than some courts were employing.<sup>5</sup> Unfortunately, however, many courts disregarded the Advisory Committee's work, and cited instead to selectively excerpted language in post- and even pre-*Daubert* opinions in support of a more liberal admissibility standard.<sup>6</sup>

During the past eight years, the Advisory Committee has extensively analyzed this history of judicial recalcitrance in the wake of its 2000 amendments, and the Committee's findings are reflected both in the Advisory Committee Note accompanying the newly amended Rule and, in the Committee, working papers and publications

that explain the Committee's reasoning. Particularly in light of the oft-flawed understanding of the prior Rule 702 amendments in 2000, practitioners and courts applying the new Rule 702 should look to these materials as necessary guidance in the proper screening of unreliable expert testimony going forward. Committee Notes provide the most succinct and readily accessible guide to the proper application of federal rules. Published alongside the rules themselves, the Notes are subject to the same rule-making process, public notice and comment, and Supreme Court and Congressional review and approval. As such, "the interpretations in the Advisory Committee Notes are nearly universally accorded **great weight** in interpreting federal rules." *Horenkamp v. Van Winkle & Corp.*, 402 F.3d 1129, 1132 (11th Cir. 2005) (quotation marks omitted).<sup>7</sup> In *Tome v. United States*, 513 U.S. 150, 168 (1995), for example, Justice Kennedy, writing in support of his majority opinion, relied heavily on the Committee Note for Fed. R.

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<sup>4</sup> D. Bernstein & E. Lasker, *Defending Daubert: It's Time to Amend Federal Rule of Evidence 702*, 57 Wm. & Mary L. Rev. 1 (2015).

<sup>5</sup> *Id.* at 6-7, 12-19.

<sup>6</sup> *Id.* at 19-26.

<sup>7</sup> See also *C.B. v. City of Sonora*, 769 F.3d 1005, 1018 (9th Cir. 2014) (ascribing weight to the advisory committee's note) (citing cases); *In re Cooper Tire & Rubber Co.*, 568 F.3d 1180, 1188 (10th Cir. 2009) (giving persuasive weight to advisory committee notes while interpreting the Federal Rules of Civil Procedure); *In re Cashco, Inc.*, 598 B.R. 9, 15 n.5 (Bankr. D.N.M. 2019) ("Advisory Committee Notes are generally accorded great weight to determine Congressional purpose, though they do not constitute

binding authority"); *Al Qari v. Am. Steamship Co.*, No. 21-cv-10650, 2023 WL 5014782 (E.D. Mich. Aug. 7, 2023) (relying on Rule 702 and the associated Committee Notes as persuasive authority); *Alonzo v. Biomet, Inc.*, No. 21-CV-62232, 2023 WL 3478585, at \*1 n.3 (S.D. Fla. May 1, 2023) ("Although not binding, the interpretations in the Advisory Committee Notes are nearly universally accorded great weight in interpreting federal rules") (citing *Horenkamp*, 402 F.3d at 1132 (internal quotation marks and citations omitted)); *Vergis v. Grand Victoria Casino & Resort*, 199 F.R.D. 216, 218 (S.D. Ohio 2000) ("It is sufficient to say here, without exaggeration, that Advisory Committee Notes are nearly universally accorded great weight in interpreting federal rules.").

Evid. 801(d)(1)(B) in concluding that the rule incorporated the common-law requirement that prior consistent statements had to be made before the motive to fabricate arose.<sup>8</sup> In so doing, Justice Kennedy emphasized the Congressional approval of the proposed Rule and Committee Note without amendment.<sup>9</sup> He cited also to the Committee's impressive credentials and to the notice-and-comment process by which the Committee consults the views of the academic community and the public when preparing the Committee Notes.<sup>10</sup>

While less readily accessible than the Committee Note, the Advisory Committee working papers are posted on the Federal United States Courts website and provide a more detailed discussion of the reasoning behind and intended meaning of the federal rules.<sup>11</sup> The deliberations are set forth in separate collections of agenda books, meeting minutes, committee reports, preliminary drafts, and Congressional and Supreme Court Rules packages, and also include suggestions for rule amendments and public comments on proposed amended rules.<sup>12</sup> Beyond this, members of Advisory Committees often make public statements

or draft publications to further elucidate their reasoning.

As with Committee Notes, there is a solid body of judicial authority holding that Advisory Committee deliberations provide important guidance in the interpretation of federal rules. In *Mississippi Publishing Corporation v. Murphree*, 326 U.S. 438, 444 (1946), for example, the Supreme Court looked to statements from the Advisory Committee's spokesperson when construing the meaning of Fed. R. Civ. P. Rule 4(f). Later, in *Amchem Products v. Windsor*, 521 U.S. 591, 613-19 (1997), the Supreme Court relied upon public statements by the Advisory Committee reporter to assist in determining the meaning of Fed. R. Civ. P. Rule 23(b)(3). Likewise, the Fourth Circuit (sitting *en banc*) relied heavily on the unpublished Advisory Committee writings and hearing transcripts to aid the court's interpretation of Fed. R. Civ. P. Rule 63<sup>13</sup> and, the Ninth Circuit looked to the Advisory Committee's meeting minutes and agenda books to confirm its interpretation of Fed. R. Crim. P. Rule 32.<sup>14</sup> Academic commentators likewise have explained the importance of the working papers of Advisory Committees in interpreting the federal rules.<sup>15</sup>

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<sup>8</sup> *Id.* at 159-61.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> See Administrative Office of the U.S. Courts on behalf of the Federal Judiciary, *Records of the Rules Committees | United States Courts*, available at <https://www.uscourts.gov/rules-policies/records-rules-committees>.

<sup>12</sup> *Id.*

<sup>13</sup> *Whalen v. Ford Motor Credit Co.*, 684 F.2d 272 (4<sup>th</sup> Cir. 1982) (en banc), *cert. denied*, 459 U.S. 910 (1982).

<sup>14</sup> *United States v. Petri*, 731 F.3d 833, 839-40 (9<sup>th</sup> Cir. 2013).

<sup>15</sup> Eileen A. Scallen, *Interpreting the Federal Rules of Evidence: The Use and Abuse of the Advisory Committee Notes*, 28 Loyola L.A. L. Rev. 1283 (June 1995); David I. Levine, *The Authority for the*

## II. The Advisory Committee Note to the 2023 Rule 702 Amendments Calls Out Courts That Have Misapplied The Rule.

The Advisory Committee is explicit in its Note to the 2023 Rule 702 amendment in calling out courts that had resisted the “more rigorous and structured approach” to expert admissibility that the Committee had sought to codify in 2000. First, the Committee Note explains that “the rule has been amended to clarify and emphasize that expert testimony may not be admitted unless the proponent demonstrates to the court that it is more likely than not that the proffered testimony meets the admissibility requirements set forth in the rule.”<sup>16</sup> The Committee then admonishes the “many courts [that] 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 Rule 702 and 104(a).*”<sup>17</sup> (emphasis added).

The Note continues, “[t]he Committee concluded that emphasizing the preponderance standard in Rule 702 was made necessary by the courts that have

failed to apply correctly the reliability requirements of that rule.”<sup>18</sup> As the Committee further explains “[t]he amendment clarifies that the preponderance standard applies to the three reliability-based requirements added in 2000 – requirements that many courts have incorrectly determined to be covered by the more permissive Rule 104(b) standard.”<sup>19</sup>

The importance of this Committee Note language cannot be overstated. Beyond simply providing guidance on the interpretation of the amended rule, the Rule 702 Committee Note makes clear that a large body of case law regularly relied upon by parties seeking to admit expert testimony is incorrect and should no longer carry any weight. As discussed below, in its deliberations, the Advisory Committee identified many of these flawed ruling by name and provided clear reasoning whereby other such flawed rulings can be identified and properly discarded.

The Committee Note also takes aim at experts who offer opinions that may start with reliable facts and reliable

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*Appointment of Remedial Special Masters in Federal Institutional Reform Litigation: The History Reconsidered*, 17 U.C. Davis L. Rev. 753, 764-69 (1984) (arguing that courts should consider the unpublished papers, transcripts of meetings, or private statements of the Advisory Committee members because they essentially serve as the legislative committee in drafting the rules); David Marcus, *Institutions and an Interpretive Methodology for the Federal Rules of Civil Procedure*, 2011 Utah L. Rev. 927, 965-67 (arguing that various types of Committee materials should be given weight by the Court).

<sup>16</sup> Appendix A: Rules for Final Approval, Proposed Amendment to the Federal Rules of Evidence, at 892 in COMMITTEE ON RULES OF PRACTICE AND PROCEDURE JANUARY AGENDA BOOK (June 7, 2022), available at [https://www.uscourts.gov/sites/default/files/2022-06\\_standing\\_committee\\_agenda\\_book\\_final.pdf](https://www.uscourts.gov/sites/default/files/2022-06_standing_committee_agenda_book_final.pdf).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 893.

methodologies but then stretch beyond what those facts and methodologies would reasonably support. This is often the most challenging step in a court's gatekeeping function because it requires courts to closely scrutinize the analyses and reasoning by which an expert reaches his or her opinion. The Note specifies that the amendment to Rule 702(d) is designed to "emphasize that each expert opinion must stay within the bounds of what can be concluded from a reliable application of the expert's basis and methodology."<sup>20</sup> As the Note explains, "judicial gatekeeping is essential because just as jurors may be unable, due to a lack of specialized knowledge, to evaluate meaningfully the reliability of scientific and other methods underlying an expert's opinion, jurors may also lack the specialized knowledge to determine whether the conclusions of an expert go beyond what the expert's basis and methodology may reasonably support."<sup>21</sup>

### **III. The Advisory Committee Working Papers Provide More Detailed Criticisms of Improper Expert Witness Gatekeeping**

The Advisory Committee's working papers and statements are likewise replete with

criticisms of courts that have been too liberal in their admission of expert testimony. The Committee bemoaned the "pervasive problem" that in "a number of federal cases . . . judges did not apply the preponderance standard of admissibility to [Rule 702's] requirements of sufficiency of basis and reliable application of principles and methods, instead holding that such issues were ones of weight for the jury."<sup>22</sup> In his memorandum to the Advisory Committee, the Committee Reporter, Professor Daniel J. Capra noted that "courts have defied the Rule's requirements ... that the sufficiency of an expert's basis and the application of methodology are both admissibility questions requiring a showing to the court by a preponderance of the evidence."<sup>23</sup> After an extensive review of "wayward caselaw" Professor Capra admonished courts that found expert testimony to be reliable when the expert has failed to conduct "sufficient investigation, or has cherry-picked the data, or has misapplied the methodology" stating that "wayward courts simply don't follow the rule" and going as far as saying the "Evidence Rules are disregarded by courts."<sup>24</sup>

In a Report of the Advisory Committee to the Committee on Rules of Practice &

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<sup>20</sup> *Id.* at 894.

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

<sup>22</sup> Advisory Comm. on Evidence Rules, Minutes of the Meeting of November 13, 2020, at 3 *in* ADVISORY COMMITTEE ON EVIDENCE RULES APRIL AGENDA BOOK, at 17 (Apr. 30, 2021), available at [https://www.uscourts.gov/sites/default/files/advisory\\_committee\\_on\\_evidence\\_rules\\_-\\_agenda\\_book\\_spring\\_2021.pdf](https://www.uscourts.gov/sites/default/files/advisory_committee_on_evidence_rules_-_agenda_book_spring_2021.pdf).

<sup>23</sup> Daniel J. Capra, Reporter, Mem. To: Advisory Committee on Evidence Rules Re: Public comment suggesting an amendment to Rule 702, at 10 (Oct. 1, 2016) *in* ADVISORY COMMITTEE ON EVIDENCE RULES OCTOBER AGENDA BOOK at 268 (Oct. 21, 2016), available at <https://www.uscourts.gov/sites/default/files/2016-10-evidence-agenda-book.pdf>.

<sup>24</sup> *Id.* at 10, 13 (Oct. 1, 2016) and 268, 271 (Oct. 21, 2016).

Procedure, Committee Chair Judge Schiltz, further explained that “[t]he Committee has determined that in a fair number of cases, the courts have found expert testimony admissible even though the proponent has not satisfied the Rule 702(b) and (d) requirements by a preponderance of the evidence.”<sup>25</sup>

In a law review article explaining the Committee’s thinking, the Chair of the Advisory Committee’s Rule 702 subcommittee, Judge Schroeder, provided a detailed analyses of many of these flawed opinions.<sup>26</sup> Judge Schroeder was particularly critical of the United States Court of Appeals for the Ninth Circuit, which he explained is “facially wrong” in its failure to hold proponents of expert testimony to their Rule 104(a) burden.<sup>27</sup> In doing so, Judge Schroeder noted that “[t]he Ninth Circuit appears to set its own standard for assessing admissibility of expert opinion apart from Rule 702” and improperly “interpret[s] *Daubert* as liberalizing the admission of expert testimony.”<sup>28</sup> Likewise, in his initial legal memorandum to the Advisory Committee assessing the need to amend Rule 702, Professor Capra conducted a case-

by-case analysis in which he highlighted the flawed reasoning in many court’s Rule 702 analyses.<sup>29</sup> Specifically, Professor Capra noted “wayward caselaw” from lower courts that had “disregard[ed] either Rule 702(b) or Rule 702(d)” resulting in “rulings that are far more lenient about admitting expert testimony than any reasonable reading of the Rule would allow.”<sup>30</sup>

In particular, the Advisory Committee discussed three cases decided *before* the 2000 amendments that are often still relied upon by plaintiffs’ counsel to suggest there is a presumption in favor of admitting expert testimony or that Rule 702’s requirement that the expert’s methodology have a sufficient basis is a question for the jury, not the court: (1) *Loudermill v. Dow Chemical Co.*, 863 F.2d 566 (8th Cir. 1988); (2) *Viterbo v. Dow Chemical Co.*, 826 F.2d 420 (5th Cir. 1987); and (3) *Smith v. Ford Motor Co.*, 215 F.3d 713 (7th Cir. 2000). In discussing these cases, the Committee emphasized that the parts of these cases that suggest there is “[t]here is a presumption in favor of admitting expert testimony” or that “[t]he sufficiency of facts or data supporting an expert opinion is a question for the jury not

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<sup>25</sup> Hon. Patrick J. Schiltz, Report of the Advisory Committee on Evidence Rules, at 5 *in* COMMITTEE ON RULES OF PRACTICE AND PROCEDURE JANUARY AGENDA BOOK, at 445 (Jan. 5, 2021), available at [https://www.uscourts.gov/sites/default/files/2021-01\\_standing\\_agenda\\_book.pdf](https://www.uscourts.gov/sites/default/files/2021-01_standing_agenda_book.pdf).

<sup>26</sup> See T.D. Schroeder, *Toward a More Apparent Approach to Considering the Admission of Expert Testimony*, 95 Notre Dame L. Rev. 2039 (2020).

<sup>27</sup> *Id.* at 2051.

<sup>28</sup> *Id.* at 2050-51.

<sup>29</sup> Daniel J. Capra, Reporter, Mem. To: Advisory Committee on Evidence Rules Re: Public comment suggesting an amendment to Rule 702, at 1-13 (Oct. 1, 2016) *in* ADVISORY COMMITTEE ON EVIDENCE RULES OCTOBER AGENDA BOOK at 259-271 (Oct. 21, 2016), available at <https://www.uscourts.gov/sites/default/files/2016-10-evidence-agenda-book.pdf>.

<sup>30</sup> *Id.* at 4 (Oct. 1, 2016) and 262 (Oct. 21, 2016).

the court” are wrong, which is “absolutely apparent from the inclusion of the preponderance standard in the text.”<sup>31</sup>

In another Report of the Advisory Committee Judge Schiltz and Professor Daniel Capra explained, regarding the amendment to Rule 702(d), that “the trial court must evaluate whether the expert’s conclusion is properly derived from the basis and methodology that the expert has employed”.<sup>32</sup> The reasoning for the amendment to subpart (d) is further explicated in various working papers (e.g., memoranda and minutes) discussing the Committee’s desire to curb overstated opinions by experts, particularly in the area of forensics.<sup>33</sup>

Advisory Committee Note and working papers are key resources to ensure proper understanding of the import of the amendment and to put an end to the judicial recalcitrance that has too often undermined this important evidentiary protection.

## Conclusion

As amended on December 1, 2023, Federal Rule of Evidence 702 takes a strong step forward in protecting jurors from unreliable expert testimony in the courtroom. The

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<sup>31</sup> Daniel J. Capra and Liesa L. Richter, Mem. To: Advisory Committee on Evidence Rules Re: Possible Amendment to Rule 702, at 24 (Apr. 1, 2022) *in* ADVISORY COMMITTEE ON EVIDENCE RULES MAY AGENDA BOOK at 148 (May 6, 2022), available at [https://www.uscourts.gov/sites/default/files/evidence\\_agenda\\_book\\_may\\_6\\_2022.pdf](https://www.uscourts.gov/sites/default/files/evidence_agenda_book_may_6_2022.pdf).

<sup>32</sup> Judge Schiltz and Professor Capra, Report of the Advisory Committee on Evidence Rules, January 2022 Standing Committee Meeting Minutes, at 9 (Jan. 4, 2022) *in* ADVISORY COMMITTEE ON EVIDENCE RULES MAY AGENDA BOOK at 41 (May 6, 2022), available at [https://www.uscourts.gov/sites/default/files/evidence\\_agenda\\_book\\_may\\_6\\_2022.pdf](https://www.uscourts.gov/sites/default/files/evidence_agenda_book_may_6_2022.pdf).

<sup>33</sup> See, e.g., Daniel J. Capra and Liesa A. Richter, Mem. To: Advisory Committee on Evidence Rules Re:

Possible Amendment to Rule 702 at 1-58 (Oct. 1, 2020) *in* ADVISORY COMMITTEE ON EVIDENCE RULES OCTOBER AGENDA BOOK at 102-159 (Nov. 13, 2020) (discussing the Committee’s focus on a possible amendment to Rule 702 “that would prevent an expert from overstating the results”), available at [https://www.uscourts.gov/sites/default/files/agenda\\_book\\_for\\_evidence\\_rules\\_committee\\_meeting\\_november\\_13\\_2020final.pdf](https://www.uscourts.gov/sites/default/files/agenda_book_for_evidence_rules_committee_meeting_november_13_2020final.pdf); Minutes of the Advisory Committee on Evidence Rules (May 6, 2022) at 5-6 (noting that the preponderance standard already governs and that “the point of the amendment is to emphasize and clarify that fact for the courts that have missed it.”), available at [https://www.uscourts.gov/sites/default/files/2022-04\\_evidence\\_rules\\_meeting\\_minutes\\_final\\_0.pdf](https://www.uscourts.gov/sites/default/files/2022-04_evidence_rules_meeting_minutes_final_0.pdf).