

## PRODUCT LIABILITY

MARCH 2021

### IN THIS ISSUE

*This article updates readers on the status of a potential amendment to Federal Rule of Evidence 702 and questions whether the rule change being discussed will do enough to address major problems in the application of Daubert.*

## The Proposed Amendment to Federal Rule of Evidence 702 – Will it Work?

### ABOUT THE AUTHOR



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### ABOUT THE COMMITTEE

The Product Liability Committee serves all members who defend manufacturers, product sellers and product designers. Committee members publish newsletters and *Journal* articles and present educational seminars for the IADC membership at large and mini-seminars for the committee membership. Opportunities for networking and business referral are plentiful. With one listserv message post, members can obtain information on experts from the entire Committee membership. Learn more about the Committee at [www.iadclaw.org](http://www.iadclaw.org). To contribute a newsletter article, contact:



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*The International Association of Defense Counsel serves a distinguished, invitation-only membership of corporate and insurance defense lawyers. The IADC dedicates itself to enhancing the development of skills, professionalism and camaraderie in the practice of law in order to serve and benefit the civil justice system, the legal profession, society and our members.*

In the December 2019 Product Liability Committee Newsletter, Committee Chair Bill Anderson penned a tremendous piece that asked the question, “*Is Daubert Broken?*”<sup>1</sup> The article highlighted an alarming trend of runaway jury verdicts in product liability cases, some predicated on plaintiff expert opinions that even the overseeing trial judge acknowledged were “shaky” or “weak.” Bill rightfully questioned whether a system that seemingly permits a jury to consider anything above “junk science” is fundamentally broken.

Members of the defense bar who, like Bill, are concerned about expert testimony in product liability litigation should be pleased to know that the United States Judicial Conference’s Advisory Committee on the Federal Rules of Evidence has noticed our concern and is considering an amendment to Rule 702, the evidentiary rule that governs expert testimony and its admissibility at trial. Whether the proposed change will do enough to address the problem, however, remains to be seen.

### **The Potential Rule 702 Amendment**

When the Supreme Court decided *Daubert* in 1993, it described a “gatekeeping role” for the trial court that entails “a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid.” This preliminary

assessment, the Court explained, is subject to Rule 104(a), meaning the proponent of the expert testimony bears the burden of establishing reliability by a preponderance of proof.<sup>2</sup>

Rule 702 was amended seven years later in 2000. Consistent with *Daubert*, Rule 702 requires that expert testimony be “based on sufficient facts or data” (section (b)), the testimony be “the product of reliable principles and methods” (section (c)), and the expert have “reliably applied the principles and methods to the facts of the case” (section (d)). Like the Supreme Court, the Advisory Committee clarified in its note that “the admissibility of all expert testimony is governed by the principles of Rule 104(a),” under which “the proponent has the burden of establishing that the pertinent admissibility requirements are met by a preponderance of the evidence.”<sup>3</sup>

Critics of the 2000 amendment insist that, in the two decades since, Rule 702 has not consistently weeded out unreliable expert testimony. Observers maintain that courts too often “seem not to understand the rule and do not apply it as written” or “recite it by rote, then rely on obsolete pre-2000 case law to determine the admissibility of expert testimony.”<sup>4</sup> Judge Thomas Schroeder, currently a member of the Advisory Committee on the Federal Rules of Evidence, agreed that some courts do “appear to be

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<sup>1</sup> If you missed Bill’s newsletter, you can read it on the IADC webpage. See William L. Anderson, *Is Daubert Broken*, IADC PROD. LIAB. COMMITTEE NEWSL. (Int’l Ass’n of Def. Counsel, Chi., Ill.), Dec. 2019, available at [https://www.iadclaw.org/securedocument.aspx?file=/1/19/Product\\_Liability\\_December\\_2019.pdf](https://www.iadclaw.org/securedocument.aspx?file=/1/19/Product_Liability_December_2019.pdf).

<sup>2</sup> *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 592 n.10 (1993).

<sup>3</sup> FED. R. EVID. 702 advisory committee’s note to 2000 amendment.

<sup>4</sup> Cary Silverman, *Fact or Fiction: Ensuring the Integrity of Expert Testimony* (U.S. CHAMBER INST. FOR LEGAL REFORM), Feb. 2021, at 14.

abdicating their charge under the Federal Rules of Evidence and *Daubert* and its progeny to make the hard call on admissibility,” with the result being “to relegate to the jury the very decisions Rule 702 contemplates to be beyond jury consideration.”<sup>5</sup>

The growing criticism prompted the Advisory Committee in 2018 to consider possible amendments to Rule 702.<sup>6</sup> The Committee heard from a panel of judges about whether an amendment was warranted,<sup>7</sup> and members of the defense bar submitted letters concluding that district courts were ignoring the admissibility requirements of Rule 702(b) and (d).<sup>8</sup> The Committee’s own research likewise revealed that “there are certainly a number of cases in which the court not only misstates the appropriate standard, but also misapplies it in the specific case—by allowing experts to testify even though the proponent has not established more likely than not that there is a sufficient basis for the opinion and/or that the methodology has been reliably applied.”<sup>9</sup>

In October 2020, Professors Daniel J. Capra and Liesa A. Richter (the Reporter and the Consultant to the Advisory Committee, respectively) proposed possible

amendments to Rule 702. They suggested adding language to the text of Rule 702 that incorporates the Rule 104(a) preponderance standard. For example:

**Rule 702. Testimony by Expert Witnesses**

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 by a preponderance of the evidence that:

- (a) the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- (b) the testimony is based on sufficient facts or data;
- (c) the testimony is the product of reliable principles and methods; and
- (d) the expert has reliably applied the principles and methods to the facts of the case.<sup>10</sup>

The reasoning behind the professors’ proposal is straightforward: “there is

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<sup>5</sup> Thomas D. Schroeder, *Federal Courts, Practice & Procedure: Toward a More Apparent Approach to Considering the Admission of Expert Testimony*, 95 NOTRE DAME L. REV. 2039, 2043 (2020).

<sup>6</sup> See Memorandum from Debra Ann Livingston, Chair, Advisory Comm. on Evidence Rules, to David G. Campbell, Chair, Committee on Rules of Practice and Procedure (May 14, 2018).

<sup>7</sup> See Symposium, *Advisory Committee on Evidence Rules: Conference on Best Practices for Managing Daubert Questions*, 88 FORDHAM L. REV. 1215 (2020).

<sup>8</sup> One such letter came from the IADC. See Int’l Ass’n of Def. Counsel, Comment to the Advisory Comm. on Evidence Rules and Its Rule 702 Subcomm. in Support of Amending Rule 702 and Its Comments To Achieve More Robust and Consistent Gatekeeping (July 31, 2020).

<sup>9</sup> Memorandum from Daniel J. Capra, Reporter & Liesa A. Richter, Consultant, to the Advisory Comm. on Evidence Rules 36 (October 1, 2020).

<sup>10</sup> *Id.* at 51.

nothing in Rule 702 *itself* that directs the parties or the court to the preponderance standard,” and “there is *nothing in Rule 104(a) itself* that speaks to a preponderance standard.”<sup>11</sup> A court facing expert admissibility questions therefore must do “a lot of thinking (and reading outside the Rules)” to properly apply the preponderance standard to the Rule 702(b) and (d) admissibility requirements.<sup>12</sup> In short, “it makes sense to change the specific rule to remind the courts that the general requirement applies.”<sup>13</sup>

The Advisory Committee will vote on whether to adopt this or a similar proposal at its upcoming meeting in April 2021. If the Advisory Committee pursues a change, it must then seek permission from the Committee on Rules of Practice and Procedure, also known as the Standing Committee, to publish a draft of the amendment and seek comment from the bench, bar, and general public. Following public comment, the Advisory Committee can then discard, revise, or transmit the proposal to the Standing Committee, which must then assess whether to submit the proposed amendment to the Judicial Conference and, ultimately, the Supreme Court.

### **Is the Proposed Amendment Enough?**

Getting back to Bill’s question of “*Is Daubert Broken?*” will the proposed amendment prevent a jury from awarding tens or hundreds of millions of dollars on “shaky” or “weak” expert evidence? Critics of *Daubert*

will likely say no. After all, the proposal does nothing to change the *Daubert* analysis; it deals only with its application. And more importantly, the proposed amendment does not even change the application of *Daubert*. It simply “remind[s] the courts” of what they were supposed to be doing in the first place (that is, applying the preponderance standard to Rule 702).

Take the *Roundup* litigation—one of the worst offenders in terms of “shaky” science leading to exorbitant verdicts—as an example of why the proposed change might be insufficient. District Judge Vince Chhabria of the Northern District of California admitted the plaintiffs’ expert witnesses, even though he found their theory of a causal link between glyphosate exposure and Non-Hodgkin’s Lymphoma “rather weak” and “too equivocal to support any firm conclusion.”<sup>14</sup> And as we know from Bill’s article, what followed was a series of million- and even billion-dollar plaintiff verdicts.

Yet Judge Chhabria is no stranger to *Daubert*, and his views on expert evidence are apparently informed enough that he was invited to be a panelist on the Advisory Committee’s Conference on Best Practices for Managing *Daubert* Questions in October 2019, a year after his *Roundup* rulings. Moreover, Judge Chhabria correctly recognized in the *Roundup* case that the burden rested on the plaintiffs to establish the admissibility of their experts’ testimony.<sup>15</sup> Naysayers would therefore be right to question whether the potential Rule

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<sup>11</sup> *Id.* at 37.

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

<sup>13</sup> *Id.*

<sup>14</sup> *In re Roundup Prods. Liab. Litig.*, 390 F. Supp. 3d 1102, 1108-09 (N.D. Cal. 2018).

<sup>15</sup> *See id.* at 1111.

702 amendment would have had any effect on the *Roundup* outcome.

The problem in *Roundup* was not that Judge Chhabria forgot to apply Rule 104(a)'s preponderance standard to the expert admissibility question. Rather, the problem was that, as a district judge sitting in California, he was bound to follow Ninth Circuit law that, frankly, is inconsistent with Rule 702 and *Daubert*.<sup>16</sup> For example, Judge Chhabria cited *City of Pomona v. SQM North America Corp.* seven times in his *Roundup* decision. *City of Pomona* is a 2014 decision in which the Ninth Circuit: (1) recited the proposition that “[s]haky but admissible evidence is to be attacked by cross examination, contrary evidence, and attention to the burden of proof, not exclusion”; (2) concluded that an expert’s deviation from protocols raised only a question as to the weight of the evidence, to be decided by the jury; and (3) rested its conclusion on pre-*Daubert* case law.<sup>17</sup> Scholars have identified *City of Pomona* as one example of “[t]he Ninth Circuit . . . set[ting] its own standard for assessing admissibility of expert opinion apart from Rule 702.”<sup>18</sup> Similar errant rulings can be found from appellate courts across the United States.<sup>19</sup>

If the Advisory Committee is concerned about trial judges failing to make the unstated connection between Rule 104(a) and Rule 702, should the Committee not also be concerned about district courts deciding which of the circuit court decisions over the last twenty years did and did not correctly apply *Daubert*? Even if Rule 702 were to be amended to make clear that Rule 104(a)'s preponderance standard applies to the admissibility question, would a trial judge like Judge Chhabria not still be bound to follow *City of Pomona* and cases like it, unless and until the Ninth Circuit acknowledges that its decision misstates the law? In addition to clarifying the text of Rule 702, perhaps the Advisory Committee also needs to identify and reject those cases it believes have incorrectly applied *Daubert*.<sup>20</sup>

### Conclusion

All indications are that the Advisory Committee on the Federal Rules of Evidence will soon recommend that Rule 702 be amended to underscore that a trial court must apply Rule 104(a)'s preponderance standard in its gatekeeping function. Less certain is whether that proposal will do enough—or anything—to address the

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<sup>16</sup> Judge Chhabria has openly acknowledged his opinion that Ninth Circuit precedent favors the admission of expert testimony, even if shaky or equivocal. See Symposium, *Advisory Committee on Evidence Rules: Conference on Best Practices for Managing Daubert Questions*, *supra* note 7, at 1228.

<sup>17</sup> See 750 F.3d 1036, 1044, 1047-48 (9th Cir. 2014).

<sup>18</sup> Schroeder, *supra* note 5, at 2051.

<sup>19</sup> *Id.* at 2044-56 (discussing cases from First, Fourth, Sixth, Eighth, Ninth, and Eleventh Circuits); see also Lee Mickus, *Gatekeeping Reorientation: Amend Rule 702 To Correct Judicial Misunderstanding about*

*Expert Evidence* (WASH. LEGAL FOUND.), May 2020, at 13-18 (citing federal cases that depart from Rule 702's intended approach).

<sup>20</sup> See, e.g., Lawyers for Civil Justice, Comment to the Advisory Comm. on Evidence Rules and its Rule 702 Subcomm., 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 1 (Feb. 8, 2021) (“The only unambiguous way for the Note to convey the intent of the amendment is to reject the specific offending caselaw by name.”).



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**PRODUCT LIABILITY COMMITTEE NEWSLETTER**

*March 2021*

central problems that the Committee and defense bar have identified with the gatekeeping analysis.

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