COMMENT
to the

ADVISORY COMMITTEE ON EVIDENCE RULES
and its
RULE 702 SUBCOMMITTEE

CLEARING UP THE CONFUSION: THE NEED FOR A RULE 702 AMENDMENT TO ADDRESS THE PROBLEMS OF INSUFFICIENT BASIS AND OVERSTATEMENT

September 6, 2019

Lawyers for Civil Justice ("LCJ")[1] respectfully submits this Comment to the Advisory Committee on Evidence Rules ("Committee") and its Rule 702 Subcommittee ("Subcommittee").

INTRODUCTION

The Committee's examination of expert evidence standards has revealed widespread inconsistency in the application of Rule 702. For example, the Committee's thorough evaluation of the cases cited in the William and Mary law review article[2] was summarized as follows:

> 1. Five circuit court opinions in which the court appeared to apply a Rule 104(b) standard to the questions of sufficiency of basis and reliable application;
> 2. Six circuit opinions in which the court used inappropriate Rule 104(b) language, but actually appeared to apply the Rule 104(a) standard to those questions;
> 3. Three district court opinions that wrongly applied the Rule 104(b) standard;
> 4. Four district court opinions that used Rule 104(b) language but actually appeared to review under Rule 104(a); and

[1] Lawyers for Civil Justice ("LCJ") is a national coalition of corporations, law firms, and defense trial lawyer organizations that promotes excellence and fairness in the civil justice system to secure the just, speedy, and inexpensive determination of civil cases. For over 30 years, LCJ has been closely engaged in reforming federal procedural rules in order to: (1) promote balance and fairness in the civil justice system; (2) reduce costs and burdens associated with litigation; and (3) advance predictability and efficiency in litigation.

[2] Eric Lasker and David Bernstein, *Defending Daubert: It's Time to Amend Federal Rule of Evidence 702*, 57William & Mary L. Rev. 1 (2015).

5. Three district court opinions in which Rule 104(b) language was used and there is not enough to determine from the opinion which standard was actually applied.[3]

Understanding the nuances among these decisions is very important—but so is the big picture: Rule 702 is not providing adequate direction to the courts, causing courts to misapply the rule's requirements and inviting policy judgments that are inconsistent with the rule's intent. That some courts nevertheless arrive at the correct result, after misapplying the rule, should be of little solace to the Committee.

An amendment to Rule 702 would remedy the widespread inconsistencies by clarifying that: (1) the proponent of the expert's testimony bears the burden of establishing its admissibility; (2) the proponent's burden requires demonstrating the sufficiency of the basis and reliability of the expert's methodology and its application; and (3) an expert shall not assert a degree of confidence in an opinion that is not itself derived from sufficient facts and reliable methods. Additionally, the Committee should clarify that the statement in the 2000 Note that "the rejection of expert testimony is the exception rather than the rule" was not meant to define or affect the standards for admissibility of expert opinion testimony.

I. FRE 702 SHOULD CLARIFY THAT THE PROPONENT HAS THE BURDEN TO ESTABLISH ADMISSIBILITY OF EXPERT TESTIMONY BECAUSE A MISUNDERSTANDING OF THAT BURDEN IS CAUSING COURTS TO MISAPPLY THE RULE.

The current absence of an explicit allocation of the burden for establishing admissibility has caused courts to rely upon their characterizations of the nature of Rule 702, rather than to apply the directives of the Rule itself. This drift away from the text of Rule 702 dilutes the consistency and thoroughness of judicial analysis and undermines the gatekeeper function that Rule 702 intends.

Specifically, a number of courts have invented a "presumption of admissibility" that puts a thumb on the scale when assessing whether an expert's testimony will pass muster under Rule 702.[4] No such presumption appears in the current language of the Rule. Rather, this phantom presumption seems to have arisen from a decision pre-dating the 2000 amendments to Rule 702, in which the Second Circuit asserted that "by loosening the strictures on scientific evidence set by *Frye* [*v. United States*, 293 F. 1013 (D.C.Cir.1923)], *Daubert* reinforces the idea that there

[3] Agenda Book, Spring 2019 at 118.

[4] *See, e.g., Price v. General Motors, LLC*, No. CIV-17-156-R, 2018 WL 8333415, at *1 (W.D. Okla. Oct. 3, 2018)("there is a presumption under the Rules that expert testimony is admissible.")(quotation omitted); *Chen-Oster v. Goldman, Sachs & Co.*, 114 F. Supp.3d 110, 115 (S.D.N.Y. 2015)("There is a presumption that expert evidence is admissible"); *Powell v. Schindler Elevator Corp*., No. 3:14cv579 (WIG), 2015 WL 7720460, at *2 (D. Conn. Nov. 30, 2015)("The Second Circuit has made clear that *Daubert* contemplates liberal admissibility standards, and reinforces the idea that there should be a presumption of admissibility of evidence."); *Advanced Fiber Technologies (AFT) Trust v. J&L Fiber Services, Inc*., No. 1:07-CV-1191, 2015 WL 1472015, at *20 (N.D.N.Y. Mar. 31, 2015)("In assuming this [gatekeeper] role, the Court applies a presumption of admissibility."); *Bericochea-Cartagena v. Suzuki Motor Co.*, 7 F. Supp.2d 109, 112–13 (D.P.R. 1998)("this role is tempered by the liberal thrust of the Federal Rules of Evidence and the presumption of admissibility.")(quotation omitted).

should be a presumption of admissibility of evidence."[5] While the ancient *Frye* rule was certainly quite restrictive in some ways, its replacement provides no justification for creating a presumption in Rule 702 to negate the rule's intent that the proponent must demonstrate the admissibility of the expert's testimony.[6] In fact, the U.S. Supreme Court explicitly recognized that "while the Federal Rules of Evidence allow district courts to admit a somewhat broader range of scientific testimony than would have been admissible under *Frye*, they leave in place the 'gatekeeper' role of the trial judge in screening such evidence."[7]

In the absence of a clear textual statement of the proper burden of proof within Rule 702 itself, some other courts have incorporated the characterization of the rule as a "liberal standard" into the analysis of expert admissibility. Allowing such result-oriented viewpoints to influence a court's Rule 702 analysis produces a diluted assessment in which admission of the expert's testimony is a foregone conclusion.[8] A bias favoring expansive admissibility is pernicious because it can easily affect Rule 702 determinations that are otherwise subject only to a loose "abuse of discretion" appellate review.[9]

The rule's lack of clarity has also resulted in the formation of regional variations in the standard actually applied, contrary to the uniformity goal of the Federal Rules. Several circuits have adopted, as a matter of policy not simply interpretation, deliberately divergent views of the standard of expert admissibility. Courts in the Ninth Circuit recognize that they apply a standard

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[5] *Borawick v. Shay*, 68 F.3d 597, 610 (2d Cir. 1995), *cert denied*, 517 U.S. 1229 (1996). *See also Powell*, 2015 WL 7720460, at *2; (citing *Borawick* as the source of the referenced "presumption of admissibility"); *Milliman v. Mitsubishi Caterpillar Forklift Am., Inc.*, 594 F. Supp.2d 230, 238 (N.D.N.Y. 2009)(same); *UMG Recordings, Inc. v. Lindor*, 531 F. Supp.2d 453, 456 (E.D.N.Y. 2007) (same).

[6] The Rule 702 standard is widely recognized to place the burden of establishing admissibility on the proponent, rather than assuming the opinion testimony will be admitted unless demonstrated to be inadequate. *See, e.g., Varlen Corp. v. Liberty Mut. Ins. Co.*, 924 F.3d 456, 459 (7th Cir. 2019)("An expert's proponent has the burden of establishing the admissibility of the opinions"); *In re Teltronics, Inc.*, 904 F.3d 1303, 1311 (11th Cir. 2018)("The proponent of the expert testimony bears the burden of establishing that each of these [Rule 792] criteria is satisfied."); *Sims v. Kia Motors of Am., Inc.*, 839 F.3d 393, 400 (5th Cir. 2016)("The proponent of expert testimony bears the burden of establishing the reliability of the expert's testimony."); *In re Pfizer Inc. Sec. Litig.*, 819 F.3d 642, 658 (2d Cir. 2016)(" The proponent of the expert testimony has the burden to establish these admissibility requirements[.]"); *United States v. McGill*, 815 F.3d 846, 903 (D.C. Cir. 2016)("The proponent of the expert testimony bears the burden to establish the admissibility of the testimony and the qualifications of the expert."); E.*E.O.C. v. Kaplan Higher Educ. Corp.*, 748 F.3d 749, 752 (6th Cir. 2014)("the proponent of expert testimony . . . bears the burden of proving its admissibility") (citing 2000 Advisory Committee notes); *United States v. Tetioukhine*, 725 F.3d 1, 6 (1st Cir. 2013) ("The proponent of the [Rule 702] evidence bears the burden of demonstrating its admissibility."); *Conroy v. Vilsack*, 707 F.3d 1163, 1168 (10th Cir. 2013) ("The proponent of expert testimony bears the burden of showing that the testimony is admissible."). *See* Fed. R. Evid. 702 Advisory Comm. Notes, 2000 Amendments ("the proponent has the burden of establishing that the pertinent admissibility requirements are met by a preponderance of the evidence").

[7] *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 142, (1997).

[8] *See, e.g., Bonita Properties, LLC v. C&C Marine Maintenance Co*., No. 2:12cv247, 2016 WL 10520137 (W.D. Pa. Aug. 16, 2016)("In performing this function, courts must be mindful that Rule 702 of the Federal Rules of Evidence has a liberal policy of admissibility. Indeed, the Third Circuit has observed that the standard for admissibility is not intended to be a high one.. . . . Perceived flaws in Dufour's methodology, standing alone, do not justify excluding his testimony.")(quotations omitted); *In re Zyprexa Prod. Liab. Litig.*, 489 F. Supp.2d 230, 282 (E.D.N.Y. 2007)("Since Rule 702 embodies a liberal standard ofadmissibility for expert opinions, the assumption the court starts with is that a well-qualified expert's testimony is admissible.").

[9] *Joiner*, 522 U.S. at 146, ("We hold . . . that abuse of discretion is the proper standard by which to review a district court's decision to admit or exclude scientific evidence.").

that is "more tolerant of borderline expert opinions than in other circuits."[10] Courts in the Second Circuit have determined that they will give "especially broad" reception to expert testimony, despite the directives of Rule 702.[11] The Eighth Circuit has taken a policy position that the burden of establishing reliability or a sufficient factual basis should not pose an obstacle to admitting expert testimony.[12]

The development of regional variations based on characterizations or policy preferences, rather than the standards set forth in Rule 702 itself, is increasingly problematic. MDL and pattern litigation concentrate key decisions into individual courts; MDL rulings on the admissibility of a particular expert's analysis are ordinarily given great weight by later courts addressing the admissibility of similar opinion testimony in remanded or companion cases in other districts. When courts from different circuits apply unique overlays or conceptions to the Rule 702 standard, the consistency expected from a uniform national rule vanishes, and forum shopping is encouraged.

Even more fundamentally, when courts assess expert opinions "presuming admissibility," or re-configuring the standard to exclude expert testimony only when it is "fundamentally unreliable," they effectively shift the burden of proof away from the proponent. The fact that these developments have taken place indicates that the current language of Rule 702 is failing to provide sufficient direction and needs amendment to re-align application of the Rule with its intent.[13] The intent can be restored by an amendment such as the following to insert the burden of proof into Rule 702:

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[10] *In re Roundup Products Liability Litigation*, 358 F. Supp.2d 956, 959 (N.D. Cal. 2019). *See also id*. at 960 ("Of course, district judges must still exercise their discretion, but in doing so they must account for the fact that a wider range of expert opinions (arguably much wider) will be admissible in this circuit."); *Hannah v. United States*, No. 2:17-cv-01248-JAM-EFB, 2019 WL 316812, at *3 (E.D. Cal. Jan. 24, 2019)("The Ninth Circuit has not imposed such stringent requirements for medical experts."); *In re Roundup Products Liability Litigation*, No. 16-md-02741-VC, 2018 WL 3368534, at *5 (N.D. Cal. July 10, 2018) ("[The Ninth Circuit's] emphasis has resulted in slightly more room for deference to experts in close cases than might be appropriate in some other Circuits. This is a difference that could matter in close cases.")(citations omitted).

[11] *United States v. Raniere*, No. 18-CR-204-1 (NGG) (VMS), 2019 WL 2212639, at *6 (E.D.N.Y. May 22, 2019) ("The Second Circuit's standard for admissibility of expert testimony is especially broad.")(citations omitted).

[12] *See Nebraska Plastics, Inc. v. Holland Colors Americas, Inc.*, 408 F.3d 410, 416 (8th Cir. 2005)("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.")(quotation and citations omitted); *United States v. Ameren Missouri*, 2019 WL 1384580, at *3 (E.D. Mo. Mar. 27, 2019)("Additionally, in a borderline circumstance such as this, it is far better to allow the expert opinion, and if the court remains unconvinced, allow the jury to pass on the evidence.")(quotation and citations omitted); *Paul Beverage Co. v. American Bottling Co.*¸ No. 4:17CV2672 JCH, 2019 WL 1044057, at *2 (E.D. Mo. Mar. 5, 2019)("The expert's opinion thus should be excluded only when it is so fundamentally unreliable that it can offer no assistance to the jury.")(quotation and citations omitted).

[13] Even the circuits which incorporate presumptions, characterizations, and policy variations in the standard have acknowledged that Rule 702 intends to place the burden of establishing admissibility on the expert's proponent. See *Varlen Corp.*, 924 F.3d at 459 ("An expert's proponent has the burden of establishing the admissibility of the opinions"); *Pfizer Inc. Sec. Litig.*, 819 F.3d at 658 (" The proponent of the expert testimony has the burden to establish these admissibility requirements[.]"); *Conroy*, 707 F.3d at 1168 ("The proponent of expert testimony bears the burden of showing that the testimony is admissible."); *United States v. 87.98 Acres of Land More or Less in the Cty. of Merced*, 530 F.3d 899, 904 (9th Cir. 2008)(" As the proponent of . . . expert testimony, [it] also has the burden to establish its admissibility."); *Menz v. New Holland N. Am., Inc.*, 507 F.3d 1107, 1114 (8th Cir. 2007)("The proponent of the expert testimony bears the burden to prove its admissibility.").

> The proponent of the opinion testimony bears the burden of establishing the expert's qualification, helpfulness, and reliability for each opinion to be expressed.[14]

Placing this language within the Rule will remedy the inconsistencies the Committee has noted by focusing the attention of courts assessing challenged expert testimony on what is required to meet the standard.

II. THE 2000 COMMITTEE NOTE SHOULD BE CORRECTED BECAUSE A COMMON MISINTERPRETATION IS CAUSING COURTS TO PRESUME ADMISSIBILITY OF EXPERT TESTIMONY.

The Advisory Committee's 2000 Note mentioning that exclusion of expert testimony is the "exception" is also causing inconsistency, by drawing courts' attention away from the substance of Rule 702's requirements. Taken in context,[15] this Note makes the simple observation that judicial decisions ruling on the admissibility of expert testimony between 1993, when *Daubert* was decided, and the 2000 issuance of revised Rule 702 had not excluded opinion testimony with high frequency. A number of courts, however, have converted this empirical observation into a qualitative commentary on the nature of Rule 702 and interpreted it to reinforce the misguided idea that proffered expert testimony should be presumed admissible.[16]

In conjunction with amending the language of Rule 702, the Committee should also draft a Note explaining this comment. Doing so would repair a distraction that is re-directing the attention of too many lower courts away from the directives of the rule itself.

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[14] This language is adapted from *United States v. Wilson*, 634 F. App'x 718, 735 (11th Cir. 2015)("The proponent of the expert opinion bears the burden of establishing qualification, reliability, and helpfulness by a preponderance of the evidence."). *See also Daubert v. Merrell Dow Pharmaceuticals, Inc*., 509 U.S. 579, 592 n. 10 (1993).

[15] The full sentence reads "A review of the caselaw after *Daubert* shows that the rejection of expert testimony is the exception rather than the rule." Fed. R. Evid. 702 Advisory Committee Note (2000).

[16] *See, e.g., Joe-Cruz v. United States*, Civ. No. 16-258 JCH/JHR, 2018 WL 1322139, at *3 (D.N.M. Mar. 14, 2018)("The Federal Rules encourage the admission of expert testimony. . . . The presumption under the Rules is that expert testimony is admissible. 'A review of the caselaw after *Daubert* shows that the rejection of expert testimony is the exception rather than the rule.' Fed. R. Evid. 702 Advisory Committee's note to 2000 amendment.")(citations omitted); *Chen-Oster v. Goldman, Sachs & Co.*, 114 F. Supp.3d 110, 115 (S.D.N.Y. 2015)("There is a presumption that expert evidence is admissible and 'the rejection of expert testimony is the exception rather than the rule.' Fed. R. Evid. 702 advisory committee's note (2000)")(internal quotation omitted); *Evans v. Washington Metro. Area Transit Auth.*, 674 F. Supp.2d 175, 178 (D.D.C. 2009)("The presumption under the Federal Rules is that expert testimony is admissible. . . . Fed.R.Evid. 702 Advisory Committee Note (2000) ('A review of the caselaw after *Daubert* shows that the rejection of expert testimony is the exception rather than the rule.')")(citations and quotation omitted). *See also In re Scrap Metal Antitrust Litig.*, 527 F.3d 517, 530 (6th Cir. 2008)("But 'rejection of expert testimony is the exception, rather than the rule,' and we will generally permit testimony based on allegedly erroneous facts when there is some support for those facts in the record.")(quoting Fed. R. Evid. 702 advisory committee's note, 2000 amend.).

III. FRE 702 SHOULD EXPLICITLY PRECLUDE WITNESSES FROM EXPRESSING A DEGREE OF CONFIDENCE IN OPINIONS ABSENT A RELIABLE BASIS FOR THOSE ASSERTIONS.

The Committee's consideration of the dangers of expert "overstatement" is important in civil as well as criminal cases. Specifically, assertions of confidence in the veracity of an expert's conclusions, unless supported by a reliable methodology and limited by the established understanding of the field of expertise, create the potential for misleading juries and producing unjust results. The potential for expert overstatement to impact decision-making is very real; jury research shows that the confidence expressed by an expert has an outsized effect, which creates the potential for abuse when statements of confidence lack evidentiary basis and reflect nothing more than the expert's exuberance about the theory.[17] The rule should contain a direct restriction that prevents an expert from claiming a degree of confidence in an opinion unless that expression of certainty is drawn from reliably employed principles and methods.

One example of excessive, but unsubstantiated, expression of confidence in a conclusion commonly seen in civil cases involves opinions using a "differential diagnosis" methodology for identifying the cause of a medical condition. This practice involves eliminating known alternative causes, but it is frequently applied to conditions for which science has not established all possible causes—and so the expert cannot eliminate those presently unknown causes. Many courts (and other authorities) hold that the use of a differential etiology in such a scenario is fundamentally unreliable.[18] Yet courts addressing opinion testimony reflecting a differential diagnosis that ignores the presence of unknown causes often allow the experts not only to testify regarding causation, but also to provide bold, but scientifically unjustified, expressions of confidence in the conclusion. For example, one expert was allowed to assert that "[w]hatever other factors may have played a role in cancer development, the cancer would not have developed to clinical significance in the absence of [exposure to the product at issue]."[19] Another court allowed an expert who applied a differential diagnosis despite "scientific unknowns" to conclude that "[t]he use of [the drug] was a significant contributor <u>in all medical</u>

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[17] *See, e.g.*, Neil Vidmar, *Expert Evidence, the Adversary System, and the Jury*, 95 Amer. J. Pub. Health S137, S139 (Supplement 1 2005)("The jurors reported that the factors they considered were such things as the expert's tendency to draw firm conclusions, his or her reputation, familiarity with the facts of the case, reasoning, and appearance of impartiality, including bias associated with the party that called the expert.").

[18] *See, e.g.*, Reference Manual on Scientific Evidence at 618 ("Although differential etiologies are a sound methodology in principle, this approach is only valid if general causation exists and a substantial proportion of competing causes are known. Thus, for diseases for which the causes are largely unknown, such as most birth defects, a differential etiology is of little benefit"); Restatement (Third) of Torts: Phys. & Emot. Harm § 28, cmt. c(4) (2010) ("When the causes of a disease are largely unknown, however, differential etiology is of little assistance."); *Bland v. Verizon Wireless, (VAW) L.L.C.*, 538 F.3d 893, 897 (8th Cir. 2008) (the expert's "attempt to use a differential diagnosis . . . fails because . . . the cause of exercise-induced asthma in the majority of cases is unknown."); *Doe 2 v. OrthoClinical Diagnostics, Inc.*, 440 F. Supp.2d 465, 477-78 (M.D.N.C. 2006) ("Although [the expert] apparently has considered a number of specific genetic disorders in performing his differential diagnosis, the Court finds that his failure to take into account the existence of such a strong likelihood of a currently unknown genetic cause of autism serves to negate [his] use of the differential diagnosis technique as being proper in this instance."); *Whiting v. Boston Edison Co.*, 891 F. Supp. 12, 21 n.41 (D. Mass. 1995) ("If 90 percent of the causes of a disease are unknown, it is impossible to eliminate an unknown disease as the efficient cause of a patient's illness.").

[19] *Costa v. Wyeth, Inc.*, No. 8:04–cv–2599–T–27MAP, 2012 WL 1069189, at *4 (M.D. Fla. Mar. 29, 2012).

certainty to the development of acute kidney injury in [the plaintiff.]"[20] These statements of certainty in the conclusion of causation, while very powerful, do not arise from any actual methodology. Such overstated expressions of confidence therefore cannot be squared with Rule 702's requirement that all expert opinions be the product of reliable principles and methods applied reliably to the facts of the case.

Amending Rule 702 to prevent testimony expressing overstated, but unsubstantiated, confidence in the conclusion that an expert has reached would help courts distinguish between an opinion for which there may be a reliable basis and an overstated or speculative expression of certainty in the veracity of a questionable opinion. The Committee should consider adding language such as the following:

> An expert shall not describe a degree of confidence in the opinions and conclusions expressed unless a basis for such confidence is independently established in accordance with the standards of this Rule.

CONCLUSION

That current Rule 702 is failing to provide clear, uniform standards for the admission of expert testimony is undeniable, given the well-observed inconsistencies including numerous regional variations that have emerged. Amendments are needed to clarify that: (1) the proponent has the burden to establish the basis for expert testimony; (2) this burden is to show sufficiency of basis and reliability of application by a preponderance of evidence; and (3) experts shall not testify to a degree of confidence in an opinion that cannot be drawn from the principles and methods applied. Additionally, the Committee should address the 2000 Note to clarify that the statement "A review of the caselaw after *Daubert* shows that the rejection of expert testimony is the exception rather than the rule" was not meant to define or affect the standards for admissibility of expert opinion testimony.

[20] *In re Trasylol Products Liability Litigation*, No. 08-MD-01928, 2010 WL 8354662, at *8, *11 (S.D. Fla. Nov. 23, 2010)(emphasis added).