FEDERAL RULE OF EVIDENCE 702: A HISTORY AND GUIDE TO THE 2023 AMENDMENTS GOVERNING EXPERT EVIDENCE

*Mark A. Behrens & Andrew J. Trask**

ABSTRACT

Federal Rule of Evidence 702 was amended effective December 1, 2023. The Rule was amended to clarify and emphasize that expert testimony may not be admitted unless the proponent demonstrates to the court by a preponderance of the evidence that the proffered testimony meets all of the Rule's admissibility requirements. The amendment was necessitated by decisions by many federal courts incorrectly applying the reliability requirements set forth in Rule 702(b) and (d) and declaring that expert testimony is presumed to be admissible. Rule 702 was also amended to prevent "overstatement" by experts. Rule 702(d) now emphasizes that an expert's opinion must stay within the bounds of what can be concluded from a reliable application of the expert's basis and methodology. The Article discusses the widespread misapplication of Rule 702 since it was last amended in 2000. The Article then discusses the march toward the 2023 amendment with a detailed history of the amended Rule's development. Next, the Article discusses the amended Rule and some early decisions showing how the Rule is to be applied. The Article also suggests some principles for litigants and courts to keep in mind as they apply Rule 702. The Article concludes by calling on judges to embrace their gatekeeping obligation and to faithfully apply the text of Rule 702 over any obsolete case law to the contrary.

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* Mark A. Behrens co-chairs Shook Hardy & Bacon L.L.P.'s Washington, D.C.-based Public Policy Group. He received his J.D. from Vanderbilt University Law School. Andrew J. Trask is Senior Counsel in Shook Hardy & Bacon L.L.P.'s Los Angeles office. He received his J.D. from the University of Chicago Law School with Honors. The authors thank Alex Dahl, General Counsel for Lawyers for Civil Justice, and Lee Mickus with Evans Fears Schuttert McNulty & Mickus LLP for their thoughtful review and feedback.

I. Introduction

Federal Rule of Evidence 702 strikes an important balance regarding the admission of expert evidence in federal court: it allows litigants to introduce expert testimony that is "reliable" and will "help" the trier of fact, but excludes unreliable testimony that may lead jurors astray.[1]

The modern iteration of Rule 702 developed from the "*Daubert* trilogy"—a series of United States Supreme Court cases in the 1990s that articulated the standards for admitting scientific and other expert testimony in federal court: *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[2] *Kumho Tire Co. v. Carmichael*,[3] and *General Electric Co. v. Joiner*.[4] In 2000, Rule 702 was amended to codify these holdings and add further safeguards to ensure the reliability of expert testimony.[5]

Despite the clear guidance provided by the 2000 amendments, many courts "continued to apply significantly more lenient standards for expert testimony than Rule 702 permits."[6] According to Professor David Bernstein, co-author of *The New Wigmore: Expert Evidence* treatise, many judges were "ignor[ing] the text of Rule 702" and, instead, relying on "precedents that predate[d] (and conflict[ed] with) not only the text of amended Rule 702, but also with some or all of the *Daubert* trilogy."[7] Inconsistent application of Rule 702 led to "roulette wheel randomness" in court decisions.[8]

In a landmark 2015 article, Professor Bernstein and co-author Eric Lasker showed conclusively that many courts had not been applying Rule 702 as intended, or even as written.[9] For instance, many courts emphasized a "liberal" policy favoring admission of expert testimony and had a predilection to defer questions about the reliability of scientific evidence to juries.[10] Additional studies and reviews of case opinions back up the findings in their article.[11]

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1. Fed. R. Evid. 702.
2. Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579 (1993).
3. Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999).
4. Gen. Elec. Co. v. Joiner, 522 U.S. 136 (1997).
5. Fed. R. Evid. 702 advisory committee's note to 2000 amendment.
6. David E. Bernstein, *The Misbegotten Judicial Resistance to the* Daubert *Revolution*, 89 Notre Dame L. Rev. 27, 30 (2013).
7. *Id.* at 29.
8. Victor E. Schwartz & Cary Silverman, *The Draining of* Daubert *and the Recidivism of Junk Science in Federal and State Courts*, 35 Hofstra L. Rev. 217, 218 (2006); *see also* Archibald Cruz, Note, *The Paradigm Shift in the Proposed Amendment to Federal Rule of Evidence 702*, 75 Baylor L. Rev. 265, 265 (2023) (stating that application of Rule 702's "gatekeeping function is inconsistent among the federal circuits").
9. David E. Bernstein & Eric G. Lasker, *Defending* Daubert*: It's Time to Amend Federal Rules of Evidence 702*, 57 Wm. & Mary L. Rev. 1, 25–26 (2015).
10. *Id.* at 21 (discussing an Eighth Circuit case, *Johnson v. Mead Johnson & Co.*, 754 F.3d 557 (8th Cir. 2014), where "the court used variations of the word 'liberal' to describe its admissibility standards four different times").
11. *See* Kateland R. Jackson & Andrew J. Trask, Federal Rule of Evidence 702: A One-Year Review and Study of Decisions in 2020, at 2 (2021), https://www.

The federal judiciary's Advisory Committee on Evidence Rules independently studied the issue and confirmed that many courts were misapplying Rule 702.[12] As the chair of the Advisory Committee, Chief United States District Court Judge Patrick Schiltz of the District of Minnesota, explained in a memorandum to the Committee on Rules of Practice and Procedure, also known as the Standing Committee:

> [M]any courts have declared that the reliability requirements set forth in Rule 702(b) and (d)—that the expert has relied on sufficient facts or data and has reliably applied a reliable methodology—are questions of weight and not admissibility, and more broadly that expert testimony is presumed to be admissible. These statements misstate Rule 702, because its admissibility requirements must be established to a court by a preponderance of the evidence. The Committee concluded 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—essentially treating these questions as ones of weight rather than admissibility, which is contrary to the Supreme Court's holdings that under Rule 104(a), admissibility requirements are to be determined by court under the preponderance standard.[13]

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lfcj.com/document-directory/federal-rule-of-evidence-702a-one-year-review-and-study-of-decisions-in-2020 [https://perma.cc/33SE-5E33]; Lee Mickus, *Gatekeeping Reorientation: Amend Rule 702 to Correct Judicial Misunderstanding About Expert Evidence* 19–25 (Wash. Legal Found., Critical Legal Issues Working Paper, No. 217, May 2020), https://www.wlf.org/wp-content/uploads/2020/05/0520MickusWPfinal-for-web-002.pdf [https://perma.cc/2XFU-HC42].

12. The Advisory Committee on Evidence Rules plays a key role in the development of the Federal Rules of Evidence. The development of the federal rules and the Advisory Committee's role are summarized below:

> Through the Rules Enabling Act, Congress delegated to the Supreme Court the responsibility for maintaining all procedural codes, including the Federal Rules of Evidence. The Court assigned this responsibility to the Judicial Conference of the United States, which now has responsibility for maintaining all of the procedural codes Congress has adopted. Within the Judicial Conference, this responsibility has been assigned to the Committee on [Rules of] Practice and Procedure and, in turn, to Advisory Committees for each procedural code.
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> . . .
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> The Advisory Committee proposes revisions to the rules, holds public hearings and reports any approved change to the Rules Committee. If that Committee approves the change, in whole or in part, the change is reported to the full Judicial Conference. Approval of the full Judicial Conference must be followed by approval from the Supreme Court (a review that, usually, is pro forma). From the Supreme Court, the change is sent to Congress. Congress can reject the change (a rare occurrence), explicitly approve it (even more rare), or do nothing (the usual course). Congress' inaction functions as an implicit approval of the change, which then becomes effective in the month of December following the "approval."

Paul R. Rice, *Advisory Committee on the Federal Rules of Evidence: Tending to the Past and Pretending for the Future?*, 53 HASTINGS L.J. 817, 818–19 (2002).

13. Memorandum from Hon. Patrick J. Schiltz, Chair, Advisory Comm. on Evidence Rules, to Hon. John D. Bates, Chair, Standing Comm. on Rules of Prac. & Proc.,

Chair Schiltz's memorandum suggested that some courts may have erroneously applied the 2000 version of Rule 702 because "it takes some effort" to determine that the preponderance of the evidence standard applies.[14] The standard was not included in the text of Rule 702; instead, courts had to study the Advisory Committee's note to the 2000 version of the Rule,[15] read the footnotes in *Daubert*,[16] or connect Rule 702 with Rule 104(a)[17] and relevant case law.[18]

Rule 702 was amended effective December 1, 2023, to address these issues as well as "overstatement" by experts.[19] The 2023 version of the Rule makes clear that "the court" must decide admissibility employing the Rule's standards.[20] Further, the proponent of expert testimony must establish "to the court that it is more likely than not"[21] that all of the

Report of the Advisory Comm. on Evidence Rules (May 15, 2022), *in* COMM. ON RULES OF PRAC. & PROC., JUNE 7, 2022 AGENDA BOOK 871, https://www.uscourts.gov/sites/default/files/2022-06_standing_committee_agenda_book_final.pdf [https://perma.cc/37A6-TU4Y]; *see also* FED. R. EVID. 702 advisory committee's note to 2023 amendment (stating "many courts have incorrectly determined" that Rule 702 inquiries are "governed by the more permissive Rule 104(b) standard" rather than Rule 104(a)); *see generally* Cruz, *supra* note 8, at 281 (stating that by incorrectly applying Rule 104(b) rather than Rule 104(a) to scrutinize expert testimony, "judges have acted less like gatekeepers and more like doorstops," admitting "all manner of expert testimony, whether reliable or not").

14. Schiltz, *supra* note 13, at 871 (stating "it takes some effort to determine the applicable standard of proof—Rule 104(a) does not mention the applicable standard of proof, requiring a resort to case law. And while *Daubert* mentions the standard, *Daubert* does so only in a footnote in the midst of much discussion about the liberal standards of the Federal Rules of Evidence.").

15. FED. R. EVID. 702 advisory committee's note to 2000 amendment.

16. Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 592 n.10 (1993) (stating that, pursuant to Rule 104(a), "the admissibility of evidence shall be . . . established by a preponderance of proof").

17. FED. R. EVID. 104(a) ("The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible.").

18. Bourjaily v. United States, 483 U.S. 171, 175 (1987) ("The preponderance standard ensures that before admitting evidence, the court will have found it more likely than not that the technical issues and policy concerns addressed by the Federal Rules of Evidence have been afforded due consideration."); *see also* Huddleston v. United States, 485 U.S. 681, 687 n.5 (1988) (stating that "preliminary factual findings under Rule 104(a) are subject to the preponderance-of-the-evidence standard").

19. FED. R. EVID. 702 advisory committee's note to 2023 amendment. "Overstatement" refers to "experts overstating the certainty of their conclusions beyond what can be supported by the underlying science or other methodology as properly applied to the facts." COMM. ON RULES OF PRAC. & PROC., Minutes of the Meeting of June 22, 2021, *in* COMM. ON RULES OF PRAC. & PROC. JANUARY 4, 2022 AGENDA BOOK 20, 38, https://www.uscourts.gov/sites/default/files/standing_committee_agenda_book_jan_2022_0.pdf [https://perma.cc/DLQ5-XDJJ].

20. FED. R. EVID. 702; *see also* State Farm Auto. Mut. Ins. Co. v. Freehold Mgmt., Inc., No. 3:16-CV-2255-L, 2023 WL 8606773, at *12 (N.D. Tex. Dec. 12, 2023) (stating that party's assertion that a court is limited to addressing only the arguments briefed by the parties "ignores the mandate of *Daubert* that the district court must act as a gatekeeper").

21. FED. R. EVID. 702. "[M]ore likely than not" is "the preponderance of the evidence standard that applies to most of the admissibility requirements set forth in the evidence rules." FED. R. EVID. 702 advisory committee's note to 2023 amendment.

Rule's admissibility requirements are met.[22] The Rule thus reminds courts of their gatekeeping role to ensure the reliability of expert testimony.[23] Finally, the Rule clarifies that the court's gatekeeping responsibility is ongoing. A court's decision to admit expert testimony does not allow the expert to offer an opinion that is not grounded in Rule 702's standards.[24]

The 2023 amendments changed the 2000 version of Rule 702 as follows:

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 to the court that it is more likely than not 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~~ expert's opinion reflects a reliable application of the principles and methods to the facts of the case.[25]

The 2023 version of Rule 702 is the product of many years of deliberation by the Advisory Committee and a lengthy public comment process.[26] The amended Rule is intended to: (1) "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," and (2) "emphasize that each expert opinion must stay within the

22. FED. R. EVID. 702; *see also Freehold Mgmt.*, 2023 WL 8606773, at *10 ("The 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 governed by the more permissive Rule 104(b) standard.").

23. FED. R. EVID. 702 advisory committee's note to 2023 amendment ("[E]xpert 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."); *see also* FED. R. EVID. 702 advisory committee's note to 2000 amendment (stating trial court judges are charged "with the responsibility of acting as gatekeepers to exclude unreliable expert testimony").

24. FED. R. EVID. 702(d) (stating an expert's opinion must reflect "a reliable application of the principles and methods to the facts of the case").

25. FED. R. EVID. 702.

26. Colleen Cochran, *The Process, Progression, and Potential Ramifications of the Rule 702 Amendment*, ABA (Sept. 5, 2022), https://www.americanbar.org/groups/business_law/resources/business-law-today/2022-september/process-progression-and-potential-ramifications-of-rule-702-amendment/ [https://perma.cc/5QY3-FS2S].

bounds of what can be concluded from a reliable application of the expert's basis and methodology."[27]

The 2023 amendments are simultaneously modest and ambitious. They are modest because little was changed in the Rule's text. At the same time, the changes are ambitious because they seek to change over twenty years of erroneous decisions by many courts.[28]

This Article describes the history of the 2023 amendments to Rule 702 and their purpose: reinforcing the proper interpretation of the Rule in the face of numerous judicial opinions misapplying the Rule since it was last amended in 2000. Next, the Article turns to a discussion of the proper application of the Rule. The Article concludes by calling on judges to embrace their gatekeeping obligation and to faithfully apply the text of Rule 702 over any obsolete case law to the contrary.[29]

II. History of the 2023 Amendments to Rule 702

A. *Widespread Misapplication of Rule 702 Post-2000*

In 2000, Rule 702 was amended to codify important changes to the admission of expert testimony that were articulated by the United States Supreme Court in *Daubert* and its progeny.[30] As the commentary accompanying the 2000 amendments explained:

> In *Daubert* the Court charged trial judges with the responsibility of acting as gatekeepers to exclude unreliable expert testimony, and the Court in *Kumho* clarified that this gatekeeper function applies to all expert testimony, not just testimony based in science. The amendment affirms the trial court's role as gatekeeper and provides some general standards that the trial court must use to assess the reliability and helpfulness of proffered expert testimony.[31]

The 2000 amendments added the three reliability-based requirements that are found in subdivisions (b), (c), and (d) of Rule 702.

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27. Fed. R. Evid. 702 advisory committee's note to 2023 amendment.

28. Cruz, *supra* note 8, at 291 (explaining that the 2023 version of Rule 702 effects "a substantial shift in expert testimony admissibility in practice; however, the standard is not new." The amended Rule "reinforces the judge's role as a gatekeeper, which has been the law for decades.").

29. Thomas D. Schroeder, *Toward a More Apparent Approach to Considering the Admission of Expert Testimony*, 95 Notre Dame L. Rev. 2039, 2060 (2020) ("[T]he elements of Rule 702, not the caselaw, are the starting point for the requirements for admissibility."); *see also In re* Nat'l Prescription Opiate Litig., 956 F.3d 838, 841, 844 (6th Cir. 2020) (stating federal court rules "have the same force of law that any statute does" and are "binding upon court and parties alike, with fully the force of law").

30. Fed. R. Evid. 702 advisory committee's note to 2000 amendment ("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).").

31. Fed. R. Evid. 702 advisory committee's note to 2000 amendment (internal citation omitted).

Rule 702(b)'s "requirement of sufficient facts or data means that an expert's opinion must be grounded in sufficient investigation or research."[32] This has been called the "homework requirement" because "the expert must have done her homework before testifying."[33] For example, an expert testifying as to causation in a toxic tort case should not be permitted to cherry-pick certain studies or give an opinion based on a limited review of studies.

Rule 702(c)'s requirement that an expert's testimony must be "the product of reliable principles and methods" is found explicitly in *Daubert*.[34] In *Daubert*, the Court identified various factors for judging the reliability of scientific expert testimony.[35] In *Kumho*, the Court "held that these factors might also be applicable in assessing the reliability of nonscientific expert testimony, depending upon 'the particular circumstances of the particular case at issue.'"[36]

Rule 702(d) requires the trial court to "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."[37] Thus, "when an expert purports to apply principles and methods in accordance with professional standards, and yet reaches a conclusion that other experts in the field would not reach, the trial court may fairly suspect that the principles and methods have not been faithfully applied."[38]

The Rule 702 analysis is governed by the principles of Rule 104(a), under which "the proponent has the burden of establishing that the

32. Memorandum from Daniel J. Capra on Public Comment Suggesting an Amendment to Rule 702 to Advisory Comm. on Evidence Rules (Oct. 1, 2016), *in* Advisory Comm. on Evidence Rules October 21, 2016 Agenda Book 260, https://www.uscourts.gov/sites/default/files/2016-10-evidence-agenda-book.pdf [https://perma.cc/3VZ4-FJBF]; *see also* Fed. R. Evid. 702(b).

33. Memorandum from Daniel J. Capra on Public Comment Suggesting an Amendment to Rule 702 to Advisory Comm. on Evidence Rules, *supra* note 32.

34. *Daubert*, 509 U.S. at 595 (stating courts must focus on the expert's "principles and methodology"); *see also* Fed. R. Evid. 702(c).

35. *Daubert*, 509 U.S. at 593–94. The Committee Note to the 2000 amendment to Rule 702 explains:

> *Daubert* set forth a non-exclusive checklist for trial courts to use in assessing the reliability of scientific expert testimony. The specific factors explicated by the *Daubert* Court are (1) whether the expert's technique or theory can be or has been tested—that is, whether the expert's theory can be challenged in some objective sense, or whether it is instead simply a subjective, conclusory approach that cannot reasonably be assessed for reliability; (2) whether the technique or theory has been subject to peer review and publication; (3) the known or potential rate of error of the technique or theory when applied; (4) the existence and maintenance of standards and controls; and (5) whether the technique or theory has been generally accepted in the scientific community.

Fed. R. Evid. 702 advisory committee's note to 2000 amendment.

36. Fed. R. Evid. 702 advisory committee's note to 2000 amendment (quoting Kumho Tire Co. v. Carmichael, 526 U.S. 137, 150 (1999)).

37. *Id.*; *see also* Fed. R. Evid. 702(d).

38. Fed. R. Evid. 702 advisory committee's note to 2000 amendment.

pertinent admissibility requirements are met by a preponderance of the evidence."[39]

Many courts have ignored the text of Rule 702, particularly subdivisions (b) and (d). As the Advisory Committee explains, "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."[40] Some courts admitted "shaky" evidence because of what they perceived as the "liberal thrust" of the *Daubert* opinion—even though that opinion was superseded by the 2000 amendment to Rule 702 (and now by the 2023 amendment).[41] In addition, some courts replaced Rule 702's mandated considerations with local common-law formulations.

For example, opinions from the U.S. Courts of Appeals for the Fifth, Eighth, and Ninth Circuits discarded Rule 702(b)'s directive that admissible opinion testimony must have sufficient factual support. Instead, Eighth and Fifth Circuit opinions have expressed a "general rule" that "deficiencies in an expert's factual basis go to weight and not admissibility."[42] The Ninth Circuit has said that the "factual basis of an expert opinion goes to the credibility of the testimony, not the admissibility."[43] Decisions by other circuit courts and many district courts provide additional examples of courts misapplying Rule 702.[44]

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39. *Id.*; *see also* Fed. R. Evid. 702 (stating a court must find "it is more likely than not" that the Rule's requirements are satisfied); Fed. R. Evid. 702 advisory committee's note to 2023 amendment ("[E]xpert 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.").

40. Fed. R. Evid. 702 advisory committee's note to 2023 amendment.

41. *In re* Roundup Prods. Liab. Litig., 390 F. Supp. 3d 1102, 1108, 1151 (N.D. Cal. 2018) (allowing case to proceed based upon testimony the court called "rather weak" and "shaky"); Wendell v. GlaxoSmithKline LLC, 858 F.3d 1227, 1237 (9th Cir. 2017) (stating the "interests of justice favor leaving difficult issues in the hands of the jury," such as "shaky" expert evidence).

42. *In re* Bair Hugger Forced Air Warming Devices Prods. Liab. Litig., 9 F.4th 768, 786 (8th Cir. 2021); Puga v. RCX Sols., Inc., 922 F.3d 285, 294 (5th Cir. 2019) (announcing similar "general rule"); *see also* Child.'s Broad. Corp. v. Walt Disney Co., 357 F.3d 860, 865 (8th Cir. 2004) ("[T]he 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.").

43. Mighty Enters., Inc. v. She Hong Indus. Co., 745 F. App'x 706, 709 (9th Cir. 2018); *see also In re Roundup Prods. Liab. Litig.*, 390 F. Supp. 3d at 1113 (stating that the Ninth Circuit's approach toward expert testimony "has resulted in slightly more room for deference to experts in close cases than might be appropriate in some other Circuits"); *cf.* Jessica Miller et al., *Defendants' Chances on* Daubert *May Vary by Circuit*, Law360 (Oct. 1, 2019) (stating a survey of decisions found that the "Ninth Circuit is considerably more likely than other circuits to reverse district courts that exclude expert witnesses"), https://www.law360.com/articles/1203411/defendants-chances-on-daubert-may-vary-by-circuit [https://perma.cc/9KKN-8HAC].

44. Schroeder, *supra* note 29, at 2044–59 (discussing illustrative cases of courts abdicating their gatekeeper role such as *Milward v. Acuity Specialty Products Group, Inc.*, 639 F.3d 11 (1st Cir. 2011), *Bresler v. Wilmington Trust Co.*, 855 F.3d 178 (4th Cir. 2017), *McLean v. 988011 Ontario, Ltd.*, 224 F.3d 797 (6th Cir. 2000), and *Quiet Technology DC-8, Inc. v. Hurel-Dubois UK Ltd.*, 326 F.3d 1333 (11th Cir. 2003)); *see also* Smith v.

These opinions often rely on obsolete case law that not only predates the 2000 amendments to Rule 702, but even the United States Supreme Court's announcement of new standards for admitting expert testimony in *Daubert*.[45] For example, the Eighth Circuit has held that a district court may only exclude an expert's opinion "if it is 'so fundamentally unsupported' by its factual basis 'that it can offer no assistance to the jury.'"[46] The court drew this lenient test from *Loudermill v. Dow Chemical Co*.,[47] directly referencing that pre-*Daubert* 1988 ruling.[48]

The Ninth Circuit has cited a 2004 case, *Hangarter v. Provident Life & Accident Insurance Co.*,[49] as authority for declaring that the "factual basis of an expert opinion goes to the credibility of the testimony, not the admissibility."[50] Before that language was embraced by the court in *Hangarter*, however, it had been carried forward by several Eighth Circuit decisions following its first appearance in *Loudermill*.[51] The Fifth Circuit's "general rule" that "questions relating to the bases and sources of an expert's opinion affect the weight to be assigned that opinion rather than its admissibility"[52] originated in *Viterbo v. Dow Chemical Co*.,[53] a pre-*Daubert* 1987 case.

Courts have also consistently undermined Rule 702's preponderance of the evidence standard by citing dicta from the superseded-by-Rule

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Ford Motor Co., 215 F.3d 713, 718 (7th Cir. 2000) ("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[.]").

45. 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*, Comment to the Advisory Comm. on Evidence Rules and its Rule 702 Subcomm. (Oct. 20, 2020) https://www.uscourts.gov/sites/default/files/20-ev-y_suggestion_from_lawyers_for_civil_justice_-_rule_702_0.pdf [https://perma.cc/LV4V-GLYF].

46. *In re Bair Hugger*, 9 F.3d at 778 (citation omitted); *see also* Wood v. Minn. Mining & Mfg. Co., 112 F.3d 306, 309 (8th Cir. 1997).

47. Loudermill v. Dow Chem. Co., 863 F.2d 566, 570 (8th Cir. 1988) ("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.").

48. *In re Bair Hugger*, 9 F.4th at 778. Recently, the Fifth Circuit seems to have recognized the changed import of Rule 702. The court applied Rule 702's required approach in *Harris v. FedEx Corporate Services, Inc.*, 92 F.4th 286 (5th Cir. 2024), rejecting expert testimony in an employment discrimination case. The circuit court found that "the district court abdicated its role as gatekeeper" by allowing an expert "to testify without a proper foundation." *Id.* at 303. The court said that the expert's opinion "should not have been allowed through the gate." *Id.*; *see also* McKee v. Chubb Lloyds Ins. Co. v. Tex., No. SA-22-CV-01110-XR-ESC, 2024 WL 1055122, *2 (W.D. Tex. Mar. 11, 2024) ("A district court that permits an expert to testify without a proper foundation abdicates its role as gatekeeper and commits reversible error.") (citing *Harris*, 92 F.4th at 303), *aff'd*, 2024 WL 2720450 (W.D. Tex. May 28, 2024).

49. Hangarter v. Provident Life & Accident Ins. Co., 373 F.3d 998 (9th Cir. 2004).

50. Mighty Enters., Inc. v. She Hong Indus. Co., 745 F. App'x 706, 709 (9th Cir. 2018) (quoting *Hangarter*, 373 F.3d at 1018 n.14).

51. *Loudermill*, 863 F.2d at 570.

52. Puga v. RCX Sols., Inc., 922 F.3d 285, 294 (5th Cir. 2019).

53. Viterbo v. Dow Chem. Co., 826 F.2d 420, 422 (5th Cir. 1987).

Daubert decision.[54] In *Daubert,* the United States Supreme Court held that applying a "rigid 'general acceptance' requirement would be at odds with the 'liberal thrust' of the Federal Rules [of Evidence]."[55] Numerous courts have referred to this "liberal thrust" language despite the fact that *Daubert* explicitly states that, pursuant to Rule 104(a), "the admissibility of evidence shall be . . . established by a preponderance of proof."[56]

To quantify just how chaotic Rule 702 jurisprudence had become, the organization Lawyers for Civil Justice reviewed all federal district court opinions considering Rule 702 motions in 2020 (1,059 opinions).[57] Sixty-five percent of the opinions did not cite the preponderance of the evidence standard.[58] More disturbing was the extreme inconsistency within judicial districts. In fifty-seven federal judicial districts, "courts split over whether to apply the preponderance standard when assessing admissibility."[59] Six percent of cases cited "both the preponderance standard *and* a presumption favoring admissibility (a 'liberal thrust' approach)," which is "remarkable" since "these standards are inconsistent with each other."[60]

In sum, judicial treatment of expert evidence after the 2000 amendments to Rule 702 was arbitrary and unpredictable.[61] This messy environment set the stage for consideration of changes to Rule 702 that led to the 2023 amendments.

B. *"It's Time to Amend Rule 702"*

The impetus to amend Rule 702 began with a significant law review article by Professor David Bernstein and co-author Eric Lasker in

54. Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 588 (1993).
55. *Id.*
56. *Id.* at 592 n.10.
57. Jackson & Trask, *supra* note 11, at 2.
58. *Id.*
59. *Id.*
60. *Id.* at 4. The Report explained:

> 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 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.

Id. at 4–5.

61. *See generally* Andrews Jurs & Scott DeVito, *A Return to Rationality: Restoring the Rule of Law After* Daubert*'s Disastrous U-Turn*, 54 N.M. L. Rev. 163, 201 (2024) (concluding "the effect of *Daubert* since 1993 on litigant behavior has been wildly inconsistent" and "falls short of the predictability and clarity necessary for a legal test to meet fundamental notions of the rule of law").

2015.[62] Bernstein and Lasker provided empirical evidence that many judges were not following Rule 702.[63] Instead, many courts were applying superseded approaches to analyzing expert testimony that often quoted *Daubert* over the Rule's text.[64] That was problematic, they explained, because "the wording of the Rule at the time of *Daubert* was significantly different than the amended Rule."[65] The 2000 version of Rule 702 drew on two post-*Daubert* United States Supreme Court cases—*Kumho*[66] and *Joiner*[67]—which had elaborated on the requirements for expert evidence.

Further, the Court "larded *Daubert* with conflicting rhetoric that left ambiguous whether the case should be interpreted as establishing a strict or lenient standard of admissibility."[68] For example, in *Daubert*, the Court noted the "liberal thrust"[69] of the Federal Rules of Evidence, emphasized the "'flexible' nature of the inquiry in which trial courts must engage," "expressed optimism about the capabilities of the adversarial process and of the jury, and spoke of 'shaky but admissible evidence.'"[70] On the other hand, the Court "insisted that trial court judges adopt 'a gatekeeping role' to 'ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable,'"[71] "emphasized that Rule 702 'requires a valid scientific connection to the pertinent inquiry as a precondition to admissibility,'"[72] and explained that trial judges exercise "more control over experts than over lay witnesses."[73]

As a result, the "same divisions that existed in the courts prior to 2000 [continued post-2000]—and on the very same issues that the Judicial Conference sought to resolve" with the 2000 amendments.[74] Some courts followed Rule 702 and rigorously evaluated proposed expert testimony while others did not.[75] As an example, Bernstein and Lasker

62. Bernstein & Lasker, *supra* note 9, at 1.
63. *Id.* at 19–25.
64. *Id.* at 1 ("Many courts continue to resist the judiciary's proper gatekeeping role, either by ignoring Rule 702's mandate altogether or by aggressively reinterpreting the Rule's provisions.").
65. *Id.* at 8–9.
66. Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999).
67. Gen. Elec. Co. v. Joiner, 522 U.S. 136 (1997).
68. Bernstein & Lasker, *supra* note 9, at 5.
69. *Id.* (quoting Daubert v. Merrell Dow Pharms. Inc., 509 U.S. 579, 588 (1993)).
70. *Id.* (quoting *Daubert*, 509 U.S. at 594, 596).
71. *Id.* (quoting *Daubert*, 509 U.S. at 589, 597).
72. *Id.* (quoting *Daubert*, 509 U.S. at 592).
73. *Id.* (quoting *Daubert*, 509 U.S. at 595).
74. *Id.* at 7.
75. Joe G. Hollingsworth & Mark A. Miller, *Inconsistent Gatekeeping Undercuts the Continuing Promise of* Daubert 1 (Wash. Legal Found., Critical Legal Issues Working Paper, No. 213, July 2019) (noting inconsistent application of Rule 702 and *Daubert*'s mandates on gatekeeping), https://www.wlf.org/wp-content/uploads/2019/07/7-19HollingsworthMillerWPfinal.pdf [https://perma.cc/3477-FVPB]; Int'l Ass'n of Def. Couns., 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) (stating "too many courts

point to a Ninth Circuit decision in which the court "began its discussion of the admissibility of expert testimony by quoting Rule 702" then "proceeded to ignore the Rule thereafter, in favor of its own interpretation of what it deemed '*Daubert*['s] liberal standard' that allows district courts to exclude only 'nonsense opinions.'"[76] Bernstein and Lasker concluded that revisions to Rule 702 were needed "to secure the promise of *Daubert* and effectively protect future litigants and juries from the powerful and quite misleading impact of unreliable expert testimony."[77]

C. *The Advisory Committee Considers Amending the Rule*

The Bernstein and Lasker article became a springboard for the Advisory Committee on Evidence Rules to address the misapplication of Rule 702 by courts and to consider other amendments to the Rule.[78] The Advisory Committee's thinking was captured in thorough memoranda by its Reporters, Professors Daniel Capra and Liesa Richter, and in minutes of meetings published in the Advisory Committee's Agenda Books.[79]

The Bernstein and Lasker article was first brought to the Advisory Committee's attention in the fall of 2016.[80] In a memorandum to the Advisory Committee, Professor Capra said that Bernstein and Lasker were "absolutely right that there are a number of lower court decisions that do not comply with Rule 702(b) or (d)."[81] Professor Capra was

misunderstand" that "the admissibility of all expert testimony is governed by the principles of Rule 104(a)" and "at least two appellate circuits—the Eighth and Ninth Circuits—have expressly adopted standards for admissibility that defy the Advisory Committee's 2000 Comment"), https://static1.squarespace.com/static/640b6c7e5b8934552d35ab05/t/64837d1d3ee48075135094cf/1686338852276/iadc_federal_rule_702_comment_july_31_2020.pdf [https://perma.cc/6BLB-9AGD].

76. Bernstein & Lasker, *supra* note 9, at 22 (citing City of Pomona v. SQM N. Am. Corp., 750 F.3d 1036, 1044, 1049 (9th Cir. 2014)); *see also* Edward J. Imwinkelried, *(Partial) Clarity: Eliminating the Confusion About the Regulation of the "Fact"ual Bases for Expert Testimony Under the Federal Rules of Evidence*, 63 Wm. & Mary L. Rev. 719, 740–41 (2022) ("[I]n cases such as *City of Pomona v. SQM North America Corp*., many courts have misapplied [Rule 702(d)] and indicated that the issue of reliable application is a weight question for the jury rather than an admissibility question the judge must decide as part of his or her gatekeeping responsibility.").

77. Bernstein & Lasker, *supra* note 9, at 48.

78. Schroeder, *supra* note 29, at 2044 n.27 (stating that the "Advisory Committee's investigation was prompted" by the Bernstein and Lasker article).

79. The advisory committees on federal court rules meet twice a year. The agendas for those meetings, as well as the minutes of prior meetings, are published in Agenda Books for the committee members.

80. Advisory Comm. on Evidence Rules, Agenda for Comm. Meeting on Oct. 21, 2016, *in* Advisory Comm. on Evidence Rules October 21, 2016 Agenda Book 6 (2016), https://www.uscourts.gov/sites/default/files/2016-10-evidence-agenda-book.pdf [https://perma.cc/T4ZX-MYQB] (stating that a "recent law review article" had suggested amendments to Rule 702 based on a showing that "a number of courts are not following the 2000 amendments to Rule 702").

81. Memorandum from Daniel J. Capra on Public Comment Suggesting an Amendment to Rule 702 to Advisory Comm. on Evidence Rules, *supra* note 32, at 268.

blunt in his diagnosis: "courts have defied the Rule's requirements—which stem from *Daubert*—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."[82] He said that "wayward courts simply don't follow the rule. They have a different, less stringent view of the gatekeeper function."[83]

Professor Capra believed that "public reports challenging the reliability of various forms of forensic evidence" would be a "stronger reason" for the Advisory Committee to revisit Rule 702.[84] He noted that the National Academy of Science and President's Council of Advisors on Science and Technology ("PCAST") had "examined the scientific validity of forensic evidence techniques—fingerprint, bitemark, firearm, footwear and hair analysis—and ha[d] concluded that virtually all of these methods are unscientific and insufficiently standardized."[85] Professor Capra suggested that if the Advisory Committee chose to address forensic expert evidence, "then adding some emphatic text to Rules 702(b) and (d) might be made part of the package."[86]

The Advisory Committee's then-Chair, United States District Court Judge William Sessions III of the District of Vermont, discussed the possibility that the Advisory Committee's fall 2017 meeting could be held in conjunction with a symposium at Boston College Law School on Rule 702's application to forensic testimony.[87] Chair Sessions suggested that the Symposium "could cover not only the challenges to forensic expert testimony, but also whether changes should be made more generally to assure that courts are undertaking the gatekeeping function established by *Daubert* and the 2000 amendment to Rule 702."[88]

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82. *Id.*

83. *Id.*

84. *Id.* at 271.

85. *Id.*; *see also* Nat'l Rsch. Council, Strengthening Forensic Science in the United States: A Path Forward xix (2009); President's Council of Advisors on Sci & Tech., Exec. Off. of the President, Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods (2016), https://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/PCAST/pcast_forensic_science_report_final.pdf [https://perma.cc/NA8G-ZCDZ]. The PCAST report provided "an exhaustive analysis of why certain forensic comparison methods are questionable" with particular attention paid "to the problem of experts overstating their results." Daniel J. Capra, *Foreword: Symposium on Forensic Expert Testimony,* Daubert*, and Rule 702*, 86 Fordham L. Rev. 1459, 1459–60 (2018); *see generally* Eric S. Lander, *Fixing Rule 702: The PCAST Report and Steps to Ensure the Reliability of Forensic Feature-Comparison Methods in the Criminal Courts*, 86 Fordham L. Rev. 1661 (2018) (discussing PCAST report).

86. Memorandum from Daniel J. Capra on Public Comment Suggesting an Amendment to Rule 702 to Advisory Comm. on Evidence Rules, *supra* note 32, at 271.

87. Daniel J. Capra, Advisory Comm. on Evidence Rules: Minutes of the Meeting of Oct. 21, 2016, *in* Advisory Comm. on Evidence Rules April 21, 2017 Agenda Book 30 (2017), https://www.uscourts.gov/sites/default/files/advisory_committee_on_rules_of_evidence_-_spring_2017_meeting_materials.pdf [https://perma.cc/S2Q5-WHQ5].

88. *Id.*

At the Advisory Committee's spring 2017 meeting, the Chair confirmed that the Advisory Committee would be sponsoring a Symposium to coincide with its fall 2017 meeting.[89] The conference agenda would "include a discussion of a number of recent developments regarding expert testimony, with the goal of determining whether any changes to Rule 702 are necessary to accommodate these developments."[90]

In October of 2017, the Advisory Committee held its "Symposium on Forensic Expert Testimony, *Daubert*, and Rule 702."[91] Panelists included "scientists, federal judges, law professors, and practitioners."[92] The 2016 PCAST report was "[c]entral to the discussion."[93]

In a subsequent memorandum, the Advisory Committee's then-Chair, Judge Debra Ann Livingston of the Second Circuit Court of Appeals, explained that the Advisory Committee had determined that "it would be difficult to draft a freestanding rule on forensic expert testimony," because of overlap with Rule 702, but the Advisory Committee was interested in considering an amendment to Rule 702 to address the overstatement issue.[94] She also explained that the Advisory Committee had "agreed to consider an amendment to Rule 702 that would address the fact that a fair number of courts have treated the Rule 702 reliability requirements of sufficient basis and reliable application as questions

89. Advisory Comm. on Evidence Rules, Agenda for Comm. Meeting on Apr. 21, 2017, *in* Advisory Comm. on Evidence Rules April 21, 2017 Agenda Book 5 (2017), https://www.uscourts.gov/sites/default/files/advisory_committee_on_rules_of_evidence_-_spring_2017_meeting_materials.pdf [https://perma.cc/S2Q5-WHQ5].

90. *Id.* The chair said that the following issues would be among those considered at the Symposium: (1) "recent challenges to forensic expert testimony"; (2) "problems in applying the *Daubert* standards in cases involving non-scientific and 'soft science' experts"; (3) "problems in applying Rule 702 in criminal cases"; and (4) "the failure of some courts to recognize that deficiencies in foundation and misapplication of methods are questions of admissibility and not weight." *Id.*

91. Capra, *supra* note 85, at 1459.

92. Cruz, *supra* note 8, at 283.

93. *Id.*; *see also* Capra, *supra* note 85, at 1459 (stating the Symposium was envisioned as "the first step in considering how the Advisory Committee should respond to the recent challenges to the reliability of feature-comparison expert testimony . . . ."); Memorandum from Daniel J. Capra on Symposium on Forensic Expert Testimony, *Daubert*, and Rule 702 to Advisory Comm. on Evidence Rules (Oct. 1, 2017), *in* Advisory Comm. on Evidence Rules October 26–27, 2017 Agenda Book 371, https://www.uscourts.gov/sites/default/files/Advisory-Committee-on-Rules-of-Evidence-Agenda-Materials-Fall-2017_0.pdf [https://perma.cc/89CH-9JJV] (stating the "fundamental objective" of the Symposium was to "provide the Committee with input on what the problems are, *and whether rulemaking is a good option for trying to solve them*"); *see generally* Jim Hilbert, *The Disappointing History of Science in the Courtroom:* Frye, Daubert*, and the Ongoing Crisis of "Junk Science" in Criminal Trials*, 71 Okla. L. Rev. 759, 821 (2019) (calling on courts to commit themselves to act as gatekeepers against unreliable expert evidence in criminal trials).

94. Memorandum from Hon. Debra Ann Livingston, Chair, Advisory Comm. on Evidence Rules, on Report of the Advisory Comm. on Evidence Rules to Hon. David G. Campbell, Chair, Comm. on Rules of Prac. & Proc. (May 14, 2018), *in* Comm. on Rules of Prac. & Proc. June 12, 2018 Agenda Book 402, https://www.uscourts.gov/sites/default/files/2018-06_standing_agenda_book_final.pdf [https://perma.cc/QQW4-HVD9].

of weight and not admissibility."[95] She mentioned the possibility of an amendment to "specify that the court must find these requirements met by a preponderance of the evidence."[96]

The Advisory Committee continued to discuss these issues at its spring 2018 meeting. In a memorandum to the Advisory Committee, Professor Capra reported that "[m]any speakers at the [Boston] Symposium argued that one of the major problems with forensic experts is that they overstate their conclusions."[97] He also discussed the Bernstein and Lasker article at length.[98] Professor Capra concluded "[i]t is certainly a problem when Evidence Rules are disregarded by courts."[99]

Professor Capra expressed skepticism whether "the problem of courts straying from the text will be solved by more text."[100] Nevertheless, he said "it may be possible to tweak the existing language in some way, and then write a Committee Note that strongly reaffirms the admissibility requirements in Rule 702 and criticizes the cases that treat these requirements as questions of weight rather than admissibility."[101]

The minutes from the spring 2018 meeting contain further details of the "vast array of information" provided to the Committee at the Boston Symposium.[102] Professor Capra explained that many federal courts were treating the "foundational requirements" of Rule 702 "as matters of weight"—an approach that was "indeed wrong."[103] Several Advisory Committee members expressed serious concern about courts' misapplication of the Rule. One Advisory Committee member said it was "very troubling" that some courts were essentially "saying that [Rule] 702 doesn't apply in their circuit."[104] Another Advisory Committee member was "taken aback by the federal courts blatantly ignoring Rule 702."[105] Chair Livingston indicated that amendments to address both overstatement by experts and misapplication of Rule 702's admissibility requirements by courts "would be considered at a future meeting."[106]

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95. *Id*.
96. *Id.*
97. Memorandum from Daniel J. Capra on Forensic Evidence, *Daubert* and Rule 702 to Advisory Comm. on Evidence Rules (Apr. 1, 2018), *in* Advisory Comm. on Evidence Rules April 26–27, 2018 Agenda Book 51, https://www.uscourts.gov/sites/default/files/agenda_book_advisory_committee_on_rules_of_evidence_-_final.pdf [https://perma.cc/JU7K-YN7R].
98. *Id.* at 89–100.
99. *Id.* at 100; *see also id.* (stating that "some courts are ignoring the requirements of Rule 702(b) and (d)").
100. *Id.*
101. *Id.* at 101.
102. Liesa L. Richter & Daniel J. Capra, Advisory Comm. on Evidence Rules: Minutes of the Meeting of Apr. 26–27, 2018, *in* Advisory Comm. on Evidence Rules October 19, 2018 Agenda Book 30, https://www.uscourts.gov/sites/default/files/2018-10-evidence-agenda-book_0.pdf [https://perma.cc/C8GB-Q825].
103. *Id.* at 35.
104. *Id.*
105. *Id.*
106. *Id.* at 36.

The Advisory Committee's fall 2018 meeting included a Symposium with a smaller group of panelists at the University of Denver Sturm College of Law.[107] Chief Judge Thomas Schroeder of the United States District Court for the Middle District of North Carolina described the work of a Rule 702 subcommittee he chaired. He explained that the subcommittee was constituted to consider issues raised at previous meetings and had identified three main issues: (1) "whether Rule 702 should be amended to regulate forensic expert testimony"; (2) "whether Rule 702 should be amended to address the perception that a sufficient number of courts are relegating their gatekeeper role to the jury or, more precisely, that they're not discharging the duty to determine admissibility by a preponderance under Rule 104(a) but are stating that questions as to experts' opinions only raise issues of weight and credibility under the Rule 104(b) standard, and so all challenges go off to the jury"; and (3) "whether there are other non-rule-related efforts like education, best practices, et cetera that would be useful to address the issues."[108] The Symposium materials included proposals to address overstatement by experts and to make explicit in the text of Rule 702 that Rule 104(a) applies.[109]

The panelists at the Denver Symposium "recognized the inconsistent application of Rule 702 across the federal circuits."[110] Panelists, however, questioned the need for an amendment to clarify the standard.[111] Some "found it odd to make the standard explicit for Rule 702 but not for other rules."[112] The recalcitrant position, however, would not prevail.

At the Advisory Committee's fall 2018 meeting, Chair Livingston said there was "strong interest in the possibility of amendments to Rule 702, noting that Lawyers for Civil Justice had already submitted a letter in support of a textual addition of the Rule 104(a) standard."[113] According to Chair Livingston, "both of the potential changes to Rule 702—a change to clarify the application of the Rule 104(a) preponderance standard and one to prohibit overstatement by expert conclusions—would

107. *Conference on Proposed Amendments: Experts, the Rule of Completeness, and Sequestration of Witnesses*, 87 FORDHAM L. REV. 1361, 1361 (2019) [hereinafter *Conference on Proposed Amendments*].

108. *Id.* at 1362–63 (quoting Judge Schroeder).

109. *Id.* at 1365 (quoting Judge Schroeder).

110. Cruz, *supra* note 8, at 285.

111. *Id.* (citing *Conference on Proposed Amendments*, *supra* note 107, at 1394–95).

112. *Id.* (citing *Conference on Proposed Amendments*, *supra* note 107, at 1394, 1396–97).

113. Daniel J. Capra & Liesa L. Richter, Advisory Comm. on Evidence Rules: Minutes of the Meeting of Oct. 19, 2018, *in* ADVISORY COMM. ON EVIDENCE RULES MAY 3, 2019 AGENDA BOOK 15, https://www.uscourts.gov/sites/default/files/2019-05-evidence-agenda-book.pdf [https://perma.cc/84BJ-ZPZ7] (referring to Lawyers for Civil Justice, Comment to the Advisory Comm. on Evidence Rules and its Subcomm. on Rule 702, In Support of Amending Rule 702 to Address the Problem of Insufficient Basis for Expert Testimony (Oct. 10, 2018), https://www.uscourts.gov/sites/default/files/18-ev-a-suggestion_lcj_0.pdf [https://perma.cc/82RA-XA74]).

be designed to serve a signaling function for trial judges and lawyers."[114] She believed that "either change could send a strong signal and that making both changes could have a significant impact," but "there would need to be a compelling case for making both changes at once."[115]

As between the two proposals, Professor Capra believed that adding language to Rule 702 to prevent overstatement by experts would be the "more meaningful of the two potential amendments given that the Rule 104(a) standard already applies to Rule 702."[116] He suggested that a Committee Note could be used to reinforce "the intended operation of Rule 104(a)."[117]

At the Advisory Committee's spring 2019 meeting, Chair Livingston reported that the Committee had decided "that a free-standing evidence rule on 'forensic evidence' would be ill-advised and that both an 'amendment' to a Committee [N]ote and a 'best practices manual' were outside the charter of the Committee."[118] The Advisory Committee determined that it would focus on an amendment to Rule 702 to limit overstatement by experts.[119]

The Advisory Committee continued to study whether "to clarify the trial judge's obligation to decide reliability pursuant to Rule 104(a) prior to admitting expert testimony."[120] Chair Livingston noted that "all of the judges" at the Denver Symposium raised questions about amending Rule 702, suggesting the Rule was "functioning properly in its current form."[121] Nevertheless, she "suggested that the Committee should discuss the drafting options for an amendment to Rule 702 to see if they could facilitate gatekeeping."[122]

In the fall of 2019, the Advisory Committee held a mini-conference at Vanderbilt University Law School on "Best Practices" for managing *Daubert* issues.[123] According to United States District Court Judge David Campbell of the District of Arizona, a former chair of the Standing Committee, the event "was extremely helpful in focusing judges on the need to evaluate the admissibility requirements of Rule 702 and

114. *Id.* at 16.
115. *Id.*
116. *Id.*
117. *Id.*
118. Daniel J. Capra & Liesa L. Richter, Advisory Comm. on Evidence Rules: Minutes of the Meeting of May 3, 2019, *in* Advisory Comm. on Evidence Rules October 25, 2019 Agenda Book 89, https://www.uscourts.gov/sites/default/files/advisory_committee_on_rules_of_evidence_-_final_draft_agenda_book.pdf [https://perma.cc/DN9B-DD44].
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.* at 94.
123. Daniel J. Capra & Liesa L. Richter, Advisory Comm. on Evidence Rules: Minutes of the Meeting of Oct. 25, 2019, *in* Advisory Comm. on Evidence Rules November 13, 2020 Agenda Book 25, https://www.uscourts.gov/sites/default/files/agenda_book_for_evidence_rules_committee_meeting_november_13_2020final.pdf [https://perma.cc/DZJ9-S58J].

Daubert through Rule 104(a), using a preponderance of the evidence standard."[124] He noted that "caselaw describing *Daubert* questions as primarily for the jury blurs the inquiry" and that "lawyers do not focus on the judge's obligation to make a preponderance finding when they brief *Daubert* issues."[125] Judge Campbell suggested "that an amendment or Committee Note emphasizing the trial judge's obligation to find all Rule 702 requirements by a preponderance of the evidence before admitting expert opinion testimony could be very beneficial."[126]

By the fall of 2020,[127] the Advisory Committee had narrowed its focus to (1) "an amendment that would clarify the application of the [Rule] 104(a) preponderance standard of admissibility to [Rule] 702 inquiries" and (2) "an amendment that would prevent an expert from 'overstating' her conclusions."[128] Professors Capra and Richter prepared a lengthy memorandum with drafting alternatives and a draft Committee Note for the Advisory Committee.[129] Then-Chair Patrick Schiltz, Chief United States District Court Judge for the District of Minnesota, proposed discussing each of the alternatives with the goal of having "a proposal that could be voted upon at the [s]pring 2021 meeting."[130]

Advisory Committee members "expressed substantial support for a preponderance amendment," explaining that "a trial judge ought to be able to open the Federal Rules of Evidence and understand the rule to be applied from the text."[131] Chair Schiltz candidly admitted that, initially, he had reservations about adding preponderance language to the Rule.[132] He came to favor the proposal, however, because "[c]ircuit court language at odds with the language of Rule 702 presents a serious concern . . . and trial judges often do not discuss Rule 702 issues in Rule 104(a) preponderance terms."[133]

In the spring of 2021, the Advisory Committee considered two alternative draft amendments to Rule 702.[134] Both drafts proposed to add

124. *Id.* at 26.
125. *Id.*
126. *Id.*
127. The Advisory Committee did not meet in the spring of 2020 due to the COVID-19 pandemic. Liesa L. Richter, Advisory Comm. on Evidence Rules: Minutes of the Meeting of Nov. 13, 2020, *in* Advisory Comm. on Evidence Rules, April 30, 2021 Agenda Book 16, https://www.uscourts.gov/sites/default/files/advisory_committee_on_evidence_rules_-_agenda_book_spring_2021.pdf [https://perma.cc/9UZR-2NV7].
128. *Id.* at 17.
129. Memorandum from Daniel J. Capra & Liesa A. Richter on Possible Amendment to Rule 702 to the Advisory Comm. on Evidence Rules (Oct. 1, 2020), *in* Advisory Committee on Evidence Rules November 13, 2020 Agenda Book 102, 142–59, https://www.uscourts.gov/sites/default/files/agenda_book_for_evidence_rules_committee_meeting_november_13_2020final.pdf [https://perma.cc/PL96-NYQD].
130. Richter, *supra* note 127, at 17.
131. *Id.* at 18.
132. *Id.* at 19.
133. *Id.*
134. Advisory Comm. on Evidence Rules, Agenda for Comm. Meeting on Apr. 30, 2021, *in* Advisory Committee on Evidence Rules April 30, 2021 Agenda Book 2,

language to the "beginning of the Rule alerting trial judges that they must find all requirements of Rule 702 satisfied by a preponderance of the evidence according to Rule 104(a) before admitting an expert opinion over objection."[135] The drafts differed in their treatment of the overstatement issue. One of the drafts proposed to make a "modest change to the language of existing Rule 702(d) to focus the trial judge on the opinion expressed by an expert, as well as on the reliability of principles and methods and their application."[136] The other draft proposed to add a new subsection (e) to Rule 702 "to regulate 'overstatement' of conclusions by expert witnesses."[137]

Because of a lack of consensus on adding a new subsection to the Rule, "the Committee unanimously agreed to focus its discussion on the draft that would alter Rule 702(d), and to reject the addition of a new subsection (e)."[138] The Committee then "unanimously approved publication of the proposed amendment to Rule 702 and accompanying Committee [N]ote, with the recommendation that it be referred to the Standing Committee to seek release for public comment."[139]

The Standing Committee met in June 2021 to determine whether to publish the proposed amendment for public comment.[140] Advisory Committee Chair Schiltz explained that the Advisory Committee had decided to amend Rule 702 because "many judges have not been correctly applying Rule 702."[141] Instead, these courts "have treated the [Rule] 702 requirements as if they go to weight rather than admissibility, and some have explicitly said that this is what they are doing even though it is not consistent with the text of Rule 702."[142] Chair Schiltz said that the Advisory Committee also decided to amend Rule 702 to address "the problem of overstatement—especially with respect to forensic expert testimony in criminal cases."[143] A judge on the Standing Committee lauded the amendments "as beneficial and thoughtful."[144] No other members commented.[145] The Standing Committee approved publication of the proposed amendments for public comment by voice vote.[146]

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https://www.uscourts.gov/sites/default/files/advisory_committee_on_evidence_rules_-_agenda_book_spring_2021.pdf [https://perma.cc/QA8N-FWJR].

135. *Id.* at 14.
136. *Id.*
137. *Id.*
138. *Id.* at 15.
139. *Id.* at 18.
140. *See* Comm. on Rules of Prac. & Proc., *supra* note 19, at 38.
141. *Id.*
142. *Id.* As an example, Chair Schiltz said that "instead of asking whether an expert's opinion *is* based on sufficient data, some courts have asked whether the opinion *could be found by a reasonable juror to be* based on sufficient data"—"[t]his is an entirely different question [and] sets a lower and incorrect standard." *Id.*
143. *Id.*
144. *Id.* at 39.
145. *Id.*
146. *Id.*; *see also* Liesa L. Richter & Daniel J. Capra, Advisory Comm. on Evidence Rules: Minutes of the Meeting of Nov. 5, 2021, *in* Advisory Comm. on Evidence Rules,

In August of 2021, the Standing Committee published the proposed amendments for public comment along with other proposed Federal Rules changes.[147] The proposed amendment to Rule 702 included notable additions and edits to its existing text:

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 has demonstrated 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~~ expert's opinion reflects a reliable application of the principles and methods to the facts of the case.[148]

The Advisory Committee held a public hearing on the proposal on January 21, 2022, and received comments through February 16, 2022.[149]

D. *The Public Comment Process*

The Advisory Committee received over 530 comments on the proposed amendments to Rule 702.[150] Lawyers for Civil Justice, which had expressed early support for the amendment, was joined by the

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May 6, 2022 Agenda Book 16, https://www.uscourts.gov/sites/default/files/evidence_agenda_book_may_6_2022.pdf [https://perma.cc/4EWR-BNHV] (Chair Schiltz reporting that the Advisory Committee received "no comments on the proposed amendment to Rule 702, but did receive praise for the proposal from the Standing Committee.")

147. Memorandum from Hon. John D. Bates, Chair, Comm. on Rules of Prac. and Proc., to the Bench, Bar, and Public (Aug. 6, 2021), *in* Preliminary Draft: Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure, and the Federal Rules of Evidence 2 (2021), https://www.uscourts.gov/sites/default/files/preliminary_draft_of_proposed_amendments_-_august_2021_0.pdf [https://perma.cc/5KXD-NLSY].

148. *Id*. at 308–09.

149. *Id*. at 3; *see also* Transcript of Proceedings at 1, Public Hearing on Proposed Amendments to the Federal Rules of Evidence 106, 615, and 702 Before the Judicial Conference Advisory Committee on Evidence Rules (Jan. 21, 2022), https://www.uscourts.gov/sites/default/files/2022-01-21_public_hearing_transcript_0.pdf [https://perma.cc/7AZD-N646].

150. Memorandum from Daniel J. Capra & Liesa L. Richter on Possible Amendment to Rule 702 to the Advisory Comm. on Evidence Rules (Apr. 1, 2022), *in* Advisory Committee on Evidence Rules May 6, 2022 Agenda Book 125, https://www.uscourts.gov/sites/default/files/evidence_agenda_book_may_6_2022.pdf [https://perma.cc/G4PU-5ZZN].

Innocence Project and Democracy Forward Foundation, along with many others, in supporting the proposed amendment.[151] The American Association for Justice and National District Attorneys' Association opposed the amendment.[152] Public Justice—ostensibly a public-interest organization—objected to the amendment because it believed "evidence" of admissibility would be restricted to "admissible evidence" and because it did not want to see criticisms of specific appellate cases in the Committee Note.[153]

According to Professors Capra and Richter, "almost all" of the comments opposing the amendment and Committee Note were written by plaintiffs' lawyers following "what appeared to [be] one of four standardized talking points memos."[154] Many comments from the plaintiffs' bar "complained that the amendment would shift the burden of proof on reliability to the proponent of the experts."[155] Professors Capra and Richter explained that such comments were "based on misunderstandings of the existing law," since the "burden has been on the proponent to establish reliability at least since *Daubert*, and definitely since the 2000

151. *Id.* at 155, 166, 169, 198 ("Lawyers for Civil Justice (EV-2021-0005-0098) provided a supplementary submission in support of the rule, in response to the comments criticizing the preponderance of the evidence standard.") ("The Innocence Project, together with a coalition of public interest organizations and legal scholars (EV-2021-0005-0121) supports the proposed amendment to Rule 702, emphasizing 'the importance of amending Federal Rule of Evidence 702 to bring scientific integrity to proceedings in which life and liberty are at stake.'") ("The Democracy Forward Foundation (EV-2021-0005-0443), an organization working to show that independent science can inform public decisionmaking without political interference, supports the proposed amendment to Rule 702.").

152. *Id.* at 166–67 ("The American Association for Justice (EV-2021-0005-0099) '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.' It asserts that including the preponderance of the evidence standard 'has the unintended potential for causing the court to believe that the court, and not the jury, must weigh and decide the correctness of the scientific evidence, which will intrude and diminish the role of the jury.' The Association recommends that a reference to the court determining the issue not be brought back into the rule, and that the phrase 'preponderance of the evidence' should be changed to 'preponderance of the information.' As to the change to Rule 702(d), the Association does not disagree about its overall purpose but declares that 'it is not evident that courts or parties will find the direction provided in the rule text helpful.'") ("The National District Attorneys' Association (EV-2021-0005-0105) is opposed to the proposed amendment to Rule 702(d) and the accompanying portion of the Committee Note.").

153. *Id.* at 208.

154. *Id.* at 128. *See, e.g.*, *id.* at 176 ("Donovan Potter, Esq. (EV-2021-0005-0201) states, identically with others, that the preponderance of the evidence standard 'is inextricably intertwined with fact-finding and weighing evidence, which judges must not do in this analysis.'"); *id.* at 176 ("William Sutton, Esq. (EV-2021-0005-0206) replicates a number of other comments about the judge taking up 'the mantel of juror' under the proposed amendment."); *id.* at 180 ("Mike Crow, Esq. (EV-2021-0005-0243) filed the form comment set forth in its entirety in the summary to Comment 0239."); *id.* at 185 ("Andrew Fulk, Esq. (EV-2021-0005-0300) posted the comment set forth in the summary of Comment 0239, with minor variations such as changing 'waterfall' to 'deluge.'").

155. *Id.* at 128.

amendment."[156] Other comments from the plaintiffs' bar argued that the amendment conflicted with *Daubert* "because it requires the court to evaluate whether the expert's methodology was reliably applied."[157] Professors Capra and Richter pointed out, however, that "the 'methodology-only' statement in *Daubert* was completely rejected by the 2000 amendment to Rule 702, which added Rule 702(d), specifically requiring the judge to find by a preponderance that the expert's methodology was properly applied."[158]

Professors Capra and Richter noted the irony that comments by opponents based on "common misconceptions actually end up supporting the need for an amendment" to reinforce the correct understanding of the Rule.[159] They said:

> The fact that so many good lawyers misstate the intent and meaning of Rule 702 provides cause for clarifying that: 1) the proponent has the burden of demonstrating reliability; and [2)] the court must consider whether the expert's opinion reflects a reliable application of the methodology. That's exactly what the amendment does.[160]

Professors Capra and Richter stressed that the amendment "was simply thought to be good rulemaking."[161] They drew reassurance from the fact "that organizations considered to be neutral submitted public comment in favor of the amendment."[162]

One concrete suggestion received from the public comment was to reinsert "'if the court finds' into the text of the amendment."[163] Comments explained that this change would address "confusion about the respective roles of judge and jury in deciding the admissibility of expert testimony."[164] A reference to the "court" making "findings" had been considered by the Advisory Committee but was removed from the text of the proposed Rule prior to publication for public comment "due to concerns that courts might think they need to make Rule 702 'findings' even in the absence of any objection to expert opinion testimony."[165]

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156. *Id.*

157. *Id.* at 129. These comments refer to the *Daubert* Court's statement that a court's "focus must be solely on principles and methodology, not on the conclusions that they generate." Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 580 (1993).

158. Capra & Richter, *supra* note 150, at 129.

159. *Id.*

160. *Id.*

161. *Id.* at 131.

162. *Id.* at 132 ("Those organizations include the Federal Magistrate Judges' Association, the Association of the Bar of the City of New York, the Federal Bar Association, and the Democracy Forward Foundation.").

163. Liesa L. Richter, Advisory Comm. on Evidence Rules: Minutes of the Meeting of May 6, 2022, *in* Advisory Comm. on Evidence Rules, October 28, 2022 Agenda Book 33, https://www.uscourts.gov/sites/default/files/2022-10_evidence_rules_committee_agenda_book_final_0.pdf [https://perma.cc/74FM-65ES].

164. *Id.*

165. Richter & Capra, *supra* note 146, at 19.

The Advisory Committee ended up deciding that the Rule should clarify that the court, not the jury, "must decide whether it is more likely than not that the reliability requirements of the rule have been met."[166] The Advisory Committee "unanimously agreed with a change requiring that the proponent establish 'to the court' that it is more likely than not that the reliability requirements have been met."[167]

The Advisory Committee chose the "more likely than not" phrase to placate opponents who asserted that the "preponderance of the evidence" language in the amendment published for public comment "would limit the court to considering only *admissible* evidence" at a Rule 702 hearing.[168] The Advisory Committee "disagree[d] with these comments," explaining that the "plain language of Rule 104(a) allows the court deciding admissibility to consider inadmissible evidence."[169] Nevertheless, the Advisory Committee decided to "replace the term 'preponderance of the evidence' with a term that would achieve the same purpose while not raising the concerns (valid or not) mentioned by many commentators."[170] "With those changes, and a few stylistic and corresponding changes to the Committee Note," the Advisory Committee "unanimously gave final approval to the proposed amendment to Rule 702."[171]

E. *Final Approval*

The Standing Committee unanimously approved the proposed amendments to Rule 702 by voice vote in June of 2022.[172] The Judicial Conference of the United States approved the proposed amendments in September of 2022 and transmitted them to the United States Supreme Court in October of 2022.[173] United States Supreme Court Chief Justice John Roberts, Jr. transmitted the proposed amendments to Congress in April of 2023.[174] Congress made no changes to the proposed amendments, and they became effective on December 1, 2023.

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166. Schiltz, *supra* note 13, at 872.
167. *Id.*
168. *Id.*
169. *Id.*
170. *Id.* The Advisory Committee explained, "This [more likely than not] standard is substantively identical to 'preponderance of the evidence' but it avoids any reference to 'evidence' and thus addresses the concern that the term 'evidence' means only admissible evidence." *Id.*
171. *Id.* at 873.
172. Comm. on Rules of Prac. & Proc., Minutes of the Meeting of June 7, 2022, *in* COMM. ON RULES OF PRAC. & PROC. JANUARY 4, 2023 AGENDA BOOK 20, 38, https://www.uscourts.gov/sites/default/files/2023-01_standing_committee_meeting_agenda_book_final_0.pdf [https://perma.cc/9FAL-42XP].
173. Memorandum from the Hon. John D. Bates, Chair, Comm. on Rules of Prac. & Proc., on Summary of Proposed New and Amended Federal Rules of Procedure to Scott S. Harris, Clerk, U.S. Sup. Ct. (Oct. 19, 2022), https://www.uscourts.gov/sites/default/files/2022_scotus_package_0.pdf [https://perma.cc/3RBB-NEXD].
174. Letters from U.S. Sup. Ct. Chief J. John G. Roberts, Jr. to Hon. Kevin McCarthy, Speaker, U.S. House of Reps., and Hon. Kamala Harris, President, U.S. Senate

III. The "New" Rule 702

The 2023 version of Rule 702 is the result of Advisory Committee work dating back to 2016 and a lengthy public comment process. Rule 702 now reads:

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 to the court that it is more likely than not 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's opinion reflects a reliable application of the principles and methods to the facts of the case.[175]

According to the accompanying Committee Note, "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."[176] The Committee Note explains that "more likely than not" is "the preponderance of the evidence standard that applies to most of the admissibility requirements set forth in the evidence rules."[177] The Committee Note further explains that the preponderance standard applies to all three reliability-based requirements added to Rule 702 in 2000—"requirements that many courts have incorrectly determined to be governed by the more permissive Rule 104(b) standard."[178]

Next, the Committee Note provides guidance to courts trying to navigate situations where an expert's testimony will raise matters of weight:

> [I]f the court finds it more likely than not that an expert has a sufficient basis to support an opinion, the fact that the expert has not

(Apr. 24, 2023), https://www.uscourts.gov/sites/default/files/2023_congressional_package_april_24_2023_0.pdf [https://perma.cc/HH68-ZV6T].

175. Fed. R. Evid. 702.

176. Fed. R. Evid. 702 advisory committee's note to 2023 amendment. The Committee Note states that the Advisory Committee's decision to place the preponderance standard language in the text of Rule 702 "was made necessary by the courts that have failed to apply correctly the reliability requirements of that rule." *Id.*

177. *Id.*

178. *Id.*

> read every single study that exists will raise a question of weight and not admissibility. But this does not mean, as certain courts have held, that arguments about the sufficiency of an expert's basis always go to weight and not admissibility. Rather it means that once the court has found it more likely than not that the admissibility requirement has been met, any attack by the opponent will go only to the weight of the evidence.[179]

To address overstatement by experts, Rule 702(d) was changed 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."[180] The Committee Note stresses the limitations of juries when evaluating expert testimony:

> Judicial gatekeeping is essential because just as jurors may be unable, due to lack of specialized knowledge, to evaluate meaningfully the reliability of scientific and other methods underlying expert 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 reliably support.[181]

The change to Rule 702(d) is "especially pertinent to the testimony of forensic experts in both criminal and civil cases."[182] The Committee Note instructs forensic experts to "avoid assertions of absolute or one hundred percent certainty—or to a reasonable degree of scientific certainty—if the methodology is subjective and thus potentially subject to error."[183] The Committee Note further explains:

> In deciding whether to admit forensic expert testimony, the judge should (where possible) receive an estimate of the known or potential rate of error of the methodology employed, based (where appropriate) on studies that reflect how often the method produces accurate results. Expert opinion testimony regarding the weight of feature comparison evidence (i.e., evidence that a set of features corresponds between two examined items) must be limited to those inferences that can reasonably be drawn from a reliable application of the principles and methods. This amendment does not, however, bar testimony that comports with substantive law requiring opinions to a particular degree of certainty.[184]

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179. *Id.* Professor Capra put it this way: "It is not the case that the judge can say, 'I see the problems, but they go to the weight of the evidence.' *After* a preponderance is found, then any slight defect in either of these factors becomes a question of weight. But not before." Memorandum from Daniel J. Capra on Forensic Evidence, *Daubert* and Rule 702 to Advisory Comm. on Evidence Rules, *supra*, note 97, at 91.

180. FED. R. EVID. 702 advisory committee's note to 2023 amendment.

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

IV. Applying Amended Rule 702

The 2023 amendments to Rule 702 are intended to lead trial courts to fulfill their gatekeeping duty with respect to the admission of expert evidence.[185] Since the amended Rule took effect, several federal courts have issued opinions that reference or apply, at least in part, the new language.[186] In some cases the testimony and briefing in the cases occurred under the 2000 version of the Rule, but the decisions still help to illustrate how the 2023 Rule should be applied.[187]

An example is a pre-amendment wrongful death case decided by the Fourth Circuit Court of Appeals, *Sardis v. Overhead Door Corporation*,[188] involving an alleged defect in the packaging of garage doors.[189] The defendant challenged the plaintiff's experts as unreliable, but the trial court permitted the jurors to hear their testimony, "finding that cross-examination was the proper, and only, tool to vet any relevance or reliability factors."[190] The jury returned a multi-million dollar verdict for the plaintiff.[191]

The Fourth Circuit reversed the award, ruling that the trial court had "improperly abdicated its critical gatekeeping role" by failing to engage in the "required Rule 702 analysis."[192] The circuit court explained that proper gatekeeping is critical because "[e]xpert evidence can be both powerful and quite misleading."[193] The court emphasized that "the importance of [the] gatekeeping function cannot be overstated."[194]

185. Boyer v. City of Simi Valley, No. 2:19-cv-00560-DSF-JPR, 2024 WL 993316, at *1 (C.D. Cal. Feb. 13, 2014) ("The Court is required to analyze the expert's data and methodology at the admissibility stage more critically than in the past."); Cleaver v. Transnation Title & Escrow, Inc., No. 1:21-cv-00031-AKB, 2024 WL 326848, at *2 (D. Idaho Jan. 29, 2024) (stating the 2023 amendments to Rule 702 "clarified the proponent of expert testimony must meet all of Rule 702's substantive standards for admissibility by a preponderance of evidence. The amendments are intended to correct some courts' prior, inaccurate application of Rule 702."); West v. Home Depot U.S.A., Inc., No. 21 CV 1145, 2024 WL 1834112, at *2 (N.D. Ill. Apr. 26, 2024) (stating that amended Rule 702 is "not a wholesale change in the law, but rather a refocusing of the Supreme Court's instruction for district court judges to act as a 'gatekeeper'" when expert testimony is challenged), *aff'd in relevant part*, 2024 WL 2845988 (N.D. Ill. June 5, 2024).

186. *See* Lee Mickus, *The First 100 Days of Amended FRE 702: The Good, the Bad, the Ugly, and the Next Steps* (Wash. Legal Found., Critical Legal Issues Working Paper, No. 229, Apr. 2024), https://www.wlf.org/2024/04/04/publishing/the-first-100-days-of-amended-fre-702-the-good-the-bad-the-ugly-and-the-next-steps/ [https://perma.cc/6Z86-42C5].

187. Fed. R. Evid. 702 advisory committee's note to 2023 amendment ("Nothing in the amendment imposes any new, specific procedures.").

188. Sardis v. Overhead Door Corp., 10 F.4th 268, 276 (4th Cir. 2021).

189. *Id.* at 276.

190. *Id.* at 275.

191. *Id.* at 278.

192. *Id.* at 279.

193. *Id.* at 283 (quoting Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 592 (1993).

194. *Id.*

The *Sardis* opinion was published before the amended rule's adoption but the Fourth Circuit pointed to the Advisory Committee's work as supporting the need for trial courts to fulfill their gatekeeping obligation.[195] The Fourth Circuit concluded by "confirm[ing] once again the indispensable nature of district courts' Rule 702 gatekeeping function in all cases in which expert testimony is challenged on relevance and/or reliability grounds."[196] The court also said that when "the admissibility of expert testimony is specifically questioned, Rule 702 and *Daubert* require that the district court make explicit findings, whether by written opinion or orally on the record, as to the challenged preconditions to admissibility."[197]

Several courts have drawn on the *Sardis* decision to shape their approach to gatekeeping. For example, a Pennsylvania federal court cited *Sardis* and Rule 702 as requiring district courts to "make explicit findings, whether by written opinion or orally on the record, as to the challenged preconditions to admissibility."[198] The court went on to discuss the 2023 amendment to Rule 702 and the Advisory Committee's motivation before excluding the plaintiff's expert and granting summary judgment in favor of the defendant.[199]

In re Google Play Store Antitrust Litigation,[200] a multidistrict litigation decision from Northern California, is also noteworthy. The court described the then-pending amendment to Rule 702 as "an amplification of existing FRE 702 standards,"[201] noting that "the burden of establishing the reliability of the proposed expert witness testimony rests with the proponent of the expert evidence."[202] The court proceeded to examine the opinions of the plaintiff's expert in depth before concluding that they were not reliable enough to be admitted.[203]

The Sixth Circuit Court of Appeals in *In re Onglyza (Saxagliptin) and Kombiglyze (Saxagliptin and Metformin) Products Liability Litigation* upheld a multi-district litigation judge's decision to exclude experts supporting plaintiffs' claim that a diabetes drug caused their heart

195. *Id.* at 283–84.
196. *Id.* at 284.
197. *Id.* at 283.
198. Allen v. Foxway Transp., Inc., No. 4:21-CV-00156, 2024 WL 388133, at *2 (M.D. Pa. Feb. 1, 2024) (citing *Sardis*).
199. *Id.*; *see also In re* Payment Card Interchange Fee & Merch. Disc. Antitrust Litig., No. 05-MD-1720, 2022 WL 15053250, at *4 n.9 (E.D.N.Y. Oct. 26, 2022) (stating "the Court is mindful of the proposed amendments' purpose of 'emphasiz[ing] that the court must focus on the expert's opinion, and must find that the opinion actually proceeds from a reliable application of the methodology' and 'explicitly weaving the Rule 104(a) standard into the text of Rule 702'") (quoting Schiltz, *supra* note 13, at 871).
200. *In re* Google Play Store Antitrust Litig., No. 20-CV-02981-JD, 2023 WL 5532128 (N.D. Cal. Aug. 28, 2023).
201. *Id.* at *5.
202. *Id.*
203. *Id.* at *10.

failure.[204] Given how close in time the decision was to the 2023 Rule's adoption, the court conducted its analysis under the 2000 version, but resorted to the amended Rule to bolster its opinion.[205] The court noted that Rule 702 "entrusts district courts with a 'gatekeeping role' to 'ensur[e] that an expert's testimony both rests on a reliable foundation and is relevant.'"[206] The court observed that the "party proffering the expert (here plaintiffs) bears the burden of showing by a preponderance of the evidence that the expert satisfies Rule 702."[207] The court rejected plaintiffs' assertion that a "jury, not the trial judge, must evaluate and weigh conflicting expert testimony."[208] The court found that the district court "properly exercised its 'gatekeeping role"[209] when the court excluded an expert who "cherry-picked data"[210] and "inferred a causal relationship" from a key study "that did not come to a conclusion about causation."[211]

Another noteworthy opinion is *Farmers Insurance Company of Arizona v. DNA Auto Glass Shop LLC*,[212] written by former Standing Committee chair and Advisory Committee member Senior United States District Court Judge David Campbell of the District of Arizona. The case involved various claims by an insurer against auto glass repair and replacement businesses for submission of allegedly misleading insurance claims. Judge Campbell noted the appropriate standard to be applied—"preponderance of the evidence"—and explained that the proponent of expert testimony must show that "the proposed testimony satisfies each of the rule's requirements."[213] He also noted that "[t]he trial court—not the jury—applies this standard, acting as a gatekeeper to ensure expert testimony satisfies Rule 702 admissibility."[214] Judge Campbell went on to find that the defendants' proposed expert's opinions about reasonable auto glass repair pricing were inadmissible because they were based solely on his "general experience in the industry" and "beliefs."[215] The court found that the expert did not "sufficiently explain how his experiences led to the prevailing competitive price

204. *In re* Onglyza (Saxagliptin) & Kombiglyze (Saxagliptin & Metformin) Prod. Liab. Litig., 93 F.4th 339, 342 (6th Cir. 2024).

205. The circuit court said "the district court's reasoning aligns with the updated Rule 702, since it placed the burden of showing that [plaintiffs' expert] was admissible on plaintiffs." *Id.* at 345 n.4.

206. *Id.* at 345 (quoting Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 597 (1993)).

207. *Id.*

208. *Id.* at 347–48.

209. *Id.* at 348 (quoting *Daubert*, 509 U.S. at 597).

210. *Id.* at 347.

211. *Id.* at 346–47.

212. Farmers Ins. Co. of Ariz. v. DNA Auto Glass Shop LLC, No. CV-21-01390-PHX-DGC, 2024 WL 1256042 (D. Ariz. Mar. 25, 2024), *clarified on other grounds*, 2024 WL 1961837 (D. Ariz. May 3, 2024).

213. *Id.* at *7.

214. *Id.*

215. *Id.* at 9–10.

ranges he identified, why this was a sufficient basis for his opinions, or how these experiences were reliably applied to the facts."[216] In short, the opinions were improperly "based only on 'the *ipse dixit* of the expert.'"[217]

A Kansas federal court also "decline[d] to abdicate its role as gatekeeper of expert testimony," noting the Advisory Committee's finding that many courts misapplied Rule 702 prior to its recent amendment.[218] The court granted summary judgment to a forklift manufacturer in a workplace accident case after granting the defendant's motion to exclude plaintiff's expert.[219] The court found that the expert was knowledgeable in the *general* field of industrial equipment design, fabrication, and testing of safety systems, but lacked "*specific* knowledge of forklifts."[220]

A San Jose federal court in a personal injury case arising out of alleged toxic mold contamination in a home held that the plaintiff failed to establish that her expert had, more likely than not, reliably linked alleged mold exposures from years ago to her current health conditions.[221] The expert claimed to have conducted a "thorough differential diagnosis," but his report failed to discuss his differential diagnosis "in any detail" or "how that analysis led him to rule out other potential causes of [plaintiff's] health conditions."[222]

There have also been recent opinions in criminal cases that properly apply Rule 702. A New Mexico federal district court opinion ruling on the admissibility of a DEA expert offered by the government is an example.[223] The court explained, "[i]n the past, courts have held that the Federal Rules of Evidence 'encourage the admission of expert testimony.' Thus, courts have operated on the presumption '[] that expert testimony is admissible.'"[224] The court went to explain that "[a]lthough the Court in *Daubert* explained that '[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence,' the amendments to Rule 702 stand for the

216. *Id.* at *10.
217. *Id.*
218. Hickcox v. Hyster–Yale Grp., Inc., 715 F. Supp. 3d 1362, 1380 (D. Kan. 2024) (citing FED. R. EVID. 702 advisory committee's note to 2023 amendment).
219. *Id.* at 1382 (stating "the court also grants defendant's Motion for Summary Judgment").
220. *Id.* at 1379; *see also* Post v. Hanchett, No. 21-2587-DDC, 2024 WL 474484, at *6 (D. Kan. Feb. 7, 2024) (excluding expert testimony about tire blowout causation).
221. Leakas v. Monterey Bay Military Housing, LLC, No. 22-cv-01422-VKD, 2024 WL 495938, at *5 (N.D. Cal. Feb. 8, 2024).
222. *Id.* at *6; *see also* Burdess v. Cottrell, Inc., No. 4:17-CV-01515-JAR, 2024 WL 864127, at *6 (E.D. Mo. Feb. 29, 2024) (excluding expert whose opinions did not reflect a valid methodology or were not confined to his areas of expertise).
223. United States v. Diaz, No. 24-CR-0032 MV, 2024 WL 758395 (D.N.M. Feb. 23, 2024).
224. *Id.* at *4 (citations omitted).

proposition that 'judicial gatekeeping is essential' because 'jurors may lack the specialized knowledge to determine whether the conclusions of an expert go beyond what the expert's basis and methodology reliably support.'"[225] Courts, therefore, "must assess the principles and methods applicable to law enforcement expert testimony."[226] The court held that the government's expert would be allowed to testify if the government could "make a careful showing, by a preponderance of the evidence, that his testimony satisfies the requirements of Rule 702."[227] A Utah federal court likewise noted that under amended Rule 702, "questions as to the sufficiency of the basis for an expert's opinion and the application of his methodology go to admissibility rather than weight."[228]

V. Implications of Amended Rule 702

The history of the 2023 amendments, coupled with early cases interpreting the amended Rule, suggest several principles for litigants and courts to keep in mind as they apply Rule 702.[229]

The court must be a gatekeeper. Courts "must perform a Rule 702 analysis before admitting an expert opinion over objection."[230] A court "cannot simply invoke the language of the Rule and then admit a proposed expert's testimony without finding by a preponderance of the evidence that the testimony meets all the Rule's requirements."[231]

Just as important, "a judge's gatekeeping role is a *continuing* one."[232] Thus, if an expert who is permitted to testify overstates an opinion at trial, the court is under an obligation to strike the testimony.

The court must find it is "more likely than not" that an expert meets all of Rule 702's admissibility requirements.[233] ***This is the Rule 104(a) "preponderance of the evidence" standard, not the more lenient Rule 104(b) standard.***[234] Briefs and opinions should stress

225. *Id.* (citations omitted).
226. *Id.* at *5.
227. *Id.*
228. United States v. Uchendu, No. 2:22-cr-00160-JNP-2, 2024 WL 1016114, at *2 (D. Utah Mar. 8, 2024).
229. William L. Anderson & Mark A. Behrens, *Review of Expert Causation Testimony Under Federal Rule of Evidence 702: An Early Assessment of the 2023 Amended Rule*, 28-6 Mealey's Daubert Rep. 27 (June 2024) (discussing amended Rule 702 and implications for courts and counsel).
230. Mark A. Behrens, *A Brief Guide to the 2023 Amendments to the Federal Rules of Evidence* (Federalist Soc'y Jan. 30, 2024), https://fedsoc.org/commentary/fedsoc-blog/a-brief-guide-to-the-2023-amendments-to-the-federal-rules-of-evidence-1#:~:text=It%20is%20now%20clear%20that,meets%20all%20the%20Rule's%20requirements [https://perma.cc/J34E-P5E3].
231. *Id.*
232. *Id.* (emphasis added); *see also* Fed. R. Evid. 702(d).
233. Fed. R. Evid. 702 advisory committee's note to 2023 amendment.
234. *Id.*

the preponderance ("more likely than not") standard in Rules 702 and 104(a). Post-2000, many courts were erroneously applying Rule 104(b)'s more permissive standard to Rule 702 determinations instead of Rule 104(a).[235] As explained earlier in this article, former Standing Committee chair United States District Court Judge David Campbell of the District of Arizona told the Advisory Committee that "lawyers do not focus on the judge's obligation to make a preponderance finding when they brief *Daubert* issues."[236] He thought that "emphasizing the trial judge's obligation to find all Rule 702 requirements by a preponderance of the evidence before admitting expert opinion testimony could be very beneficial" for this reason.[237]

It is imperative that lawyers follow through and remind courts not only that the preponderance standard is to be applied, but also that a "liberal thrust"[238] admission policy (or its cousin, the "presumption of admissibility"[239]) is incompatible with Rule 702.[240] Moreover, the burden of establishing that an expert meets the Rule's requirements falls on the proponent "alone."[241]

Avoid reliance on pre-2000 case law that is contrary to the text of the Rule. The 2023 changes to Rule 702 were necessary to correct decisions by courts citing pre-2000 cases as part of their analysis, even when those cases were superseded by both *Daubert* and the 2000 amendment (and now the 2023 amendment).[242] These cases tend to apply a lenient

235. Lee Mickus, *Federal Rule of Evidence 702: A Practitioner's Guide to Understanding the 2023 Amendments* 1 (Wash. Legal Found., Contemporary Legal Note, No. 83, June 2024) (stating "some courts did not assess expert testimony under the preponderance of the evidence burden of production that applies to Rule 702 inquiries, but instead relied on characterizations of Rule 702 as being a 'liberal' standard or 'presuming admissibility'"), https://www.wlf.org/wp-content/uploads/2024/06/062024Mickus-CLN.pdf [https://perma.cc/9KFS-L5RX].

236. Capra & Richter, *supra* note 123, at 26.

237. *Id.*

238. *See, e.g.*, *In re* Bair Hugger Forced Air Warming Devices Prods. Liab. Litig., 681 F. Supp. 3d 993, 1017 (D. Minn. 2023) (noting the "liberal thrust" standard).

239. *See, e.g.*, Nat'l Coal. on Black Civic Participation v. Wohl, 661 F. Supp. 3d 78, 97 (S.D.N.Y. 2023) ("In the Second Circuit, there is 'a presumption of admissibility of evidence.'") (quoting Borawick v. Shay, 68 F.3d 597, 610 (2d Cir. 1995)).

240. *See, e.g.*, Sardis v. Overhead Door Corp., 10 F.4th 268, 276 (4th Cir. 2021) (no mention of a "liberal" admission policy).

241. DeWolff, Boberg & Assocs., Inc. v. Pethick, No. 3:20-CV-3649-L, 2024 WL 1396267, at *13 (N.D. Tex. Mar. 31, 2024) ("Contrary to Plaintiff's assertion, Defendants were not required to come forward with any evidence or legal authority regarding alternative methodologies" or to establish that plaintiff expert's utilized an unacceptable method; "rather, the burden of establishing the reliability of [the expert's opinion] is Plaintiff's alone.")

242. Comment from Lawyers for Civil Justice to the Advisory Committee on Evidence Rules and its Rule 702 Subcommittee (Feb. 8, 2021) (calling for Committee Note to Rule 702 amendment to specifically reject *Loudermill v. Dow Chemical Co*., 863 F.2d 566, 570 (8th Cir. 1988), *Viterbo v. Dow Chemical Co*., 826 F.2d 420, 422 (5th Cir. 1987), *Smith v. Ford Motor Co*., 215 F.3d 713, 719 (7th Cir. 2000), and their progeny as incompatible with the Rule), https://www.uscourts.gov/sites/default/files/21-ev-a_suggestion_from_lcj_-_rule_702_0.pdf [https://perma.cc/FL4K-NS6T].

standard that is contrary to the text of the Rule.[243] As commentators have highlighted, "the amendments effectively overrule a significant body of case law that has misconstrued and misapplied Rule 702 for more than 20 years."[244] It is time for courts to formally recognize that reality.

Practitioners have an important role in helping to ensure that courts apply Rule 702 correctly. Courts typically receive information through parties' briefs. Thus, if courts are fed misinformation, there is a possibility they will repeat it.[245] Cases that have misapplied Rule 702 "should no longer be cited."[246] Commentators have further cautioned:

> Importantly, this incorrect case law will not be flagged as such through Westlaw or Lexis, which generally only identify where cases have been expressly overruled or vacated by subsequent case law or statute.
>
> Practitioners accordingly will need to review the reasoning presented in support of these opinions, and identify for the court where and how such opinions fail to apply the proper Rule 104(a) standard of review.
>
> Judges, in turn, should expressly identify and reject these cases in their Rule 702 opinions to help weed out this flawed jurisprudence.[247]

Don't Say Daubert.[248] The appropriate standard for admitting expert evidence is embodied in Rule 702. Nonetheless, many courts and litigators prefer quoting Supreme Court case law as opposed to the text of the Rule. This has induced practitioners and courts to refer to motions to exclude expert testimony as "*Daubert* motions," leading some courts to analyze expert testimony by citing *Daubert* instead of Rule 702. *Daubert* is helpful, but it applies to a rule that has now undergone two further iterations (2000 and 2023). Any analysis of expert testimony must be tied to the text of the Rule.

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243. *Id.*

244. Eric Lasker & Lawrence Ebner, *Time for Courts, Attorneys to Use Amended Evidence Rule*, Law360 (July 20, 2023), https://www.law360.com/articles/1700336/time-for-courts-attorneys-to-use-amended-evidence-rule [https://perma.cc/2CS4-9YSG].

245. Richard Collin Mangrum, Comment, *Comment on the Proposed Revision to Federal Rule of Evidence 702: "Clarifying" The Court's Gatekeeping Responsibility over Expert Testimony*, 56 Creighton L. Rev. 97, 108 (Dec. 2022) ("[T]he courts and counsel should review what the Advisory Committee labeled as prior 'incorrect' interpretations of 702" to "avoid future Rule 702 mistakes.").

246. Lasker & Lawrence Ebner, *supra* note 244; *see generally* Eric Lasker & Joshua Leader (eds.)., *New Federal Rule of Evidence Rule 702: A Circuit-by-Circuit Guide to Overruled "Wayward Caselaw*," Vol. 91 No. 2, Def. Counsel J. (June 28, 2024) (discussing cases in each federal circuit misapplying Rule 702), https://www.iadclaw.org/defensecounseljournal/new-federal-rule-of-evidence-rule-702-a-circuit-by-circuit-guide-to-overruled-wayward-caselaw/?b=dVWYaLjZMGKY3U9rKlWc3DObz8aO2K-L5YEuoM72MVtbms7QDfXYZJ1YVASkQ%2FuMa [https://perma.cc/QFP7-H9FG].

247. Lasker & Lawrence Ebner, *supra* note 244.

248. Lawyers for Civil Justice, *Don't Say* Daubert *(It's Rule 702)*, https://dontsay-daubert.com/ [https://perma.cc/6WP7-Y5WV].

VI. Conclusion

Judicial legitimacy requires judges to rule based on the law and the facts presented to them.[249] Rule 702 is one of the best-documented areas where courts have frequently misapplied (or ignored) the law. In this case, the problem was widespread enough to command the attention of the federal judiciary's Advisory Committee on Evidence Rules and prompt an amendment to Rule 702. The 2023 amended Rule is intended to lead courts to properly apply the pre-existing standard for admission.

Judges are already living with this new Rule. And, just as judges must do their best to apply the Rule properly, lawyers must do their best in briefing this issue to properly educate the courts. Stressing the Rule rather than obsolete precedent is a start.

One would expect all circuit courts to lead by example, put personal preferences aside, and follow the law.[250] If that does not happen, the United States Supreme Court must step in.[251]

249. Mark A. Behrens & Andrew J. Trask, *The Rule of Science and the Rule of Law*, 49 Sw. U. L. Rev. 436, 438 (2021) (concluding that "science in courtrooms should track mainstream science and not change in outcome-determinative ways based on location. When the rule of science is lost in the courts, so is the rule of law."); Sherman Joyce, *New Rule 702 Helps Judges Keep Bad Science out of Court*, Law360 (Feb. 13, 2024), https://www.law360.com/articles/1796188/new-rule-702-helps-judges-keep-bad-science-out-of-court [https://perma.cc/322B-GE99] ("Judges' commitment to rigorous policing of science is paramount in safeguarding the integrity of the legal system.").

250. Erin Sheley, *Courts Must, as Recently Reminded, Follow the Law in Rule 702 Expert Testimony Determinations*, 28-7 Mealey's Daubert Rep. 23 (July 2024) ("Justice and the preponderance of evidence standard both require that courts test proffered expert testimony on each of the criteria of Rule 702, as expanded upon by *Daubert*, and exclude that which cannot meet them.").

251. Victor E. Schwartz, *Expert Evidence: The Gatekeeper Role of Justice*, 18 Brook. J. Corp. Fin. & Com. L. 69, 71 (2023) ("With verdicts in tort cases increasing in frequency and amount, it is more important than ever that judges protect innocent defendants from being held responsible for harms they did not cause. Judges should embrace this basic justice and act as gatekeepers against misleading and unreliable expert evidence."); Michael Harrington, *States Should Follow Federal Lead on Expert Evidence Rules*, Law360 (Apr. 12, 2024), https://www.law360.com/articles/1824304/states-should-follow-federal-lead-on-expert-evidence-rules [https://perma.cc/GZ8A-EBLE] (former general counsel for Eli Lilly & Co. stating that "innovation in every sector of the economy is constrained when companies are forced to contemplate that legal decisions may not be based on provable facts or scientific methods").