# ADVISORY COMMITTEE
# ON
# RULES OF EVIDENCE

**November 13, 2020**

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# ADVISORY COMMITTEE ON EVIDENCE RULES

## AGENDA FOR COMMITTEE MEETING

**November 13, 2020**

## I. Committee Meeting --- Opening Business

Opening business includes:

- Introduction of new Chair, Hon. Patrick Schiltz
- Approval of the minutes of the Fall, 2019 meeting.
- Report on the June, 2020 meeting of the Standing Committee.

## II. Rule 702

The Committee has been considering two possible changes to Rule 702: 1) an amendment regulating overstatement of expert conclusions (directed toward, but not only toward, forensic experts); and 2) an amendment (or Committee Note) that the admissibility requirements set forth in the rule --- most especially sufficiency of basis and reliability of application --- are matters that must be decided by the court by a preponderance of the evidence under Rule 104(a). The Reporter's memorandum on these possible changes is behind Tab 2.

Immediately behind the Reporter's memo are three attachments:

1. A case digest prepared by the Reporter on forensic expert testimony;

2. Judge Schroeder's recently published article in the Notre Dame Law Review on the Rule 104(a)/104(b) question.

3. Letters and Reports to the Committee from the defense bar in support of an amendment to Rule 702.

## III. Rule 106

The Committee has been considering a proposal to amend Rule 106, the rule of completeness, for two purposes: 1. to specify that completing evidence is not barred by the hearsay rule; and 2. to extend its coverage to oral statements. The Reporter's memorandum on the subject is behind Tab 3.

Immediately behind the Reporter's memo is a report prepared by Professor Richter on case law in the states that allow completion with unrecorded oral statements.

## IV. Rule 615

The Committee is considering whether the Rule should be amended to provide that a Rule 615 order extends to prohibiting excluded witnesses from obtaining or from being provided trial testimony while they are excluded from the courtroom. The Reporter's memorandum on Rule 615 is behind Tab 4.

## V. Emergency Rule

The Committee was asked to consider whether the Evidence Rules should be amended to provide for different rules in an emergency such as the pandemic. The Reporter's memorandum on the subject is behind Tab 5.

## VI. Circuit Splits

The Reporter has prepared a memorandum on circuit splits on the meaning of certain Federal Rules of Evidence. This is being submitted to assess the interest of the Committee in considering amendments to rectify some of these circuit splits. The memorandum is behind Tab 6.

## VII. *Crawford* Outline

The Reporter's updated outline on cases applying the Supreme Court's Confrontation Clause jurisprudence is behind Tab 7.

# TAB 1

# TAB 1A

# RULES COMMITTEES — CHAIRS AND REPORTERS

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## Advisory Committee on Evidence Rules

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United States Courthouse
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# ADVISORY COMMITTEE ON EVIDENCE RULES

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**Advisory Committee on Evidence Rules**

| Members | Position | District/Circuit | Start Date | End Date |
|---|---|---|---|---|
| Patrick J. Schiltz | D | Minnesota | Member: 2020<br>Chair: 2020 | ----<br>2023 |
| James P. Bassett | JUST | New Hampshire | 2016 | 2022 |
| Shelly Dick | D | Louisiana (Middle) | 2017 | 2020 |
| Richard Donahue* | DOJ | Washington, DC | ---- | Open |
| Traci L. Lovitt | ESQ | Massachusetts | 2016 | 2022 |
| J. Tom Marten | D | Kansas | 2014 | 2020 |
| Kathryn Nester | FPD | California (Southern) (CDO) | 2018 | 2021 |
| Thomas D. Schroeder | D | North Carolina (Middle) | 2017 | 2020 |
| Daniel J. Capra<br>Reporter | ACAD | New York | 1996 | Open |

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## RULES COMMITTEE LIAISON MEMBERS

| | |
|---|---|
| Liaisons for the Advisory Committee on Appellate Rules | Hon. Frank M. Hull<br>*(Standing)*<br><br>Hon. Bernice B. Donald<br>*(Bankruptcy)* |
| Liaison for the Advisory Committee on Bankruptcy Rules | Hon. William J. Kayatta, Jr.<br>*(Standing)* |
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| Liaison for the Advisory Committee on Criminal Rules | Hon. Jesse M. Furman<br>*(Standing)* |
| Liaisons for the Advisory Committee on Evidence Rules | Hon. James C. Dever III<br>*(Criminal)*<br><br>Hon. Carolyn B. Kuhl<br>*(Standing)*<br><br>Hon. Sara Lioi<br>*(Civil)* |

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# TAB 1B

**Effective December 1, 2019**

REA History:

- No contrary action by Congress
- Adopted by Supreme Court and transmitted to Congress (Apr 2019)
- Approved by Judicial Conference (Sept 2018) and transmitted to Supreme Court (Oct 2018)

| Rule | Summary of Proposal | Related or Coordinated Amendments |
|---|---|---|
| AP 3, 13 | Changed the word "mail" to "send" or "sends" in both rules, although not in the second sentence of Rule 13. | |
| AP 26.1, 28, 32 | Rule 26.1 amended to change the disclosure requirements, and Rules 28 and 32 amended to change the term "corporate disclosure statement" to "disclosure statement" to match the wording used in amended Rule 26.1. | |
| AP 25(d)(1) | Eliminated unnecessary proofs of service in light of electronic filing. | |
| AP 5.21, 26, 32, 39 | Technical amendment that removed the term "proof of service." | AP 25 |
| BK 9036 | Amended to allow the clerk or any other person to notice or serve registered users by use of the court's electronic filing system and to serve or notice other persons by electronic means that the person consented to in writing. | |
| BK 4001 | Amended to add subdivision (c) governing the process for obtaining post-petition credit in a bankruptcy case, inapplicable to chapter 13 cases. | |
| BK 6007 | Amended subsection (b) to track language of subsection (a) and clarified the procedure for third-party motions brought under § 554(b) of the Bankruptcy Code. | |
| BK 9037 | Amended to add subdivision (h) providing a procedure for redacting personal identifiers in documents that were previously filed without complying with the rule's redaction requirements. | |
| CR 16.1 (new) | New rule regarding pretrial discovery and disclosure. Subsection (a) requires that, no more than 14 days after the arraignment, the attorneys are to confer and agree on the timing and procedures for disclosure in every case. Subsection (b) emphasizes that the parties may seek a determination or modification from the court to facilitate preparation for trial. | |
| EV 807 | Residual exception to the hearsay rule; clarifies the standard of trustworthiness. | |
| 2254 R 5 | Makes clear that petitioner has an absolute right to file a reply. | |
| 2255 R 5 | Makes clear that movant has an absolute right to file a reply. | |

**Effective February 19, 2020**

The Interim Rules listed below were published for comment in the fall of 2019 outside the normal REA process and approved by the Judicial Conference for distribution to Bankruptcy Courts to be adopted as local rules to conform procedure to changes in the Bankruptcy Code – adding a subchapter V to chapter 11 – made by the Small Business Reorganization Act of 2019

| Rule | Summary of Proposal | Related or Coordinated Amendments |
|---|---|---|
| BK 1007 | The amendments exclude a small business debtor in subchapter V case from the requirements of the rule. | |
| BK 1020 | The amendments require a small business debtor electing to proceed on the subchapter V to state its intention on the bankruptcy petition or within 14 days after the order for relief is entered. | |
| BK 2009 | 2009(a) and (b) are amended to exclude subchapter V debtors and 2009(c) is amended to add subchapter V debtors. | |
| BK 2012 | 2012(a) is amended to include chapter V cases in which the debtor is removed as the debtor in possession. | |
| BK 2015 | The rule is revised to describe the duties of a debtor in possession, the trustee, and the debtor in a subchapter V case. | |
| BK 3010 | The rule is amended to include subchapter V cases. | |
| BK 3011 | The rule is amended to include subchapter V cases. | |
| BK 3014 | The rule is amended to provide a deadline for making an election under 1111(b) of the Bankruptcy Code in a subchapter V case. | |
| BK 3016 | The rule is amended to reflect that a disclosure statement is generally not required in a subchapter V case, and that official forms are available for a reorganization plan and - if required by the court - a disclosure statement. | |
| BK 3017.1 | The rule is amended to apply to subchapter V cases where the court has ordered that the provisions of 1125 of the Bankruptcy Code applies. | |
| BK 3017.2 | This is a new rule that fixes dates in subchapter V cases where there is no disclosure statement. | |
| BK 3018 | The rule is amended to take account of the court's authority to set times under Rules 3017.1 and 3017.2 in small business cases and subchapter V cases. | |
| BK 3019 | Subdivision (c) is added to the rule to govern requests to modify a plan after confirmation in a subchapter V case under 1193(b) or (c) of the Bankruptcy Code. | |

**Effective (no earlier than) December 1, 2020**

Current Step in REA Process:

- Adopted by Supreme Court and transmitted to Congress (Apr 2020)

REA History:

- Approved by Judicial Conference (Sept 2019) and transmitted to Supreme Court (Oct 2019)
- Approved by Standing Committee (June 2019)
- Approved by relevant advisory committee (Spring 2019)
- Published for public comment (unless otherwise noted, Aug 2018-Feb 2019)
- Approved by Standing Committee for publication (unless otherwise noted, June 2018)

| Rule | Summary of Proposal | Related or Coordinated Amendments |
|---|---|---|
| AP 35, 40 | Proposed amendment clarifies that length limits apply to responses to petitions for rehearing plus minor wording changes. | |
| BK 2002 | Proposed amendment would: (1) require giving notice of the entry of an order confirming a chapter 13 plan; (2) limit the need to provide notice to creditors that do not file timely proofs of claim in chapter 12 and chapter 13 cases; and (3) add a cross-reference in response to the relocation of the provision specifying the deadline for objecting to confirmation of a chapter 13 plan. | |
| BK 2004 | Amends subdivision (c) to refer specifically to electronically stored information and to harmonize its subpoena provisions with the current provisions of Civil Rule 45, which is made applicable in bankruptcy cases by Bankruptcy Rule 9016. | CV 45 |
| BK 8012 | Conforms Bankruptcy Rule 8012 to proposed amendments to Appellate Rule 26.1 that were published in Aug 2017. | AP 26.1 |
| BK 8013, 8015, and 8021 | Unpublished. Eliminates or qualifies the term "proof of service" when documents are served through the court's electronic-filing system conforming to pending changes in 2019 to AP Rules 5, 21, 26, 32, and 39. | AP 5, 21, 26, 32, and 39 |
| CV 30 | Proposed amendment to subdivision (b)(6), the rule that addresses deposition notices or subpoenas directed to an organization, would require the parties to confer about the matters for examination before or promptly after the notice or subpoena is served. The amendment would also require that a subpoena notify a nonparty organization of its duty to confer and to designate each person who will testify. | |
| EV 404 | Proposed amendment to subdivision (b) would expand the prosecutor's notice obligations by: (1) requiring the prosecutor to "articulate in the notice the permitted purpose for which the prosecutor intends to offer the evidence and the reasoning that supports the purpose"; (2) deleting the requirement that the prosecutor must disclose only the "general nature" of the bad act; and (3) deleting the requirement that the defendant must request notice. The proposed amendments also replace the phrase "crimes, wrongs, or other acts" with the original "other crimes, wrongs, or acts." | |

**Effective (no earlier than) December 1, 2021**

Current Step in REA Process:

- Approved by Judicial Conference (Sept 2020)

REA History:

- Approved by Standing Committee (June 2020)
- Approved by relevant advisory committee (Apr/May 2020)
- Published for public comment (Aug 2019-Feb 2020)
- Unless otherwise noted, approved for publication (June 2019)

| Rule | Summary of Proposal | Related or Coordinated Amendments |
|---|---|---|
| AP 3 | The proposed amendment to Rule 3 addresses the relationship between the contents of the notice of appeal and the scope of the appeal. The proposed amendment changes the structure of the rule and provides greater clarity, expressly rejecting the *expressio unius* approach, and adds a reference to the merger rule. | AP 6, Forms 1 and 2 |
| AP 6 | Conforming amendment to the proposed amendment to Rule 3. | AP 3, Forms 1 and 2 |
| AP Forms 1 and 2 | Conforming amendments to the proposed amendment to Rule 3, creating Form 1A and Form 1B to provide separate forms for appeals from final judgments and appeals from other orders. | AP 3, 6 |
| BK 2005 | The proposed amendment to subsection (c) of the replaces the reference to 18 U.S.C. § 3146(a) and (b) (which was repealed in 1984) with a reference to 18 U.S.C. § 3142. | |
| BK 3007 | The proposed amendment clarifies that credit unions may be served with an objection claim under the general process set forth in Rule 3007(a)(2)(A) - by first-class mail sent to the person designated on the proof of claim. | |
| BK 7007.1 | The proposed amendment would conform the rule to recent amendments to Rule 8012 and Appellate Rule 26.1. | |
| BK 9036 | The proposed amendment would require high-volume paper notice recipients (initially designated as recipients of more than 100 court papers notices in calendar month) to sign up for electronic service and noticing, unless the recipient designates a physical mailing address if so authorized by statute. | |

**Effective (no earlier than) December 1, 2022**

Current Step in REA Process:

- Published for public comment (Aug 2020-Feb 2021)

| Rule | Summary of Proposal | Related or Coordinated Amendments |
|---|---|---|
| AP 25 | The proposed amendment to Rule 25 extends the privacy protections afforded in Social Security benefit cases to Railroad Retirement Act benefit cases. | |
| BK 3002 | The proposed amendment would allow an extension of time to file proofs of claim for both domestic and foreign creditors if "the notice was insufficient under the circumstances to give the creditor a reasonable time to file a proof of claim." | |
| BK 5005 | The proposed changes would allow papers to be transmitted to the U.S. trustee by electronic means rather than by mail, and would eliminate the requirement that the filed statement evidencing transmittal be verified. | |
| BK 7004 | The proposed amendments add a new Rule 7004(*i*) clarifying that service can be made under Rule 7004(b)(3) or Rule 7004(h) by position or title rather than specific name and, if the recipient is named, that the name need not be correct if service is made to the proper address and position or title. | |
| BK 8023 | The proposed amendments conform the rule to pending amendments to Appellate Rule 42(b) that would make dismissal of an appeal mandatory upon agreement by the parties. | AP 42(b) |
| BK Restyled Rules (Parts I & II) | The proposed rules, approximately 1/3 of current bankruptcy rules, are restyled to provide greater clarity, consistency, and conciseness without changing practice and procedure. The remaining bankruptcy rules will be similarly restyled and published for comment in 2021 and 2022, with the full set of restyled rules expected to go into effect no earlier than December 1, 2024. | |
| SBRA Rules (BK 1007, 1020, 2009, 2012, 2015, 3010, 3011, 3014, 3016, 3017.1, 3017.2 (new), 3018, 3019) | The SBRA Rules would make necessary rule changes in response to the Small Business Reorganization Act of 2019. The SBRA Rules are based on Interim Bankruptcy Rules adopted by the courts as local rules in February 2020 in order to implement the SBRA which when into effect February 19, 2020. | |
| SBRA Forms (Official Forms 101, 122B, 201, 309E-1, 309E-2, 309F-1, 309F-2, 314, 315, 425A) | The SBRA Forms make necessary changes in response to the Small Business Reorganization Act of 2019. All but the proposed change to Form 122B were approved on an expedited basis with limited public review in 2019 and became effective February 19, 2020, the effective date of the SBRA. They are being published along with the SBRA Rules in order to give the public a full opportunity to comment. | |

**Effective (no earlier than) December 1, 2022**

Current Step in REA Process:

- Published for public comment (Aug 2020-Feb 2021)

| Rule | Summary of Proposal | Related or Coordinated Amendments |
|---|---|---|
| CV 12 | The proposed amendment to paragraph (a)(4) would extend the time to respond (after denial of a Rule 12 motion) from 14 to 60 days when a United States officer or employee is sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf. | |
| CV Supplemental Rules for Social Security Review Actions Under 42 U.S.C. § 405(g) | Proposed set of uniform procedural rules for cases under the Social Security Act in which an individual seeks district court review of a final administrative decision of the Commissioner of Social Security pursuant to 42 U.S.C. § 405(g). | |
| CR 16 | Proposed amendment addresses the lack of timing and the lack of specificity in the current rule with regard to expert witness disclosures, while maintaining reciprocal structure of the current rule. | |

# TAB 1C

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**Advisory Committee on Evidence Rules**
Minutes of the Meeting of October 25, 2019
Vanderbilt University Law School
Nashville, TN.

The Judicial Conference Advisory Committee on the Federal Rules of Evidence (the "Committee") met on October 25, 2019 at the Vanderbilt University Law School in Nashville, Tennessee.

*The following members of the Committee were present:*
Hon. Debra A. Livingston, Chair
Hon. James P. Bassett
Hon. J. Thomas Marten
Hon. Thomas D. Schroeder
Traci L. Lovitt, Esq.
Kathryn N. Nester, Esq., Federal Public Defender
Elizabeth J. Shapiro, Esq., Department of Justice

*Also present were*:
Hon. David G. Campbell, Chair of the Committee on Rules of Practice and Procedure
Hon. James C. Dever III, Liaison from the Criminal Rules Committee
Hon. Carolyn B. Kuhl, Liaison from the Standing Committee
Professor Catherine T. Struve, Associate Reporter to the Standing Committee (by phone)
Professor Daniel J. Capra, Reporter to the Committee
Professor Liesa L. Richter, Academic Consultant to the Committee
Timothy Lau, Esq., Federal Judicial Center
Ted Hunt, Esq., Department of Justice
Rebecca A. Womeldorf, Esq., Secretary, Standing Committee; Rules Committee Chief Counsel
Shelly Cox, Administrative Analyst, Committee on Rules of Practice and Procedure

## I. Miniconference on Best Practices for Managing *Daubert* Questions; Rule 702

On the morning of the Committee's Fall 2019 meeting, the Committee held a miniconference on "Best Practices" for managing *Daubert* issues. The miniconference was designed to further the Committee's objective to provide education to the bench and bar on proper management of expert testimony as an addition to (or an alternative to) an amendment to Fed. R. Evid. 702. The Committee invited five experienced federal judges and a distinguished professor to share ideas about "Best Practices" in managing *Daubert* questions and in conducting *Daubert* hearings. The judges all have extensive experience in managing *Daubert* issues, and each has written extensive and influential *Daubert* opinions. The miniconference was moderated by the Reporter. A transcript

of the miniconference will be published in the Fordham law Review and copies will be distributed to federal judges.

The Chair opened the afternoon Committee meeting by applauding the great discussion that was generated at the miniconference and she invited comments for Committee discussion. Judge Campbell commented that the discussion was extremely helpful in focusing judges on the need to evaluate the admissibility requirements of Rule 702 and *Daubert* through Rule 104(a), using a preponderance of the evidence standard. He suggested that caselaw describing *Daubert* questions as primarily for the jury blurs the inquiry and noted that lawyers do not focus on the judge's obligation to make a preponderance finding when they brief *Daubert* issues. Judge Campbell stated that there may be no clear answer as to how to improve Rule 702, but 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. The Chair noted that the Committee had previously considered adding the Rule 104(a) preponderance standard to the text of Rule 702, but had ultimately rejected that option. The Reporter highlighted the problems caused by adding the Rule 104(a) standard to the text of Rule 702 – namely that the Rule 104(a) standard applies to many admissibility inquiries where it is not stated expressly in rule text – but reminded the Committee that it could emphasize the application of Rule 104(a) to Rule 702 in a Committee note if it moved forward on any other amendments to the Rule.

Judge Campbell also noted that the miniconference revealed that there can be many different problems with expert opinion testimony that might be characterized as expert "overstatement" – many of which are not the focus of the Committee's recent consideration of an amendment to Rule 702 to prevent "overstatement." In particular, he noted that an expert might attempt to testify to an opinion beyond his or her qualifications, or that an expert might be qualified and have a reliable foundation for one opinion and then attempt to add an additional opinion not supported by that same foundation. Judge Campbell suggested that these would be examples of expert "overstatement" that the Committee was not trying to address with an amendment. He explained that the Committee's concerns were centered more around an expert's "degree of confidence" for an opinion and suggested that much of expert opinion testimony (such as experience-based testimony) does not raise issues of an expert's "degree of confidence."

A Committee member responded that any factor that can affect whether a person goes to jail is significant --- for example, that risk arises when a forensic expert overstates the results that can fairly be reported from a feature-comparison. Judge Campbell agreed and the Reporter noted that even narrow rules amendments can be very effective and helpful. Still, Judge Campbell queried whether a "degree of confidence" amendment would be adding complexity to the cases not affected by that factor. The DOJ representative argued that adding a new "degree of confidence" factor to Rule 702 could create a battleground for litigants that could undermine the Rule. Judge Campbell reiterated his concern that a limitation on "overstatement" or a requirement regarding "degree of confidence" could lead to trial judges being asked to wordsmith expert opinions.

The Chair noted the ambiguity in the meaning of the term "overstatement." If a particular methodology has an error rate and the expert testifies to 100% certainty regarding an opinion, it is easy to recognize that as an "overstatement." But the Chair noted that it wasn't so clear how to

apply an "overstatement" prohibition to experience-based experts, for example. She suggested that the existing *Daubert* factors all represent standards with plenty of room for a trial judge to exercise judgment within a reasonable range. In contrast, "overstatement" seems to be a more binary factor – testimony either is or is not an "overstatement." Judge Campbell responded that "degree of confidence" may indeed reflect a standard about which judges may exercise judgment (rather than a binary inquiry). He suggested that a "degree of confidence" factor would have to be limited to types of expertise in which there is some concrete result that the expert attempts to surpass in testifying. One example might be a cell tower expert who overpromises on the precision of cell towers in locating a person's phone. He opined that it might be optimal to limit an amendment to Rule 702 to opinions with an identifiable data point from which to measure "degree of confidence" --- such as a forensic test, which provides a quantifiable result.

The Chair turned the discussion to judicial education regarding forensic evidence and science generally, querying whether the miniconference had revealed any effective methods for enhanced education. She noted that the Reporter was working with the FJC and Duke and Fordham Law Schools to put together a day-long conference on forensic evidence for federal judges to attend. One Committee member also noted that programs have been presented for judges at conferences of district and circuit courts. Another suggested that trial judges read the DOJ's uniform language regarding forensic testimony, emphasizing that opposing counsel may not object to expert overstatements and that trial judges would be better equipped to deal with the issue if they have examined the appropriate language. He suggested that trial judges should also learn to tell criminal defense counsel to review the DOJ uniform language so they are prepared to object to offending overstatements in forensic testimony. In sum, these Committee members noted that education for lawyers might be just as important as additional education for judges. Another Committee member suggested that DOJ training of non-DOJ expert witnesses on the appropriate uniform language to be used in testifying about forensic evidence could be very helpful. He noted the many cases in which the testifying experts are not DOJ analysts familiar with and bound by the DOJ policy on uniform language, and suggested that more training of the non-DOJ experts could improve the forensic expert testimony being offered in federal court.

DOJ representative Ted Hunt highlighted numerous training initiatives being undertaken by DOJ with respect to the uniform language. He described upcoming formal training for prosecutors at the National Advocacy Center, as well as engagement with state and local examiners who may be using Standard Operating Procedures not compliant with DOJ standards. He also discussed the efforts to interface with a working group of state and local leaders to educate them about feature comparison methods and to recast some of the outdated verbiage embedded in the state and local standards. Finally, he noted that efforts were underway at DOJ to strengthen some of the existing uniform language to ensure that it remains up to date. He expressed surprise that some of the federal judges participating in the miniconference had observed non-compliant overstatements in recent cases. Mr. Hunt also noted that DOJ was engaged in a working group with federal public defenders to raise awareness of the uniform language and of testimonial requirements for feature comparison experts.

Dr. Lau of the Federal Judicial Center noted that one of the participants in the miniconference had suggested that it would be helpful for judges to have a list of "red flags" that might indicate a reliability problem with expert opinion testimony. He suggested that it might be fruitful for the

FJC to explore a "red flags" list for certain areas of expertise for judges. Beyond that, Dr. Lau suggested that much of the needed education appeared to be directed to the bar rather than the bench and he suggested that much of this lawyer education was beyond the purview of the FJC. .

The Chair noted that judges can certainly help remind lawyers about the DOJ uniform language and the problem of forensic overstatement outside the trial context. Another Committee member offered that it is much easier to give reminders and admonitions in the civil context where there is significant briefing on expert issues and time to discuss and consider them, but that it is much more challenging in criminal cases where the testimony comes in "on the fly." Judge Campbell emphasized that it is very important to educate defense lawyers, particularly CJA lawyers, about appropriate forensic testimony and the risks of overstatement.

The Chair then asked Judge Dever, the Liaison from the Criminal Rules Committee, to update the Committee regarding a draft proposal to amend Federal Rule of Criminal Procedure 16 to improve advance disclosure of expert opinion evidence in criminal cases. Judge Dever noted that the goal was to have a draft proposal to the Standing Committee for its January meeting and to prepare a final draft at the April meeting of the Criminal Rules Committee. Judge Dever explained that the gist of the proposed amendment was to require a more complete statement of an expert's opinion in pre-trial disclosures in criminal cases, and to require trial judges in every criminal case to set a time for expert disclosure. Judge Dever noted that the DOJ was instrumental in helping the Committee come up with appropriate language to capture these concepts. He explained that the Criminal Rules Committee considered setting a specific number of days before trial for expert disclosures in the text of Rule 16, but determined that a set number of days would provide inadequate flexibility across districts and types of cases. But he noted that too many trial judges permit expert disclosures to be made in criminal cases right before trial. To correct the unfairness inherent in that practice without setting a rigid number of days, the Criminal Rules Committee compromised with language requiring trial judges to set a specific time for expert disclosures that will provide a "fair opportunity for the defendant to meet the government's evidence." (This language was taken from the Federal Rules of Evidence.) He noted that the proposal would require more detailed disclosures about expert opinions as well, such as a complete statement of all opinions that will be offered at trial, expert publications, and past testimony. Finally, the report will have to be signed by the expert, so it can be used to impeach the expert's trial testimony to the extent it is inconsistent with the report.

The Reporter suggested that the proposed amendment to Criminal Rule 16 might not have much impact in the forensics area, where the Committee has been focused, because the "Yates Memo" regarding disclosure of forensic evidence already required timely disclosure of the information covered by the proposed amendment to Rule 16. Judge Dever suggested that the amendment would be helpful in all cases because it would prevent a prosecutor from making disclosures three days prior to trial, would require a meet & confer between counsel, and would prevent an expert from disclosing two opinions and then testifying to five opinions at trial. The Reporter agreed that transforming a DOJ policy into a binding rule would be beneficial. A Committee member inquired whether the substantive disclosures under an amended Rule 16 would be broader or narrower than the disclosures currently required under the "Yates Memo." It was suggested that Rule 16 would add protections, in part, because it would require an expert witness to sign expert disclosures, making it difficult for the expert on cross-examination to avoid or reject

portions of the case file that are turned over under the "Yates Memo." Also, by requiring an expert to state all trial opinions in the disclosure, it will prevent an expert from giving one opinion before trial and tacking on additional opinions during testimony. Another Committee member also pointed out that advance disclosure of an expert opinion will help defense counsel identify and object to any "overstatement" with time for study and reflection.

The Reporter noted that the benefit of an amendment to Rule 16 might be tempered by the fact that some witnesses who might be experts are actually called by the government as lay witnesses, thus avoiding disclosure. He noted the confusion in the case law regarding the distinction between lay opinion testimony offered under Rule 701 of the Evidence Rules and expert opinion testimony offered under Rule 702. He explained that a witness offering an opinion on gang-related behavior, for example, might be offered as an expert under Rule 702 in some jurisdictions, but admitted as a lay witness under Rule 701 in others. The Reporter noted that the Advisory Committee attempted to resolve this issue with the 2000 amendment to Rule 701 that prohibited lay opinion testimony "based on scientific, technical, or other specialized knowledge." Still the line between expert and lay opinion testimony gets blurred in the courts. The Reporter suggested that the Evidence Rules Committee should explore mechanisms for distinguishing between lay and expert testimony to prevent prosecutors from avoiding obligations under an amended Rule 16.

## II. Rule 615

The Reporter opened the discussion of Rule 615 by reminding the Committee of the conflict that exists in the courts about the meaning of a sequestration order. When a court invokes Rule 615, it is unclear whether that means only that testifying witnesses must leave the courtroom or whether such an order includes protections against obtaining information about trial testimony outside the courtroom (such as in the media or by virtue of daily transcripts or conversations). In most circuits, protections beyond the courtroom are *automatically* included in a Rule 615 order. In some circuits, however, courts have held that such an order only demands exclusion from the courtroom and does not include any protections against disclosures outside of it. These latter courts read Rule 615 by its express terms; the rule text provides only for "excluding" witnesses from the courtroom. The Reporter noted that both interpretations of Rule 615 can create notice problems for litigants and witnesses. In the former jurisdictions, a witness might not appreciate that an order excluding him from the courtroom automatically prohibits other access to trial testimony. In the latter jurisdictions, a lawyer might think that "invoking the Rule" is sufficient to extend protection beyond the courtroom and might not appreciate the need to specifically request additional protections.

The Reporter noted that the Committee had considered and rejected the possibility of amending Rule 615 to extend sequestration automatically beyond the courtroom in every case. Instead the Committee opted for a draft that would highlight a trial judge's authority to expand protections beyond the courtroom and would alert lawyers that they need to request and receive an explicit order including such expanded protection. He noted that while the Committee supported a discretionary amendment to Rule 615 that would allow for protection outside the courtroom, it had expressed concern about the issue of counsel communicating trial testimony during witness preparation. In particular, the Committee wanted to follow up on the opinion in *United States v.*

*Rhynes,* 218 F.3d 310 (4th Cir. 2000) (*en banc*), which held that a sequestered witness's testimony could *not* be excluded after defense counsel disclosed trial testimony in the course of preparing the witness to testify.

The Reporter explained that the case law reflected in the agenda materials did not establish that counsel are exempt from prohibitions on disclosures of trial testimony to witnesses. Indeed, he explained that there are many cases that prevent attorneys from disclosing trial testimony to sequestered witnesses, because lawyers can effectively prepare witnesses without disclosing trial testimony and because a lawyer exemption from such protections would create a gap in protection that could swallow the rule entirely.

The Reporter explained that the three drafting alternatives for an amendment to Rule 615 included in the agenda materials varied only with respect to the treatment of counsel. One amendment option would prohibit counsel from conveying trial testimony to sequestered witnesses. Another would exempt counsel from any prohibition on conveying trial testimony to sequestered witnesses outside the courtroom. The third amendment alternative is silent as to the treatment of counsel, leaving courts to determine how to supervise counsel on a case-by-case basis.

The Reporter explained that counsel's preparation of sequestered witnesses presents issues of professional responsibility as well as the Sixth Amendment right to effective counsel --- topics that are typically beyond the ken of the Evidence Rules. An amendment that is silent with respect to counsel was included as an alternative because it would be most hands-off as to the complicated policy issues. The Reporter explained that bracketed material was included in the draft Advisory Committee note to this third option to alert the parties and the court to the issues regarding counsel, but to take no position in the rule on counsel's use of trial testimony to prepare witnesses. He informed the Committee that the plan was to discuss the variations at the fall meeting and to create a draft amendment that could be voted on by the Committee at the Spring 2020 meeting.

The Federal Public Defender suggested that the Sixth Amendment right to confront witnesses should be added to the bracketed language in the draft Advisory Committee note discussing the issues raised by counsel's communication of trial testimony to sequestered witnesses --- and the Reporter agreed to add such language. The Public Defender noted that criminal defense lawyers win and lose cases based on cross-examination and that if one testifying officer has access to the testimony of another officer, the all-important right to cross-examine effectively is seriously hampered. Judge Campbell inquired whether defense counsel would be happy to be bound by a prohibition on revealing trial testimony themselves. The Federal Defender responded that it would not pose any issue with respect to preparation of the defendant because the parties are allowed to remain in the courtroom and so defense lawyers wouldn't likely have any objection. Most importantly, she opined that trial judges deciding how to manage counsel should consider the right to confront witnesses in the forefront of their analysis.

One Committee member noted that attorney preparation with witness testimony is a proper ground for cross-examination and that such cross-examination about conversations with counsel is common. He suggested that the impeaching effect of these conversations provide a limit on counsel's discussions with witnesses and that he favors the alternative for amending Rule 615 that is silent as to treatment of counsel. Another Committee member expressed reservations about an

amendment that would prevent lawyers from talking to witnesses and stated a preference for allowing the issue of counsel conferring with witnesses to be handled on cross-examination.

The Chair agreed that the question of counsel's witness preparation is a can of worms, but queried whether the other problems with Rule 615 are sufficiently significant to justify an amendment. She also noted the increasing difficulty that lawyers will have in controlling witness conduct outside the courtroom, particularly given ubiquitous internet access. She suggested that adding discretionary language to the Rule would encourage judges to enter more orders that extend beyond the courtroom. The Reporter responded that the draft proposals would not encourage or incentivize orders controlling conduct outside the courtroom. Instead, the draft proposals would encourage the trial judge to *consider* the issue and to provide clear and fair notice of the limits of any sequestration order that is entered. More importantly, in most circuits, a basic Rule 615 order *already* extends beyond the courtroom automatically. So in those circuits the amendment would not encourage more orders; and in the other circuits it will result in more orders only if the court in its discretion decides to extend the order outside the courtroom --- something it can already do today.

Judge Campbell suggested that the amendment alternative that is silent as to counsel would address the current concerns about sequestration without getting embroiled in the counsel question. The Chair agreed, as did another Committee member. Another Committee member also suggested that added clarification is advantageous for lawyers – how can lawyers be expected to appreciate the operation of sequestration if the Rule is vague?

The Reporter suggested adding language to the bracketed language contained in the draft Committee note to emphasize that the amendment is neutral with respect to protections beyond the courtroom and is not encouraging extension of sequestration orders. The Chair agreed with this proposal.

The Reporter agreed to prepare a draft amendment for the Spring 2020 meeting in keeping with the Committee's recommendations.

## III. Rule 106 Rule of Completeness

The Reporter opened the discussion of Rule 106 by explaining that the Committee's review of the rule of completeness has revealed that it is one of the most complicated rules in the Federal Rules of Evidence. Because of the complexity of the Rule, the Chair suggested that the Committee try to focus on only a couple of the issues raised by the completeness doctrine at this meeting and have a longer discussion of all issues at the Spring 2020 meeting in the hope of coming up with a proposed amendment.

The Reporter reminded the Committee that the hearsay issue raised by completeness requests is the most significant problem with the existing Rule. While many circuits permit completion with otherwise inadmissible hearsay, some courts, like the Sixth Circuit, have held that a criminal defendant may not introduce a completing remainder necessary to correct a misleading impression created by the government's initial partial presentation of his statement. In essence, these cases

acknowledge the unfairness in the presentation that has been made, but find that the hearsay doctrine forecloses any remedy otherwise provided by Rule 106. The most significant question for the Committee is how to fix that serious defect in the interpretation of Rule 106.

The Chair emphasized that Rule 106 was intended to be only a partial codification of the doctrine of completeness, as recognized by the Supreme Court in *Beech Aircraft*, and was adopted to affect the timing of completion by allowing interruption of an opponent's case to complete misleading written and recorded statements. She noted that the common law doctrine of completion was much broader than Rule 106 and expressed concerns about retaining the standard adopted for a partial codification and extending it to a full codification of the doctrine of completeness. In particular, the Chair expressed concerns about an amended rule that would entirely displace the common law of completion. The Reporter queried whether the current draft heading for a proposed amendment to Rule 106 that characterizes the rule as the "Rule of Completeness" was creating that concern about displacing the common law in its entirety. The Chair stated that the heading purporting to capture all of the rule of completeness was a problem and that it would be important not to rewrite the common law of completeness. The Reporter responded that the heading was altered in the restyling process and that it would be very easy to modify to avoid the suggestion that Rule 106 displaces all common law completion rights.

The DOJ representative noted that the right to interrupt one's adversary with a completing statement was the entire purpose of Rule 106 as originally adopted. She questioned whether it made sense to retain Rule 106 if that right to contemporaneous completion were eliminated in favor of flexible timing in an amended Rule. The Reporter explained that the federal courts have interpreted the timing requirement flexibly, notwithstanding the strict language of Rule 106, and that an amendment that made the timing flexible would merely reflect the practice in the federal courts. That said, the Reporter acknowledged that the Committee could leave the timing requirement unchanged in an amended provision and reminded the Committee that the timing issue was the least important of the concerns with the existing Rule.

Judge Campbell inquired whether it would be accurate to say that existing Rule 106 does only one thing, but that an amended provision that added all of these changes would be doing three additional things (flexible timing, oral statements, otherwise inadmissible hearsay permitted). The Reporter agreed with that characterization. The Chair remarked that the Committee would not need to address the timing issue in an amended rule so long as it was careful to leave the common law untouched. Even if a party did not complete immediately under Rule 106, that party could still attempt to do so later under the common law of completion.

The Reporter again raised the significant hearsay question. The Chair opined that completing hearsay could be admitted for its truth if it independently satisfied a hearsay exception and could be admitted for its non-hearsay value of showing context if it did not fall within an exception. She noted that Wigmore was against reading Rule 106 as a hearsay exception and suggested that completing remainders might be insufficiently reliable to be admitted for their truth. She opined that Judge Grimm, who brought his concerns about Rule 106 to the Committee, would be satisfied with this approach, allowing the completing statement to be used for context only. The Reporter disagreed, noting that Judge Grimm expressed a preference for having the completing remainder admitted for its truth. That said, the Reporter suggested that an amendment that elided the issue of

the purpose for which the otherwise inadmissible remainder was offered might be satisfactory to all – as in, the completing statement may be admitted "over a hearsay objection." This amendment would prevent situations like those seen in the Sixth Circuit where the completing remainder is excluded, but would not necessarily make the completing remainder admissible for its truth.

Another participating judge reminded the Committee of the completeness scenarios trial judges face in court on a routine basis. Because of the increased use of video-recording during interrogations, prosecutors have video recordings of a defendant's admissions to present at trial, with the government offering one portion and the defendant seeking to complete with another. This judge noted that the increasing availability of video-recorded statements would make these completeness issues more common. The Reporter noted that the right to complete in these scenarios has to be addressed under the fairness standard in existing Rule 106 and that this narrow triggering standard would not be changed in an amended provision.

Another Committee member asked how the judge had handled these scenarios and he explained that the prosecution had abandoned its efforts to use the partial statements due to the defense objection and had, instead, relied on other evidence to prove the points demonstrated in the video interrogations. The Committee member queried whether the judge would have permitted the remainders in for their truth or for context if he had admitted them. He said probably for context only. The Committee member then expressed skepticism that a jury can understand an instruction limiting the use of a completing statement to context only. He suggested that juries are good at following many limiting instructions, but that a limiting instruction in this circumstance would be very difficult for jurors to comprehend and follow.

Another Committee member suggested that the hearsay issue might be addressed only in an Advisory Committee note to minimal amendments to Rule 106. Judge Campbell responded that these completion issues arise in the heat of trial and that trial judges only have time to review rule text before making an instant decision. He suggested that Rule106 – more than many others – needs to provide clear rule text to aid trial judges. Another Committee member echoed this observation, explaining that Rule 106 issues arise in "real-time" and that there are rarely motions *in limine* with respect to these issues. The Chair suggested that a minimalist amendment would simply add a second sentence to the existing rule that reads: "The court may admit the completing statement for its truth if it would otherwise be admissible or for context." Such an amended rule would resolve the hearsay question and leave remaining issues to a common law solution.

One Committee member expressed concern that completion would allow the admission of unreliable hearsay of criminal defendants. The Reporter in response noted that the parts of a defendant's statement offered by the government are themselves hearsay, and are not admissible because they are reliable --- but rather as party-opponent statements admissible under the adversary theory of litigation. The Chair again expressed reservations about creating a hearsay exception based on a fairness standard. The Reporter reminded the Committee that the fairness standard has been interpreted very narrowly and permits completion in very few circumstances. He stated that an amendment allowing substantive use of completing statements would not open the floodgates to hearsay so long as that narrow fairness trigger was retained.

Based upon the discussion of the hearsay and timing issues, the Reporter promised to present revised drafting alternatives for an amendment to Rule 106 at the Spring 2020 meeting that would:

- Rewrite the heading for the Rule to reflect the narrow scope of the provision and avoid displacing all common law completion;

- Eliminate flexibility with respect to the timing of completion and require completion contemporaneously (consistent with existing Rule 106);

- Provide two alternatives for addressing the hearsay issue: 1) allowing completion "over a hearsay objection" and 2) adding a second sentence to Rule 106 stating that "The court may admit the completing statement for its truth if it would otherwise be admissible or for context."

The Chair suggested that a completing remainder of a criminal defendant's statement would have to be presented simultaneously *by the prosecution* if the Rule remained a rule of interruption and that the completing remainder would be "otherwise admissible" as a statement of a party opponent when admitted by the prosecution --- even though it was likely to be unreliable.

The Reporter closed the discussion by noting that the Committee needed to continue its consideration of whether to include oral statements in an amended Rule 106 at the spring meeting. One question was whether to simply add oral statements to Rule 106's existing paragraph or to create a separate subsection for oral statements. Committee members unanimously disapproved of a separate subsection as unnecessarily complicated.

A Committee member noted that one draft amendment in the agenda materials simply dropped the modifiers "written or recorded" from the existing rule text and questioned whether that change would suffice to cover all written, video-recorded, and oral statements. The Reporter promised to consider that question for the next meeting. The DOJ representative repeated the Department's opposition to including oral, unrecorded statements in Rule 106. In response the Reporter referred the Committee to his memo, which indicated that almost all courts are *already* allowing admission of oral statements to complete, usually by citing Rule 611(a). He argued that all that adding oral statements to Rule 106 would do would be to treat all completeness issues under a single rule.

## IV. Closing Matters

The Chair thanked Vanderbilt University for hosting the Committee and again praised the high quality of the miniconference on *Daubert* Best Practices. She thanked everyone for their contributions to a productive meeting. The meeting was adjourned.

Respectfully Submitted,

Daniel J. Capra
Liesa L. Richter

# TAB 1D

**MINUTES**
**COMMITTEE ON RULES OF PRACTICE AND PROCEDURE**
June 23, 2020

The Judicial Conference Committee on Rules of Practice and Procedure (Standing Committee or Committee) convened on June 23, 2020 by videoconference. The following members participated in the meeting:

Judge David G. Campbell, Chair
Judge Jesse M. Furman
Daniel C. Girard, Esq.
Robert J. Giuffra Jr., Esq.
Judge Frank Mays Hull
Judge William J. Kayatta Jr.
Peter D. Keisler, Esq.
Professor William K. Kelley
Judge Carolyn B. Kuhl
Judge Patricia Millett
Judge Gene E.K. Pratter
Elizabeth J. Shapiro, Esq.*
Kosta Stojilkovic, Esq.
Judge Jennifer G. Zipps

The following attended on behalf of the Advisory Committees:

Advisory Committee on Appellate Rules
Judge Michael A. Chagares, Chair
Professor Edward Hartnett, Reporter

Advisory Committee on Bankruptcy Rules
Judge Dennis R. Dow, Chair
Professor S. Elizabeth Gibson, Reporter
Professor Laura Bartell, Associate Reporter

Advisory Committee on Criminal Rules
Judge Raymond M. Kethledge, Chair
Professor Sara Sun Beale, Reporter
Professor Nancy J. King, Associate Reporter

Advisory Committee on Civil Rules
Judge John D. Bates, Chair
Professor Edward H. Cooper, Reporter
Professor Richard L. Marcus, Associate Reporter

Advisory Committee on Evidence Rules
Judge Debra Ann Livingston, Chair
Professor Daniel J. Capra, Reporter

Others providing support to the Committee included: Professor Catherine T. Struve, the Standing Committee's Reporter; Professor Daniel R. Coquillette, Professor Bryan A. Garner, and Professor Joseph Kimble, consultants to the Standing Committee; Rebecca A. Womeldorf, the Standing Committee's Secretary; Bridget Healy, Scott Myers, and Julie Wilson, Rules Committee Staff Counsel; Brittany Bunting and Shelly Cox, Rules Committee Staff Analysts; Allison A. Bruff, Law Clerk to the Standing Committee; and John S. Cooke, Director, and Dr. Tim Reagan, Senior Research Associate, of the Federal Judicial Center (FJC).

* Elizabeth J. Shapiro (Deputy Director, Federal Programs Branch, Civil Division) and Andrew D. Goldsmith (National Coordinator of Criminal Discovery Initiatives) represented the Department of Justice on behalf of the Honorable Jeffrey A. Rosen, Deputy Attorney General.

## OPENING BUSINESS

Professor Catherine Struve, Reporter to the Standing Committee, and Professor Daniel Coquillette, Consultant, honored Judge David Campbell for his 15 years of service with the Rules Committees and presented mementos to Judge Campbell on behalf of the Standing Committee's members, staff, and consultants and the advisory committee Chairs and Reporters. Three former Standing Committee Chairs (Judges Lee Rosenthal, Anthony Scirica, and Jeffrey Sutton) joined to congratulate Judge Campbell for a remarkable tenure with the Rules Committees. Department of Justice (DOJ) representative Elizabeth Shapiro presented a letter from Attorney General William P. Barr thanking Judge Campbell for his leadership in the rulemaking process and service to the federal judiciary. Judge Campbell thanked everyone for the kind comments and gifts of recognition.

Judge Campbell opened the meeting with a roll call and welcomed those listening to the meeting by telephone. Judge Campbell noted that the Chief Justice has extended until December 31, 2020 the terms of Rules Committees members scheduled to end on October 1, 2020. Judge Campbell welcomed a new member of the Standing Committee, Judge Patricia Millett of the D.C. Circuit, who fills the unexpired term of Judge Sri Srinivasan who recently became Chief Judge of the D.C. Circuit. Before her judicial service, Judge Millett had a distinguished career as a Supreme Court practitioner in the U.S. Solicitor General's Office and in private practice. Judge Campbell recognized those who have been newly appointed to serve as committee chairs beginning in the fall: Judge John Bates as Chair of the Standing Committee, Judge Robert Dow as Chair of the Advisory Committee on Civil Rules, Judge Jay Bybee as Chair of the Advisory Committee on Appellate Rules, and Judge Patrick Schiltz as Chair of the Advisory Committee on Evidence Rules. Judge Campbell thanked Judges Michael Chagares and Debra Livingston for their service as chairs.

## APPROVAL OF THE MINUTES FROM THE PREVIOUS MEETING

Upon motion by a member, seconded by another, and on voice vote: **The Committee unanimously approved the minutes of the January 28, 2020 meeting.**

## STATUS OF PENDING RULES AMENDMENTS

Ms. Rebecca Womeldorf reported that proposed amendments are proceeding through the Rules Enabling Act process without incident and referred members to the detailed tracking chart in the agenda book for further details. Judge Campbell noted that, since the Committee's last meeting, the Supreme Court had adopted a package of proposed amendments to the Appellate, Bankruptcy, Civil, and Evidence Rules. Those proposed amendments are before Congress, with a presumed effective date of December 1, 2020.

## CONSIDERATION OF EMERGENCY RULES UNDER THE CARES ACT

Professor Struve provided an overview of the congressional directive in the Coronavirus Aid, Relief, and Economic Security (CARES) Act to the Judicial Conference to consider potential rules amendments to ameliorate the effects on court operations of future emergencies. The

advisory committees have begun work on this effort, with each advisory committee focusing on its own rules set. Public comment on potential emergency procedures has been sought. The advisory committees are working on drafts for discussion at their fall 2020 meetings with the goal of presenting drafts to the Standing Committee with requests for publication in the summer of 2021. Professor Struve explained that Professor Daniel Capra will coordinate the advisory committees' collective efforts. Under the ordinary timeline of the Rules Enabling Act process, any such rules amendments could go into effect as early as December 1, 2023.

Professor Sara Beale reported on the Criminal Rules Advisory Committee's emergency rules work, which will proceed through a subcommittee, chaired by Judge James Dever. The reporters and subcommittee are conducting research and preparing for a miniconference to be held in July.

Judge John Bates provided a summary of the Civil Rules Advisory Committee's emergency rules work. A subcommittee, chaired by Judge Kent Jordan, was formed after Congress passed the CARES Act. The subcommittee has met by several times and will meet again in one week. The first task is gathering information from judges, clerks, practitioners, and the public. The reporters have examined much of that information. Judge Bates added that the question remains whether any amendments to the Civil Rules are needed and what shape they should take. Among the areas of review that have been identified generally are service issues, remote proceedings, time limits, and conducting trials. The subcommittee's goal is to have recommendations to present to the full Advisory Committee at its fall 2020 meeting.

Judge Dennis Dow reported that the Bankruptcy Rules Advisory Committee has formed a CARES Act subcommittee which has met several times. The subcommittee has discussed a general approach which would grant courts the authority to continue hearings and extend deadlines. An alternate approach would authorize courts to do so in individual cases by motion or sua sponte, notwithstanding other limitations and restrictions that may exist in the rules. The latter approach mirrors a similar approach being considered regarding possible changes to the bankruptcy code. The subcommittee has reviewed the Bankruptcy Rules and identified those with deadlines and provisions governing extensions. It found few, if any, impediments in the rules to a more general approach. Professor Elizabeth Gibson is preparing a draft for review at the subcommittee's next meeting. Judge Dow noted that, in the process of reviewing the rules and public submissions, several other areas have been identified. Those include electronic filing and online payment of fees by unrepresented parties, guidelines for using remote hearing technology, burdens imposed by signature verification requirements, and issues regarding service of process by mail. The subcommittee will continue study of these issues and others.

Judge Chagares reported on the work of the Appellate Rules Advisory Committee's subcommittee on emergency rules. Each subcommittee member reviewed the Appellate Rules to identify potential issues. Appellate Rule 2 provides helpful flexibility but only permits a court to suspend rules in individual cases. The subcommittee is considering an emergency provision for broader application. Rule 33 provides for appeal conferences in person or by telephone and may require revision to account for modern technology. The subcommittee expects to present any potential rules amendments at the Advisory Committee's next meeting.

Professor Capra explained that he and Judge Livingston reviewed the Evidence Rules and concluded that no amendments were necessary to address issues such as remote proceedings. Professor Capra conferred with state evidence rules committees, and they observed that evidence rules distinguish between testimony and physical presence in court. "Testimony" as used in the rules, encompasses remote testimony. Further, Rule 611 provides trial judges with authority to control the mode of testimony. Professor Capra noted that trial practice would be impacted by the use of remote testimony and the inability of juries to make credibility determinations in the same way. A remote trial renders Rule 615, which deals with sequestration of witnesses, irrelevant because witnesses will not be in the courtroom. For the past two years, the Advisory Committee has been considering whether to amend Rule 615 to clarify whether sequestration can extend beyond physical presence in the courtroom. Professor Capra added that the Advisory Committee will continue to monitor the rules for possible emergency issues. Judge Campbell repeated a question raised in a public submission regarding authentication of evidence, namely whether a faster procedure for authentication should be available to shorten remote trials. Professor Capra pointed to recent amendments to Rule 902(13) and (14), which may alleviate this problem, but stated the Advisory Committee will take another look. Finally, Professor Capra noted that remote trials may raise a face-to-face confrontation issue which will need to be considered by the rules committees generally.

A member of the Standing Committee asked whether there has been any coordination with other Judicial Conference committees on the possible implications of emergency rules. Judge Campbell explained that there has been significant coordination with the Committee on Court Administration and Case Management (CACM Committee) regarding CARES Act procedures and other accommodations. He added that this coordination should continue as the advisory committees begin formulating draft emergency rule amendments. He also suggested seeking input from the Committee on Defender Services and the Criminal Law Committee. Ms. Womeldorf noted that the Administrative Office staff supporting those Judicial Conference committees – as well as the CACM Committee and the Committee on Bankruptcy Administration – are monitoring the Rules Committees' response to the CARES Act directive to consider emergency rules.

## MULTI-COMMITTEE REPORTS

Judge Chagares reported on the E-filing Deadline Joint Subcommittee which is exploring the possibility of an earlier-than-midnight deadline for electronic filing. The subcommittee continues to gather information, including data from the FJC about actual filing patterns, i.e., what time of day litigants are filing and who is filing. Judge Chagares explained that the subcommittee seeks to cast a wide net to gather as much input as possible and has reached out to law school deans, bar associations, paralegal associations, and legal assistant associations. Based on a survey conducted by the Lawyers Advisory Committee for the District of New Jersey, there are strong opinions on different sides of the electronic-filing deadline issue. The subcommittee will continue to study this issue closely.

Judge Bates reported on the Appeal Finality After Consolidation Joint Civil-Appellate Subcommittee which was formed to examine the question whether rules amendments might be proposed to address the effects of Civil Rule 42 consolidation orders on the final-judgment approach to appeal jurisdiction in the wake of the Supreme Court's decision in *Hall v. Hall*, 138

S. Ct. 1118 (2018). In *Hall*, the Court ruled that disposition of all claims among all parties to a case that began as an independent action is a final judgment, notwithstanding the consolidation of that action with one or more other actions pursuant to Rule 42(a). The subcommittee, chaired by Judge Robin Rosenberg, is comprised of members from the Appellate Rules Advisory Committee and Civil Rules Advisory Committee. The subcommittee is looking at the effects of the *Hall* decision and developing information from the FJC. Empirical research on consolidated cases will inform the subcommittee's work to determine whether any rule change is needed. This process will take time.

## REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Chagares and Professor Edward Hartnett provided the report of the Appellate Rules Advisory Committee, which last met on April 3, 2020 by telephone conference. The Advisory Committee presented several action items and information items.

### *Action Items*

*Final Approval of Proposed Amendment to Rule 42 (Voluntary Dismissal).* Judge Chagares explained that the proposed amendment to Rule 42 would assure litigants that an appeal will be dismissed if the parties settle the case at the appellate level. The current rule provides that such an appeal "may [be] dismiss[ed]" by the circuit clerk and the proposed amendment would restructure the rule to remove ambiguity. Two legal entities filed comments after publication of the draft rule. The Association of the Bar of the City of New York (ABCNY) suggested that the Advisory Committee include language giving additional examples in proposed Rule 42(b)(3). Because the proposed amendment uses non-exclusive language, the Advisory Committee decided against providing additional examples. The ABCNY also suggested adding the phrase "if provided by applicable statute" to the amendment language. Because nothing in the rule permits courts of appeals to take actions by order that are not otherwise authorized by law, the Advisory Committee found the suggested addition unnecessary. The National Association of Criminal Defense Lawyers (NACDL) submitted a comment supporting the amendment as "well taken" but suggested additional language regarding the responsibilities of individual criminal defendants and defense counsel with respect to dismissals of appeals. The Advisory Committee decided against this suggestion, as the appellate rules generally do not address defense attorneys' responsibilities to clients.

Judge Chagares explained that the Advisory Committee made minor changes to the proposed amendment based on suggestions from Standing Committee members at the last meeting. First, the word "mere" was taken out of the proposed language in Rule 42(b)(3). Second, the Advisory Committee made a change to paragraph (3) to clarify that it applies only to dismissals under Rule 42(b) itself. Minor changes were also made in response to helpful suggestions by the style consultants. Judge Chagares sought final approval of the proposed amendment to Rule 42.

Referencing a comment filed by NACDL, Judge Bates flagged a concern that some local circuit rules will be inconsistent with the proposed rule's statement that a court "must" dismiss. He noted that several circuits' local rules contain other requirements (beyond those in Rule 42) for dismissal. The Fourth Circuit's local rule, for example, requires in criminal cases that a stipulation

of dismissal or motion for voluntary dismissal must be signed or consented to by the defendant. Another circuit's local rule requires an affidavit. Judge Chagares responded that the Advisory Committee had not addressed that issue. Professor Coquillette commented that a local rule which includes additional requirements beyond a uniform national rule may be considered inconsistent. Professor Capra clarified that unless a national rule prohibits additional requirements imposed by local rules, a local rule that does so is not necessarily inconsistent. Professors Coquillette and Capra agreed that local rule variances that do not facially contradict a uniform national rule have not been considered inconsistent historically. Judge Bates observed that the amendment might create uncertainty for attorneys practicing in circuits that have local rules that mandate requirements in addition to those in Rule 42 for dismissal. He asked whether language should be added to the committee note to address this potential problem. Professor Coquillette expressed concern about committee notes that change the meaning of the actual rule text. Professor Struve suggested that Judge Bates's question may warrant further consideration by the Advisory Committee, as it raises unexplored issues. She inquired whether discussion with circuit clerks may help resolve the question. Judge Campbell added that, unlike some other rules, proposed Rule 42 requires the circuit clerk to take an action rather than the parties. He recommended that the Advisory Committee take a closer look at local rules before moving forward with the proposal. Judge Chagares agreed.

*Final Approval of Proposed Amendment to Rule 3 (Appeal as of Right—How Taken) and Conforming Amendments to Rule 6 and Forms 1 and 2.* Judge Chagares explained that the Advisory Committee began studying issues with notices of appeal in 2017. Research revealed inconsistency across the circuits in how designations in a notice of appeal are used to limit the scope of an appeal. In 2019, the Supreme Court stated in *Garza v. Idaho*, 139 S. Ct. 738, 746 (2019), that the filing of a notice of appeal should be a "simple, non-substantive act." Consistent with *Garza*, the proposed amendments seek to simplify an

d make more uniform the process for filing a notice of appeal.

Professor Hartnett summarized the comments received on the proposal after publication. The first critical comment, submitted by Michael Rosman, asserted that the proposal was inconsistent with Civil Rule 54(b). In Mr. Rosman's view, there is no finality for appeal purposes (under 28 U.S.C. § 1291) until the district court enters a single document that recites the disposition of every claim by every party in an action; in this view, finality does not occur if the district court merely enters an order that disposes of all remaining claims. Professor Hartnett noted that neither the Advisory Committee nor the Standing Committee at its January meeting were persuaded by this critique, which had been submitted previously. The second critical comment, submitted by Judge Steven Colloton, urged abandonment of this project on the theory that litigants should be held to the choices made in their notice of appeal. In Judge Colloton's view, it is easy for a litigant to designate everything, and the Advisory Committee should not be encouraging counsel to seek to expand the scope of appeal beyond what is specified in the notice. The Advisory Committee considered this critique but was not persuaded.

Other comments urging suggestions for expanding or simplifying the proposed rule were considered and rejected by the Advisory Committee. Professor Hartnett explained that one of the suggestions, which proposed a simplification, might make the designation of a judgment or order completely irrelevant and might not overcome the problem initially identified. NACDL suggested

expanding proposed Rule 3(c)(5) to appeals in criminal cases. The provisions in paragraph (5) concern Appellate Rule 3's connection to Civil Rule 58. Professor Hartnett noted that NACDL did not identify a specific problem in criminal cases that such expansion would address. Instead, NACDL's concern was that a rule limited to civil cases might lead courts to adopt an expressio unius conclusion that a similar approach should not be taken in criminal cases. Rather than changing the proposed rule, the Advisory Committee added language to the committee note to explain that while similar issues might arise in criminal cases – and perhaps similar treatment may be appropriate – this rule is not expressing a view one way or the other about those issues. The Advisory Committee also received a suggestion regarding Rule 4(a)(4)(B)(ii)'s treatment of appeals from orders disposing of motions listed in Rule 4(a)(4)(A). The suggestion is that Rule 4(a)(4)(B)(ii) be amended to remove the requirement that appellants file a new or amended notice of appeal in order to challenge orders disposing of such motions. The Advisory Committee chose not to make changes in response to this suggestion, which would require further study and republication. This question, however, is closely related to a new suggestion to more broadly allow the relation forward of notices of appeal to cover decisions issued after the filing of the notice. The Advisory Committee decided that the best way to address these issues would be to roll them forward for future consideration.

At the Standing Committee's January 2020 meeting, members raised some concern that the proposed rule may inadvertently change the doctrine that treats a judgment as final notwithstanding a pending motion for attorneys' fees. To address this concern, the Advisory Committee added language to the committee note explaining that the proposed amendment has no effect on Supreme Court doctrine as laid out in *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196 (1988), and *Ray Haluch Gravel Co. v. Cent. Pension Fund of Int'l Union of Operating Engineers & Participating Employers*, 571 U.S. 177 (2014). Professor Hartnett explained that these holdings – which treat attorneys' fees as collateral to the merits of the case for purposes of the final judgment rule – can coexist with the proposed amendment.

In response to Judge Colloton's submission, the Advisory Committee made one change to the rule text as published. Judge Colloton expressed concern about litigants filing (after the entry of final judgment) a notice of appeal designating only a prior interlocutory order. The Advisory Committee added language to proposed Rule 3(c)(7) that states an appeal must not be dismissed for failure to properly designate the judgment if the notice of appeal was filed after the entry of the judgment and designates an order that merged into that judgment.

One matter divided the Advisory Committee: whether to continue to permit a party to limit the scope of the notice of appeal. A minority of members concluded that such limitation should no longer be permitted. In their view, courts should look to the briefs to narrow the claims and issues on appeal. In contrast, most members found value in leaving this aspect of the proposal as published – allowing parties to limit the scope if expressly stated. For example, in multi-party cases, a party who has settled as to some claims may wish to appeal the disposition of other claims without violating a settlement agreement. The Advisory Committee voted to retain the feature permitting limitation and to revisit the issue in three years if problems develop. Judge Chagares observed that a provision in current Rule 3(c)(1)(B) permits the express limiting of a notice of appeal.

The Advisory Committee also sought final approval of conforming amendments to Rule 6 and Forms 1 and 2. Judge Chagares reported that the Chief Judge of the United States Tax Court has expressed approval for the proposed amendment to Form 2 (concerning notices of appeal from decisions of the Tax Court).

Professor Struve thanked Judge Chagares, Professor Hartnett, and the Advisory Committee for their work on this thorny problem. Judge Campbell offered suggestions regarding the committee note. First, he suggested that "and limit" be removed from the portion of the committee note that discusses the role of the briefs with respect to the issues on appeal. Second, he suggested clarification of two rule references in the note. These suggestions were accepted by Judge Chagares. A judge member recommended substitute language for the multiple uses of the term "trap" in the committee note. Professor Hartnett responded that the phrasing had been studied and that it is not pejorative or indicative of intentional trap-setting. Another member suggested adding "inadvertently" to the first sentence using the word "trap" in the committee note – thus: "These decisions inadvertently create a trap . . . ." Judge Chagares and Professor Hartnett accepted the suggestion and changed the committee note accordingly.

Upon motion, seconded by a member, and on a voice vote: **The Committee decided to recommend the amendment to Rule 3 and conforming amendments to Rule 6 and Forms 1 and 2 for final approval by the Judicial Conference.**

*Publication of Proposed Amendment to Rule 25 (Filing and Service).* The Advisory Committee sought publication of an amendment to Rule 25 to extend existing privacy protections to Railroad Retirement Act benefit cases. Judge Chagares explained that counsel for the Railroad Retirement Board requested protections for their litigants like those provided in Social Security benefit cases. Because Railroad Retirement Act benefit cases are appealed directly to the court of appeals, amending Civil Rule 5.2 would not work to extend privacy protections to those cases. The Advisory Committee made no changes to the draft amendment since the January 2020 Standing Committee meeting.

A judge member commented that, in other areas of the law such as ERISA, the Hague Convention, and medical malpractice, courts address privacy concerns on an ad hoc basis rather than with a categorical rule. This member expressed hesitation about picking out one area for categorical treatment without stepping back and looking comprehensively at balancing the public's right to access court records against individual privacy concerns. He also inquired whether such endeavor fell within the scope of the Committee's mandate. In response, Judge Chagares noted that Civil Rule 5.2(c) restricts only remote electronic access. He also explained that the Advisory Committee has focused on Railroad Retirement Act benefit cases because they are a close analog to Social Security benefit cases. In other cases that involve medical information, courts are still empowered to enter orders to protect that information. Judge Chagares further noted that the Supreme Court recently emphasized the close relation between the Social Security Act and the Railroad Retirement Act. Professor Hartnett explained that the Railroad Retirement Act benefit cases in the court of appeals mirror Social Security benefit cases in the district court, as they are essentially appellate in nature. Both types of cases involve administrative records full of sensitive information. Professor Edward Cooper recalled that when the Civil Rules Advisory Committee was working on Civil Rule 5.2, the Social Security Administration made powerful representations

regarding the filing of an administrative record. Under statute, it is required in every case to file a complete administrative record, which involves large amounts of sensitive information beyond the capacity of the court to redact. The Civil Rules Advisory Committee was persuaded that a categorical rule was appropriate for Social Security benefit cases. The judge member suggested that there are hundreds of ERISA disability cases every year that are almost identical to Social Security disability cases. Those cases also require the filing of an administrative record. The judge member asked whether the Rules Enabling Act publication process would reach stakeholders in other types of cases like ERISA proceedings. Judge Campbell suggested that the committees deliberately invite input from those stakeholders, as has been done with other rules in the past. The judge member agreed that such feedback would be beneficial, particularly from stakeholders not covered by the proposed amendment. Judge Chagares concurred in this approach.

Upon motion, seconded by a member, and on a voice vote: **The Committee approved the proposed amendment to Rule 25 for publication with added request for comment from identified groups.**

*Information Items*

*Rules 35 (En Banc Determination) and 40 (Petition for Panel Rehearing).* Judge Chagares stated that the Advisory Committee is conducting a comprehensive study of Rules 35 and 40 with a view to reducing duplication and confusion.

*Suggestion Regarding Decision on Grounds Not Argued.* Judge Chagares described a suggestion submitted by the American Academy of Appellate Lawyers (AAAL) that would require the court to give notice and opportunity for additional briefing before deciding a case on unbriefed grounds. After studying this issue, the Advisory Committee concluded that it was not well-suited for rulemaking. Upon the Advisory Committee's recommendation, Judge Chagares wrote to each circuit chief judge with a copy of the AAAL's suggestion. He received feedback that unanimously concluded such a rule change was unnecessary. The Advisory Committee will reconsider this issue in three years.

*Suggestion Regarding In Forma Pauperis Standards.* Professor Hartnett noted that the Appellate Rules Advisory Committee continues to look into this issue. There remains a question whether rulemaking can resolve the issue. Professor Hartnett explained that, at the very least, the Advisory Committee could consider possible changes to Form 4 (the form for affidavits accompanying motions to appeal *in forma pauperis*).

*Suggestion Regarding Rule 4(a)(2).* Current Rule 4(a)(2) allows a notice of appeal filed after the announcement of a decision but before its entry to be treated as filed after the entry of decision. This provision allows modestly premature notices of appeal to remain viable. Professor Bryan Lammon's suggestion proposes broader relation forward. The Advisory Committee considered this question a decade ago and decided against taking action. In his suggestion, Professor Lammon argues that the issue has not resolved itself in the intervening decade. The Advisory Committee is looking to see if any rule change can be made to protect those who file their notice of appeal too early.

*Suggestion Regarding Rule 43 (Substitution of Parties).* Judge Chagares described a suggestion regarding amending Rule 43 to require use of titles instead of names of government officers sued in their official capacities. The Advisory Committee decided to table this suggestion while its clerk representative gathers information from clerks of court.

*Review of Recent Amendments.* Judge Chagares reviewed the impact of two recent amendments to the Appellate Rules. In 2019, Rule 25(d)(1) was amended to eliminate the requirement for proof of service when service is made solely through the court's electronic-filing system. At least two circuits continue to require certificates of service, despite the rule change. The Advisory Committee's clerk representative agreed to reach out to the clerks of court to resolve the issue. In 2018, Rule 29(a)(2) was amended to permit the rejection or striking of an amicus brief that would result in a judge's disqualification. The Advisory Committee polled the clerks to find out if any amicus briefs had been stricken under the new rule. At least three circuits have stricken such amicus briefs since the amendment became effective.

Judge Chagares thanked everyone involved during his tenure with the Rules Committees and wished everyone and their families well.

## REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Dow and Professors Gibson and Laura Bartell delivered the report of the Bankruptcy Rules Advisory Committee, which last met on April 2, 2020 by videoconference. The Advisory Committee presented several action items and two information items.

### *Action Items*

*Final Approval of Proposed Amendment to Rule 2005 (Apprehension and Removal of Debtor to Compel Attendance for Examination).* Judge Dow explained that Rule 2005 deals generally with the apprehension of debtors for examination under oath. The last subpart deals with release of debtors. Current Rule 2005(c) refers to provisions of the criminal code that have since been repealed. The proposed change substitutes a reference to the relevant section in the current criminal code. The proposed amendment was published in August 2019. The Advisory Committee received no comments of substance. The National Conference of Bankruptcy Judges expressed a general indication of support for the proposed amendment. Judge Dow stated that the Advisory Committee recommends that the Standing Committee approve the proposed amendment to Rule 2005 as published. There were no comments from members of the Standing Committee.

Upon motion, seconded by a member, and on a voice vote: **The Committee decided to recommend the amendment to Rule 2005 for approval by the Judicial Conference.**

*Final Approval of Proposed Amendment to Rule 3007 (Objections to Claims).* Judge Dow next introduced the proposed amendment to Rule 3007, which deals generally with objections to claims filed by creditors. The subpart at issue – Rule 3007(a)(2)(A) – deals with service of those objections on creditors. It generally provides for service by first-class mail. Rule 3007(a)(2)(A)(ii) imposes a heightened service requirement for "insured depository institution[s]." "Insured

depository institution" has two different definitions in the bankruptcy rules and bankruptcy code. Rule 7004(h) imports a definition for "insured depository institution" from the Federal Deposit Insurance Act (FDIA). The FDIA definition (which is incorporated into Rule 7004(h)) does not encompass credit unions because credit unions are insured by the National Credit Union Administration rather than by the Federal Deposit Insurance Corporation. The bankruptcy code also defines "insured depository institution," in 11 U.S.C. § 101(35), and the Code's definition expressly does include credit unions. The Code definition applies to the Bankruptcy Rules pursuant to Rule 9001.

Several years ago, Rule 3007 was revised to make clear that generally standard service was adequate for purposes of the rule. But the Rule, as amended, provides that if the claimant is an insured depository institution, service must also be made according to the method prescribed by Rule 7004(h). The Advisory Committee recognized the exception to conform to the congressional desire for enhanced service on entities included under the FDIA definition. The Advisory Committee, however, did not think there was any congressional intent to afford enhanced service to entities that fall outside the FDIA definition. For purposes of consistency with other bankruptcy rules, and to conform to what the Advisory Committee understands as the congressionally-intended scope for enhanced service, the proposed amendment to Rule 3007(a)(2)(A)(ii) inserts a reference to the FDIA definition. The Advisory Committee received one comment, and it expressed support for the proposed amendment. There were no comments or questions from the Standing Committee.

Upon motion, seconded by a member, and on a voice vote: **The Committee decided to recommend the amendment to Rule 3007 for approval by the Judicial Conference.**

*Final Approval of Proposed Amendment to Rule 7007.1 (Corporate Ownership Statement).* Rule 7007.1 deals with disclosure of corporate ownership information in adversary proceedings. Judge Dow explained that the proposed amendment to Rule 7007.1 seeks to conform to the language in related rules: Appellate Rule 26.1, Bankruptcy Rule 8012, and Civil Rule 7.1. As published, the proposed amendment would amend Rule 7007.1(a) to encompass nongovernmental corporations that seek to intervene, would make stylistic changes to the rule, and would change the title of Rule 7007.1 from "Corporate Ownership Statement" to "Disclosure Statement." The Advisory Committee received two comments in response to publication. One comment suggested that the word "shall" in Rule 7007.1 be changed to "must." While the Advisory Committee agreed with the suggestion, it concluded that such word change will be considered when Part VII is restyled. The other comment, from the National Conference of Bankruptcy Judges, suggested that Rule 7007.1 retain the title and language referring to "corporate ownership statement." The comment offered two reasons: (1) "disclosure statement" is a term of art in bankruptcy law; and (2) five other bankruptcy rules refer to the same document as a corporate ownership statement. The Advisory Committee was persuaded by this and voted to approve Rule 7007.1 with the current title ("Corporate Ownership Statement") retained and the word "disclosure" in subparagraph (b) changed to "corporate ownership," with the other features of the proposed amendments remaining unchanged since publication.

Upon motion, seconded by a member, and on a voice vote: **The Committee decided to recommend the amendment to Rule 7007.1 for approval by the Judicial Conference.**

*Final Approval of Proposed Amendment to Rule 9036 (Notice and Service Generally).* Professor Gibson introduced the proposed amendment to Rule 9036. She explained that the Advisory Committee has been considering possible amendments to the Bankruptcy Rules to increase the use of electronic service and noticing in the bankruptcy courts. One amendment to Rule 9036 became effective on December 1, 2019. When the 2019 amendment to Rule 9036 was published for public comment in 2017, related proposed amendments to Rule 2002(g) and Official Form 410 were also published. The proposed amendments to Rule 2002(g) and Official Form 410 would have authorized creditors to designate an email address on their proof of claim for receipt of notices and service. Based on comments received during the 2017 publication period, the Advisory Committee decided to hold the proposed amendments to Rule 2002(g) and Official Form 410 in abeyance.

The current proposed amendment to Rule 9036 was published in August 2019 and would encourage the use of electronic noticing and service in several ways. First, the rule would recognize the court's authority to provide notice or make service through the Bankruptcy Noticing Center to entities that currently receive a high volume of paper notices from the bankruptcy courts. This program, set up through the Administrative Office, would inform high-volume paper-notice recipients to register for electronic noticing. The proposed amendment would acknowledge this process and authorize notice in that manner. Anticipating that the Advisory Committee would move forward with the earlier-mentioned amendments to Rule 2002(g) and Official Form 410, Professor Gibson explained that the rule as published would have allowed courts and parties to provide notice to a creditor at an email address indicated on the proof of claim.

The Advisory Committee received seven sets of comments on the published proposal to amend Rule 9036. Commenters expressed concern about the proposed amendments to Rule 9036 as well as about the earlier-published proposals to amend Rule 2002(g) and Official Form 410. There was, however, enthusiastic support for the program to encourage high-volume paper-notice recipients to register for electronic bankruptcy noticing. The commenters included the Bankruptcy Noticing Working Group, the Bankruptcy Clerks Advisory Group, an ad hoc group of 34 clerks of court, and individual court staff members. Their concerns fell into three categories: clerk monitoring of email bounce-backs; the administrative burden of the proof-of-claim opt-in form for email noticing, and the interplay of the proposed amendments to Rules 2002(g) and 9036. Because the same provision regarding bounce-backs is in the version of Rule 9036 that went into effect last December and in Rule 8011(c)(3), the Advisory Committee decided not to change the language in the published version of Rule 9036(d); but it did add a new sentence to that subdivision stating that the recipient has a duty to keep the court informed of the recipient's current email address.

The greatest concern was the administrative burden of allowing creditors to opt-in to email noticing and service on their proof-of-claim form (Official Form 410). Some commenters asserted that without an automated process for extracting email addresses from proofs of claim, the burden of checking each proof of claim would be too great. Others suggested that, even with automation, the process would be time consuming and burdensome (given that paper proofs of claim would continue to be filed). Persuaded by this reasoning, at its spring 2020 meeting, the Advisory Committee voted not to pursue the opt-in check-box option on the proof of claim form. Accordingly, it revised the proposed amendment to Rule 9036 so as to omit the reference to

Rule 2002(g)(1). Professor Gibson further explained that the Advisory Committee's ultimate approach here does not give any benefit to parties because parties do not have access to the Bankruptcy Noticing Center. Future improvements to CM/ECF may allow entry of email addresses in a way that will be accessible to parties. The language in proposed Rule 9036(b)(2) would allow for parties to take advantage of that future development.

Judge Campbell observed that the Advisory Committee's revisions to the Rule 9036 proposal provide a good illustration of the value of the Rules Enabling Act's public-comment process.

Upon motion, seconded by a member, and on a voice vote: **The Committee decided to recommend the amendment to Rule 9036 for approval by the Judicial Conference.**

*Retroactive Approval of Amendments to Official Forms 101, 201, 122A-1, 122B, and 122C-1.* Enacted in March 2020, the CARES Act made certain changes to the bankruptcy code, which required changes to five Official Forms. Because the law took effect immediately, the Advisory Committee acted under its delegated authority to make conforming changes to Official Forms, subject to later approval by the Standing Committee and notice to the Judicial Conference. Professor Gibson explained the two main changes the CARES Act made to the bankruptcy code, both of which will sunset in one year from the effective date of the Act. First, the Act provided a new definition of "debtor" for purposes of subchapter V of Chapter 11. The new one-year definition raised the debt limit for a debtor under subchapter V from $2,725,625 to $7,500,000. As a result of that legislative change, there are at least three categories of Chapter 11 debtors: (1) A debtor that satisfies the definition of small business debtor, with debts of at most $2,725,625; (2) a debtor with debts over $2,725,625 but not more than $7,500,000; and (3) a debtor that doesn't meet either definition, and proceeds as a typical Chapter 11 debtor. The court will separately need to know which category a debtor falls within to know whether special provisions apply. The Advisory Committee thus amended two bankruptcy petition forms – Official Forms 101 and 201 – to accommodate these changes.

Second, the CARES Act changed the definition of "current monthly income" in the Bankruptcy Code to add a new exclusion from computation of currently monthly income for federal payments related to the Coronavirus Disease 2019 (COVID-19) pandemic. An identical exclusion was also inserted in § 1325(b)(2) for computing disposable income. Both changes are effective for one year, unless extended by Congress. These changes effect eligibility for Chapter 7 and the required payments under Chapter 13. As a result, the Advisory Committee added a new exclusion in Official Forms 122A-1, 122B, and 122C-1.

Judge Campbell asked whether the Advisory Committee would seek to reverse these amendments if Congress did not extend the sunset date of the relevant CARES Act provisions. Professor Gibson replied in the affirmative.

Upon motion, seconded by a member, and on a voice vote: **The Committee decided to retroactively approve the technical and conforming amendments to Official Forms 101, 201, 122A-1, 122B, and 122C-1, and to provide notice to the Judicial Conference.**

*Publication of Restyled Parts I and II of the Bankruptcy Rules.* Professor Bartell introduced the first two parts of the restyled Bankruptcy Rules. She observed that the restyling process should get easier over time, as the first two parts required the Advisory Committee to resolve issues that will recur in subsequent parts. She noted that the style consultants have been wonderful to work with, and their work has made the restyled Bankruptcy Rules much easier to understand. For the restyling process, the Advisory Committee endorsed five basic principles. First, the Advisory Committee will avoid any substantive changes, even where some may be needed. Second, the restyled rules will not modify any term defined in the bankruptcy code. This does not include terms used, but not defined, in the code. Third, the restyled rules will preserve terms of art. There was some disagreement between the Advisory Committee and the style consultants on what constitutes a term of art. Fourth, all Advisory Committee members would remain open to new ideas suggested by the style consultants. Finally, the Advisory Committee will defer to the style consultants on matters of pure style.

Professor Bartell addressed one substantive issue that arose. In the past, Congress has directly amended certain bankruptcy rules. Rule 2002(o) (Notice for Order of Relief in Consumer Case) is a result of legislative amendment and was originally designated as Rule 2002(n) as set forth in the legislation. A subsequent amendment adding a provision earlier in the list of subdivisions in the rule resulted in changing the designation of Rule 2002(n) to 2002(o), and minor stylistic changes have been made since the provision was legislatively enacted. The question arose whether the Advisory Committee had authority to make stylistic changes to or revise the designation of the rule. The Advisory Committee concluded that any congressionally enacted rules should be left as Congress enacted them.

Judge Campbell thanked Judge Marcia Krieger for her work and leadership as Chair of the Restyling Subcommittee, as well as Professor Bartell and the style consultants, Professors Bryan Garner, Joe Kimble, and Joe Spaniol. Judge Dow echoed this sentiment and opined that the bankruptcy rules will be much improved by this process. Judge Dow also noted that progress has been made on Parts III and IV of the rules. Professors Garner and Kimble expressed their appreciation for being involved in the restyling process and the work done so far. A judge member of the Standing Committee said that the restyled rules are much more readable.

Upon motion, seconded by a member, and on a voice vote: **The Committee approved for publication the Restyled Parts I and II of the Bankruptcy Rules.**

*Publication of SBRA Rules and Official Forms.* The Advisory Committee is seeking publication of the rules and forms amendments previously published and issued on an expedited basis as interim rules, in response to the Small Business Reorganization Act (SBRA). The interim rules include amendments to the following Bankruptcy Rules: 1007, 1020, 2009, 2012, 2015, 3010, 3011, 3014, 3016, 3017.1, 3017.2 (new), 3018, and 3019. Professor Gibson noted that the only change made to the interim rules was stylistic. In response to suggestions by the style consultants, the Advisory Committee made stylistic changes to Rule 3017.2. The Advisory Committee did not make the suggested style changes to Rule 3019(c) because they would have created an inconsistency among the subheadings in the rule. Professor Gibson explained that the headings would be reconsidered as part of the restyling process.

Professor Gibson also introduced the changes made to Official Forms 101, 122B, 201, 309E-1, 309E-2, 309F-1, 309F-2, 314, 315, and 425A. Under its delegated authority, the Advisory Committee previously made technical and conforming amendments to all but one of these forms in response to the SBRA. Despite these already having taken effect, the Advisory Committee seeks to republish them for a longer period and in conjunction with the proposed amendments to the SBRA rules. The package of forms prepared for summer 2020 publication includes one addition beyond the forms initially amended in response to the SBRA: Form 122B needed to be amended to update instructions related to individual debtors proceeding under subchapter V.

Judge Campbell commended the Advisory Committee for this impressive work. Congress passed the SBRA with a short window before its effective date. Despite this, the Advisory Committee managed to produce revised rules and forms, get them approved by the Standing Committee and by the Executive Committee of the Judicial Conference, and distribute them to all the bankruptcy courts before the SBRA took effect so they could be adopted as local rules.

Upon motion, seconded by a member, and on a voice vote: **The Committee approved for publication the amendments to Rules 1007, 1020, 2009, 2012, 2015, 3010, 3011, 3014, 3016, 3017.1, 3017.2, 3018, and 3019 and Official Forms 101, 122B, 201, 309E-1, 309E-2, 309F-1, 309F-2, 314, 315, and 425A.**

*Publication of Proposed Amendment to Rule 3002(c)(6) (Time for Filing Proof of Claim).* Judge Dow next addressed the proposed amendment to Rule 3002(c)(6), which provides that the court may extend the deadline to file a proof of claim if the notice of the need to file a claim was insufficient to give the creditor a reasonable time to file because the debtor failed to file the required list of creditors. The Advisory Committee identified several problems with this provision. First, the rule would almost never come into play because a failure to file the list of creditors required by Rule 1007 is also cause for dismissal. Because such a case would likely be dismissed, there would be no claims allowance process. Second, under the language of paragraph (c)(6), the authorization to grant an extension is extremely narrow. For example, there is no provision for notices that omit a creditor's name or include an incorrect address. Further, Professor Bartell's research revealed a split in the caselaw. The proposed amendment seeks to resolve these problems by stating a general standard for the court's authority to grant an extension if the notice was insufficient to give a creditor reasonable time to file a claim. This same standard currently applies to creditors with foreign addresses. The proposed amendment would bring consistency to domestic creditors and provide more flexibility for the courts to offer relief as warranted.

Upon motion, seconded by a member, and on a voice vote: **The Committee approved for publication the amendments to Rule 3002.**

*Publication of Proposed Amendment to Rule 5005 (Filing and Transmittal of Papers).* Professor Bartell explained that Rule 9036 allows clerks and parties to provide notices or serve documents (other than those governed by Rule 7004) by electronic filing. She then introduced proposed amendment to Rule 5005. Rule 5005(b) governs transmittal of papers to the U.S. trustee and requires that such papers be mailed or delivered to an office of, or another place designated by, the U.S. trustee. It also requires the entity transmitting the paper file as proof of transmittal a verified statement. The Advisory Committee consulted with the Executive Office for U.S. Trustees

about whether Rule 5005 accurately reflects current practice and whether it could be conformed more closely to the practice under Rule 9036. The proposed amendment, which is supported by the Executive Office for U.S. Trustees, would allow papers to be transmitted to the U.S. trustee by electronic means and eliminate the requirement to file a verified statement.

Upon motion, seconded by a member, and on a voice vote: **The Committee approved for publication the amendment to Rule 5005.**

*Publication of Proposed Amendment to Rule 7004 (Process; Service of Summons, Complaint).* A committee note to Rule 7004's predecessor, Rule 704, specified that in serving a corporation or partnership or other unincorporated association by mail, it is not necessary for the officer or agent of the defendant to be named in the address so long as the mail is addressed to the defendant's proper address and directed to the attention of the officer or agent by reference to his position or title. When Rule 704 became Rule 7004, that committee note was dropped and no longer included in the published version of Rule 7004. Professor Bartell explained that, as a result, courts have divided over whether a notice addressed to a position or title is effective under Rule 7004. The Advisory Committee's proposal would insert a new subdivision (i), which inserts the substance of the previous committee note for Rule 704 into Rule 7004.

Upon motion, seconded by a member, and on a voice vote: **The Committee approved for publication the amendment to Rule 7004.**

*Publication of Proposed Amendment to Rule 8023 (Voluntary Dismissal).* Professor Bartell introduced the proposed amendment to Rule 8023, which is based on Appellate Rule 42(b), regarding voluntary dismissal of appeals. She indicated that the Standing Committee's deferred consideration of the proposed amendments to Appellate Rule 42(b) should not affect the Standing Committee's decision to approve the proposed amendment to Bankruptcy Rule 8023 for publication. She noted that the version of the proposed amendment to Rule 8023 in the agenda book needed two minor additional changes to conform to Appellate Rule 42(b). First, the phrase "under Rule 8023(a) or (b)" should be added to subdivision (c). Second, the word "mere" should be eliminated from subdivision (c). The resulting rule text for Rule 8023(c) would read ". . . for any relief under Rule 8023(a) or (b) beyond the dismissal of an appeal . . . ." Professor Bartell also suggested that publication of the proposed amendment to Rule 8023 should not preclude the Advisory Committee from making further changes if Appellate Rule 42(b) is changed.

Judge Campbell asked whether a decision by the Appellate Rules Advisory Committee not to move forward with the proposed amendments to Appellate Rule 42(b) would affect the Bankruptcy Rules Advisory Committee's desire to move forward with the proposed amendment to Bankruptcy Rule 8023. Professor Bartell responded affirmatively and clarified that the proposed amendment to Rule 8023 is purely conforming. Because Appellate Rule 42(b) has already been published and is being held at the final approval stage, the Bankruptcy Rules Advisory Committee can publish the conforming amendment to Bankruptcy Rule 8023 and be ready for final approval if Appellate Rule 42(b) is later approved.

Upon motion, seconded by a member, and on a voice vote: **The Committee approved for publication the amendment to Rule 8023.**

*Information Items*

*Amendment to Interim Rule 1020.* As previously noted, the CARES Act altered the definition of "debtor" under subchapter V of Chapter 11. This change required an amendment of interim Rule 1020, which was previously issued in response to the SBRA. The Advisory Committee drafted the amendment to the interim rule to reflect the definition of debtor in § 1182(1) of the Bankruptcy Code. The Standing Committee approved the amendment, and the Executive Committee of the Judicial Conference authorized its distribution to the courts. Professor Gibson noted that Rule 1020 is one of the rules that the Advisory Committee is publishing as part of the SBRA rules package. The version being published with the SBRA rules is the original interim Rule 1020. Because the version amended in response to the CARES Act will sunset in one year, it will no longer be applicable by the time the published version of Rule 1020 goes into effect.

*Director's Forms for Subchapter V Discharge.* The Advisory Committee approved three Director's Forms for subchapter V discharges. One is for a case of an individual filing for under subchapter V and in which the plan is consensually confirmed. The other two apply when confirmation is nonconsensual. These forms appear on the Administrative Office website.

**REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES**

Judge Bates and Professors Cooper and Richard Marcus provided the report of the Civil Rules Advisory Committee, which last met on April 1, 2020 by videoconference. The Advisory Committee presented three action items and several information items.

*Actions Items*

Judge Bates introduced the proposed amendment to Civil Rule 7.1 (Disclosure Statement) for final approval. The proposed amendment to Rule 7.1(a)(1) parallels recent amendments to Appellate Rule 26.1 and Bankruptcy Rule 8012(a) adding nongovernmental corporate intervenors to the requirement for filing disclosure statements. The technical change to Rule 7.1(b) conforms to the change to subdivision (a). Judges Bates stated that the amendment to subdivision (b) was not published but is appropriate for final approval as a technical and conforming amendment. The new provision in Rule 7.1(a)(2) seeks to require timely disclosure of information that is necessary to ensure diversity of citizenship for jurisdictional purposes. Problems have arisen with certain noncorporate entities – particularly limited liability companies (LLCs) – because of the attribution rules for citizenship. Many courts and individual judges require disclosure of this citizenship information.

Most public comments received supported the proposed amendment. In response to the comments, the Advisory Committee revised the language concerning the point in time that is relevant for purposes of the citizenship disclosure. Judge Bates explained that the time relevant to determining citizenship is usually when the action is either filed in or removed to federal court. The proposed language also accommodates other times that may apply for determining jurisdiction. The comments opposing the amendment expressed hope that the Supreme Court or Congress would address the issue of LLC citizenship. The Advisory Committee believes that

action through a rule amendment is warranted. Judge Bates noted that in response to a concern previously raised by a member of the Standing Committee, a sentence was added to the committee note to clarify that the disclosure does not relieve a party asserting diversity jurisdiction from the Rule 8(a)(1) obligation of pleading grounds for jurisdiction.

A member of the Standing Committee asked whether the language regarding other relevant times can be made more precise. Professor Cooper responded that the language is deliberately imprecise to avoid trying to define the relatively rare circumstances when a different time becomes controlling for jurisdiction. He provided examples of such circumstances. He also noted that a defendant in state court who is a co-citizen of the plaintiff cannot create diversity jurisdiction by changing his or her domicile and then removing the case to federal court. The law prohibits this, even though at the time of removal there would be complete diversity. Professor Cooper explained that the Advisory Committee sought to avoid more definite language based on the twists and turns of diversity jurisdiction and removal.

A judge member asked how the provision in question interplays with Rule 7.1(b) (Time to File). What triggers the obligation to file under subdivision (b) if there is another time that is relevant to determining the court's jurisdiction? This member observed that it was unclear whether a party or intervenor is obliged to refile or supplement under subdivision (b). Professor Cooper explained that two distinct concepts are at play: the time at which the disclosure is made and the time of the existent fact that must be disclosed. He provided an example. A party discloses the citizenship of everyone that is attributed to it, as an LLC. Later on, the party discovers additional information that was in existence (but not known to the party) at the time for determining diversity. Paragraph (b)(2) would trigger the obligation to supplement.

Another member suggested it would be better to require a party at the outset to disclose known information and impose an obligation to update that disclosure within a certain time if there is a change in circumstances that affects the previous disclosure. He also expressed concern about the language in Rule 7.1(a)(2) that places "at another time that may be relevant" with the conjunction "or" between subparagraphs (A) and (B). Professor Cooper explained that Rule 7.1(b)(1) sets the time for disclosure up front and Rule 7.1(a)(2)(B) refers to the citizenship that is attributed to that party at some time other than the time for disclosure. Judge Campbell commented that he understood Rule 7.1(a) as the "what" of what must be disclosed and Rule 7.1(b) as the "when." Professor Cooper confirmed that Judge Campbell's understanding aligned with the intent of the proposed amendment. Judge Campbell suggested revising Rule 7.1(a)(2)(B) to state "at any other time relevant to determining the court's jurisdiction." Discussion followed on the possibility of collapsing subparagraphs (A) and (B) into one provision.

A judge member echoed similar concerns regarding subparagraph (B)'s vagueness. This member suggested using as an alternative "at some other time as directed by the court." On the rare occasions when this arises, he explained, presumably the issue of the relevant time will be litigated, and the court can issue an order specifying it. This member also observed that, although subparagraph (B) would require a lawyer to make a legal determination as to what another relevant time may be, the rule does not require the lawyer to specify what that moment in time was.

Another judge member asked whether subparagraphs (A) and (B) are intended to qualify "file" or "attributed." Professor Cooper responded that the provisions are intended to qualify "attributed." A different member shared concerns about the "or" structure of Rule 7.1(a)(2)(A) and (B). This structure leaves it to the discretion and understanding of the filers whether they fall into the category that applies most often or some other category. This member favored a version that would reflect that most cases will be governed by subparagraph (A) and include a carve-out provision such as "if ordered by the court or if an alternative situation applies." He also suggested some of this uncertainty may be best resolved through commentary rather than rule language. Another judge member asked about the purpose of "unless the court orders otherwise" earlier in Rule 7.1(a)(2). This member suggested that this language might play into the resolution of subparagraph (B).

Professor Cooper then proposed a simplification of paragraph (2): "is attributed to that party or intervenor at the time that controls the determination of jurisdiction." Judge Bates noted that this proposal would still require the lawyer to make a legal determination. Judge Campbell offered an alternative, namely to instruct the parties that if the action is filed in federal court, they must disclose citizenship on the date of filing. If the action is removed to federal court, they must disclose citizenship on the date of removal. This alternative makes it clear what the parties' obligations are when they are making the disclosure and leaves it to judges to ask for more. Judge Bates agreed that this suggestion provides a clearer approach than trying to address a very rare circumstance in the rule. He also responded to a question raised earlier regarding "unless the court orders otherwise." The committee note addresses situations in which a judge orders a party not to file a disclosure statement or not to file publicly for privacy and confidentiality reasons.

A different member suggested that ambiguity remained whether subparagraphs (A) and (B) qualify "file" or "attributed." This member suggested breaking up paragraph (2) into two sentences to make clear that the latter provisions qualify "attributed." A judge member asked whether the committee note could resolve the ambiguity, but Judge Campbell noted that the committee note is not always read.

Judge Campbell recapped what the proposal would look like based on suggestions so far. Rule 7.1(a)(2) would state "In an action in which jurisdiction is based on diversity under 28 U.S.C. § 1332(a), a party or intervenor must, unless the court orders otherwise, file a disclosure statement at the time provided in subdivision (b) of this rule." A second sentence would then state that the disclosure statement must name and identify the "citizenship of every individual or entity whose citizenship is attributed to that party or intervenor at the time the action is filed in or removed to federal court." Another judge member pointed out that this proposal raises issues regarding an intervenor, whose attributed citizenship may not be relevant at the time of filing or removal.

In response to an earlier suggestion about using the committee note to resolve the issue, Professor Garner noted that many textualist judges will not look to committee notes. Such judges will consider a committee note on par with legislative history. Professor Coquillette agreed and observed that it is not good rulemaking practice to include something in a note that could change the meaning of the rule text. A judge member agreed and encouraged simpler rule language.

Judge Campbell recommended that the Advisory Committee continue working on the draft amendment to Rule 7.1 to consider the comments and issues raised. Judge Bates agreed and stated that the Advisory Committee would resubmit a redrafted rule in the future.

*Publication of Proposed Supplemental Rules for Social Security Review Actions Under 42 U.S.C. § 405(g).* Judge Bates then introduced the proposed Supplemental Rules for Social Security Review Actions. He noted that this project raises the issue of transsubstantivity. The subcommittee, chaired by Judge Sara Lioi, has been working on this for three years. The initial proposal came from the Administrative Conference of the United States. The Social Security Administration has strongly supported adoption of rules specific to Social Security review cases. Both the DOJ and the claimants' bar groups have expressed modest opposition. The Advisory Committee received substantial input – generally supportive – from district court judges and magistrate judges. The proposed rules recognize the essentially appellate nature of Social Security review proceedings. The cases are reviewed on a closed administrative record. These cases take up a substantial part of the federal docket. Judge Bates explained that the proposed rules are modest and simple. The Advisory Committee rejected the idea of considering supplemental rules for all administrative review cases given the diversity of that case category and the complicated nature of some types of cases.

The Supplemental Rules provide for a simplified complaint and answer. The proposed rules also address service of process and presentation of the case through a briefing process. Judge Bates noted several examples of civil or other rules that address specific areas separately from the normal rules. Some are narrow, while others are broad. The Rules Enabling Act authorizes general rules of practice and procedure. Here, the Advisory Committee is dealing with a unique yet voluminous area in which special rules can increase efficiency. When applied in Social Security review cases, the Civil Rules do not fit perfectly, a conclusion supported by magistrate judges and the Social Security Administration. The Advisory Committee submits that the benefits of these Supplemental Rules outweigh the risks and that the Rules Enabling Act will be able to protect against future arguments for more substance-specific rules of this kind.

The DOJ's opposition to the proposal stems from the possibility of these Supplemental Rules opening the door to more requests for subject-specific rules in other areas. After close study by the subcommittee and input from stakeholders, the Advisory Committee believed that publication and resulting comment process will shed light on whether the transsubstantivity concerns should foreclose adoption of this set of supplemental rules. Remaining issues are not focused on the specific language of the proposed rules, but rather on whether special rules for this area are warranted at all.

Judge Bates further clarified that the proposed Supplemental Rules would apply only to Social Security review actions under 42 U.S.C. § 405(g). They would not cover more complicated Social Security review matters that do not fit this framework (e.g., class actions). Professor Cooper added that the subcommittee worked very hard on this proposal, holding numerous conference calls and hosting two general conferences attended by representatives of interested stakeholders. The subcommittee has significantly refined the proposal. Professor Coquillette commended the work of the subcommittee and Advisory Committee. He also expressed his support for the decision

to draft Supplemental Rules, rather than to build a special rule into the Civil Rules themselves. The risk of transsubstantivity problems is much less under this approach.

A member of the Standing Committee commented that the decision here involves weighing the benefit that these rules would bring against the erosion of the transsubstantivity principle. He asked what kind of input the Advisory Committee received regarding the upside of this proposal. Judge Bates responded that one intended benefit is consistency among districts in handling these cases. Professor Cooper added that many judges already use procedures like the proposed Supplemental Rules with satisfactory results. He noted that the claimants' bar representatives have expressed concern that the proposed Supplemental Rules will frustrate local preferences of judges that employ different procedures.

A member noted that no one is criticizing the content of the proposed Supplemental Rules – a reflection of the care and time put in by the subcommittee. And no one is saying that the proposed rules favor a particular side. The debate largely surrounds transsubstantivity and form. A judge member generally agreed, but raised the concern expressed by some magistrate judges that the content of Supplemental Rules will limit their flexibility in case management. For example, in counseled cases some magistrate judges require a joint statement of facts. Who files first might be determined by whether the claimant has counsel: if so, then the claimant files first, but if not, then the government files first. In this judge's district the deadlines are a lot longer than those in the proposed rules. This member suggested a carve-out provision – "unless the court orders otherwise" – in the Supplemental Rules to give individual courts more leeway. He clarified that he did not oppose publication of the proposal but anticipated additional criticism and pushback.

Professor Coquillette commended the work of the subcommittee. He recognized that the Rules Committees are sensitive to the issue of transsubstantivity. One possible issue is Congress taking Supplemental Rules like this as precedent to carve out other parts of the rules. He inquired whether this issue was the basis of the DOJ's modest opposition to the proposal. Judge Bates confirmed that it was.

Judge Campbell expressed his support for publication. This situation is unique in that a government agency, the Administrative Conference of the United States, approached the Rules Committees and asked for this change. Another government agency, the Social Security Administration, has said this rule change would produce a significant benefit. The Supplemental Rules are drafted in a way that reduces the transsubstantivity concern. He cautioned against adding a carve-out provision that would allow courts to deviate, as that would not produce the desired benefit.

A DOJ representative clarified that, despite the Department's mild opposition to the proposed rules, the Department does not oppose publication. The Department may formally comment again after publication. An academic member commended the Advisory Committee and subcommittee for their elegant approach to a very difficult problem. A judge member asked whether the Supplemental Rules should be designated alphabetically rather than numerically. Professor Cooper explained that some sets of supplemental rules use letters to designate individual rules, while other sets use numbers. Professor Cooper added that his preference is to use numbers for these proposed Supplemental Rules. The judge member suggested that using letters might help

to avoid confusion, as lawyers might be citing to both the Civil Rules and the Supplemental Rules in the same submission. Judge Bates stated that the Advisory Committee will consider this issue during the publication and comment period.

Upon motion, seconded by a member, and on a voice vote: **The Committee approved for publication the proposed Supplemental Rules for Social Security Review Actions Under 42 U.S.C. § 405(g).**

*Publication of Proposed Amendment to Rule 12(a)(4).* Judge Bates introduced the proposed amendment to Rule 12(a)(4), which was initiated by a suggestion submitted by the DOJ. The proposed amendment would expand the time from 14 days to 60 days for U.S. officers or employees sued in an individual capacity to file an answer after the denial of a Rule 12 motion. This change is consistent with and parallels Rule 12(a)(3), as amended in 2000, and Appellate Rule 4(a)(1)(B)(iv), added in 2011. The extension of time is warranted for the DOJ to determine if representation should be provided or if an appeal should be taken. Judge Bates noted that the proposed language differs from the language proposed by the DOJ but captures the substance.

Upon motion, seconded by a member, and on a voice vote: **The Committee approved for publication the proposed amendment to Rule 12(a)(4).**

*Information Items*

*Report of the Subcommittee on Multidistrict Litigation (MDL).* Judge Bates stated that the subcommittee, chaired by Judge Robert Dow, has been at work for over three years. The subcommittee is actively discussing and examining three primary subjects. The subcommittee's work is informed by members of the bar, academics, and judges.

The first area of focus is early vetting of claims. This began with plaintiff fact sheets and defense fact sheets, secondarily. It has evolved to looking at initial census of claims. The FJC has researched this subject and indicated that plaintiff fact sheets are widely used in MDL proceedings, particularly in mass tort MDLs. Plaintiff fact sheets are useful for early screening and jumpstarting discovery. Initial census forms have evolved as a preliminary step to plaintiff fact sheets and require less information. Four current MDLs are utilizing initial census forms as a kind of pilot program to see how effective they are. Whether this results in a rule amendment or a subject for best practices, there is strong desire to preserve flexibility for transferee judges.

The second area is increased interlocutory review. The subcommittee is actively assessing this issue. The defense bar has strongly favored an increased opportunity for interlocutory appellate review, particularly for mass tort MDLs. The plaintiffs' bar has strongly opposed it, arguing that 28 U.S.C. § 1292(b) and other routes to review exist now, and it is not clear that these are inadequate. Judge Bates explained that delay is a major concern, as with any interlocutory review for these MDL proceedings. Another question concerns the scope of any increased interlocutory review. Should it be available in a subset of MDLs, all MDLs, or even beyond MDLs to capture other complex cases? The role of the district court is another issue that the subcommittee is considering. The subcommittee recently held a miniconference, hosted by Emory Law School and Professor Jaime Dodge, on the topic of increased interlocutory review. The miniconference

involved MDL practitioners, transferee judges, appellate judges, and members of the Judicial Panel on Multidistrict Litigation. Judge Bates stated that the miniconference was a success and will be useful for the subcommittee. A clear divide remains between the defense bar and plaintiffs' bar regarding increased interlocutory review, with the mass tort MDL practitioners being the most vocal. The judges at the miniconference were generally cautious about expanded interlocutory appeal and concerned about delay.

The third and newest area of concentration by the subcommittee is settlement review. The question is whether there should be some judicial supervision for MDL settlements, as there is under Rule 23 for class action settlements. Leadership counsel is one area of examination. As with the interlocutory review subject, one issue here is the scope of any potential rule. Judge Bates further noted that defense counsel, plaintiffs' counsel, and transferee judges have expressed opposition to any rule requiring greater judicial involvement in MDL settlements. Academic commenters are most interested in enhancing the judicial role in monitoring settlements in MDLs. The subcommittee continues to explore these questions and has not reached any decision as to whether a rule amendment is appropriate.

A member asked what research was available on interlocutory review in MDL cases. This member observed while Rule 23(f) was likely controversial when it was adopted, it has had a positive effect. He also stated that interlocutory review in big cases would be beneficial because most big cases settle, and the settlement value is affected by the district court rulings on issues that are not subject to appellate review. Judge Bates responded that the subcommittee is looking at Rule 23(f), but that rule's approach may not be a good fit. Professor Marcus noted that information on interlocutory review in MDL cases is difficult to identify, but research has been done and practitioners on both the plaintiffs' side and defense side have submitted research to the subcommittee. A California state-court case-gathering mechanism may be worth study. He noted that initial proposals sought an absolute right to interlocutory review but proposals under consideration now are more nuanced. One member affirmed the difficulty of identifying the information sought. Concerning § 1292(b), this member suggested that generally district judges want to keep these MDLs moving and promote settlement. A district judge may effectively veto a § 1292 appeal; however, under Rule 23(f), parties can make their application to the court of appeals. Professor Marcus noted that materials in the agenda book reflected these varying models regarding the district judge's role. The member suggested that the subcommittee survey appellate judges on whether Rule 23(f) has been an effective or burdensome rule.

A judge member expressed wariness about rulemaking in the MDL context. She asked whether most of the input from judges has been from appellate judges or transferee judges, and who would be most helped by a rule providing for increased interlocutory review. Regarding settlement review, she questioned whether this is a rule issue or one more appropriately addressed by best practices. Another member opined that, of the issues discussed, the settlement review issue least warrants further study for rulemaking. Professor Marcus responded that even if the subcommittee's examination of these issues does not produce rules amendments, there is much to be gained. For example, current efforts may support best practices recommendations included in a future edition of the *Manual for Complex Litigation*. Judges Bates noted that the only area of focus that may not be addressed by a best practices approach is the issue of increased interlocutory review. A member agreed with Judge Bates. This member also raised a different issue – "opt outs"

– for the subcommittee to consider. In his MDL experience, both the defense lawyers and district judges often spend more time dealing with the opt-outs than the settlement.

A judge member emphasized that, in the interlocutory review area, the big question is whether existing avenues – mandamus, Rule 54(b), and § 1292(b) – are adequate. He suggested that § 1292(b) is a poor fit for interlocutory review in MDL cases. This member also shared that several defense lawyers have indicated hesitation to filing a § 1292(b) motion because the issue is not a controlling issue of law. Another judge member stated that the interlocutory review issue does not seem like a problem specific to MDLs. There are some non-MDL mass tort cases that raise similar key legal questions that could also benefit from some expedited interlocutory review. It is very clear that appellate judges do not want to be put in a position where they are expected to give expedited review. At the same time, district judges feel that they should have a voice in how issues fit into their complicated proceedings and whether appellate review would enhance the ultimate resolution of the case.

Another member suggested that the subcommittee look at what state courts are doing in this area. Some states have what are essentially MDLs by a different name. For example, in California, certification by the trial judge is not dispositive either way with respect to appellate review.

A judge member recalled the experience with Rule 23(f). The rule is beneficial, and its costs may not be as great as they seem. For instance, in many cases, the district court proceeding will carry on while the Rule 23(f) issue is under consideration. He also suggested that a court of appeals decision whether to grant interlocutory review can itself provide helpful feedback to the parties and district court. In his view, § 1292(b) is more a tool for the district court judge than it is for a party who believes the judge may have erred on a major issue in the case. He suggested a district court, even without a veto, could have input on the effect of delay on the case or the effect of a different ruling. Regarding the Rule 23(f) model, he pointed out that not all MDL proceedings have the same characteristics. If the subcommittee focused on a specific subset of issues likely to be pivotal but often not reviewed, perhaps the Rule 23(f) model would work in this context.

Another member stated that class certification decisions are always the subject of a Rule 23(f) petition in his experience. Only one petition has been granted, and none has changed the direction of the litigation. If this avenue for interlocutory appeal is opened, it will likely be used frequently. Absent a screening mechanism, the provision will not be invoked selectively.

Judge Campbell shared several comments. He stated his support for the subcommittee's consideration of a proposal submitted by Appellate Rules Advisory Committee member, Professor Steven Sachs, as reflected in the agenda book materials. Delay is one of the biggest issues in MDL cases in his experience. The issues that are most likely to go up on appeal are those that come up shortly before trial (e.g., *Daubert* or preemption motions). If there is a two-year delay, the case must be put on hold because, otherwise, the district court is ready to move forward with bellwether trials. He acknowledged that appellate judges do not relish the notion of expediting, but the importance of the issue could factor into their decision. If the issue is very important, they may find it justified to expedite an appeal. Professor Marcus observed that appellate decision times vary considerably among the circuits.

Judge Bates thanked the Standing Committee members for their feedback which reflects many of the discussions the subcommittee has had with judges and members of the bar. The subcommittee will continue to consider whether any of these issues merit rules amendments.

*Suggestion Regarding Rule 4(c)(3) and Service by the U.S. Marshals Service in In Forma Pauperis Cases.* The suggestion regarding Rule 4(c)(3) is still under review. There is a potential ambiguity with respect to service by the U.S. Marshals Service in *in forma pauperis* cases. The Advisory Committee is considering a possible amendment that would resolve the ambiguity.

*Suggestion Regarding Rule 12(a) (Time to Serve a Responsive Pleading).* The suggestion regarding Rules 12(a)(1), (2), and (3) is under assessment. Rules 12(a)(2) and (3) govern the time for the United States, or its agencies, officers, or employees, to respond. Rules 12(a)(2) and (3) set the time at 60 days, but some statutes set the time at 30 days. There is some concern among Advisory Committee members as to whether a rule amendment is warranted.

*Suggestion Regarding Rule 17(d) (Public Officer's Title and Name).* The Advisory Committee continues to consider a suggestion regarding Rule 17(d). Judge Bates explained that potential advantages exist to amending Rule 17(d) to require designation by official title rather than by name.

Judge Bates noted in closing that the agenda book reflects items removed from the Advisory Committee's agenda relating to Rules 7(b)(2), 10, and 16.

## REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Raymond Kethledge and Professors Beale and Nancy King presented the report of the Criminal Rules Advisory Committee, which met on May 5, 2020 by videoconference. The Advisory Committee presented one action item and one information item.

### *Action Items*

*Publication of Proposed Amendment to Rule 16 (Discovery Concerning Expert Reports and Testimony).* Judge Kethledge introduced the proposed amendment to Rule 16. The core of the proposal does two things. First, it requires the district court to set a deadline for disclosure of expert testimony and includes a functional standard for when that deadline must be. Second, it requires more specific disclosures, including a complete statement of all opinions. This proposal is a result of a two-year process which included, at Judge Campbell's suggestion, a miniconference. The miniconference was a watershed in the Advisory Committee's process and largely responsible for the consensus reached. Judge Kethledge explained that the DOJ has been exemplary in the process, recognizing the problems and vagueness in disclosures under the current rule. He thanked the DOJ representatives who have been involved: Jonathan Wroblewski, Andrew Goldsmith, and Elizabeth Shapiro.

There have been changes to the proposal since the last Standing Committee meeting. The draft that the Advisory Committee presented in January required both the government and the

defense to disclose expert testimony it would present in its "case-in-chief." Following Judge Campbell's suggestion at the last meeting, the Advisory Committee considered whether the rule should refer to evidence "at trial" or in a party's "case-in-chief." The Advisory Committee concluded that "case-in-chief" was best because that phrase is used throughout Rule 16. But the Advisory Committee added language requiring the government to disclose testimony it intends to use "during its rebuttal to counter testimony that the defendant has timely disclosed under (b)(1)(C)." Additionally, the Advisory Committee made several changes to the committee note. One, suggested by Judge Campbell, clarifies that Rule 16 does not require a verbatim recitation of expert opinion. The Advisory Committee does not seek to import Civil Rule 26's much more detailed disclosure requirements into criminal practice. In response to a point previously raised by a Standing Committee member, the Advisory Committee revised the committee note to reflect that there may be instances in which the government or a party does not know the identity (but does know the opinions) of the expert whose testimony will be presented. In those situations, the note encourages that party to seek a modification of the discovery requirement under Rule 16(d) to allow a partial disclosure. Judge Kethledge explained that the Advisory Committee did not want to establish an exception in the rule language to account for these situations.

Professor Beale described other revisions to the committee note. New language was added to make clear that the government has an obligation to disclose rebuttal expert evidence that is intended to respond to expert evidence that the defense timely disclosed. The note language emphasizes that the government and defense obligations generally mirror one another. The Advisory Committee also added a parenthetical in the note clarifying that where a party has already disclosed information in an examination or test report (and accompanying documents), the party need not repeat that information in its expert disclosure so long as it identifies the information and the prior report. Finally, the committee note was restructured to follow the order of the proposed amendment.

A judge member commended the Advisory Committee on the proposal. She also raised a question regarding committee note language referring to "prompt notice" of any "modification, expansion, or contraction" of the party's expert testimony. She suggested that "contraction" might be beyond what is required by Rule 16(c), which the note language refers to. Professor King responded that the committee note includes that language because Rule 16(c) does not speak to correction or contraction but only to addition. The Advisory Committee believed it was important to address all three circumstances. Subdivision (c) is cross-referenced in the note because it provides the procedure for such modifications. Professor Beale emphasized that the key language in the note is "correction." The rule is intended to cover fundamental modifications. Professor King added that the issue of contraction came up at the miniconference. Some defense attorneys shared experiences where expert disclosures led them to prepare for multiple experts, but the government only presented one. The judge member observed that the "contraction" language could lead to a party being penalized for disclosing too much. This member recommended removing "contraction" from the note, unless something in the rule text explicitly instructs parties of their duty to take things out of their expert disclosures. Judge Kethledge suggested the word "modification," which encapsulates contraction and expansion, be substituted in the committee note language. He added that some concern was expressed regarding the supplementation requirement and the potential for parties to intentionally delay supplementation to gain an advantage. The Advisory Committee will be alert to any public comments raising this issue.

Upon motion, seconded by a member, and on a voice vote: **The Committee approved for publication the proposed amendment to Rule 16.**

*Information Items*

*Proposals to Amend Rule 6 (The Grand Jury).* The Advisory Committee received two suggestions to modify the secrecy provisions in Rule 6(e) to allow greater disclosure for grand jury materials, particularly for cases of historical interest. The two suggestions – one from Public Citizen Litigation Group and one from Reporters Committee for Freedom of the Press – are very different. Public Citizen proposes a limited rule with concrete requirements. The Reporters Committee identifies nine factors that should inform the disclosure decision.

Judge Kethledge explained that Justice Breyer previously suggested that the Rules Committees examine the issue, and a circuit split exists. A subcommittee, chaired by Judge Michael Garcia, has been formed to consider the issue. Judge Kethledge noted that the DOJ will submit its formal position on the issue to the subcommittee. One question that came up in 2012 may be relevant now: whether the district court has inherent authority to order disclosure. Judge Kethledge advised against the Advisory Committee opining on the issue, which he described as an Article III question rather than a procedural issue.

Judge Campbell agreed that it is not the Advisory Committee's role to provide advisory opinions on what a court's power is. He stated that it may be relevant, however, for a court to know whether Rule 6 was intended to set forth an exclusive list of exceptions. Judge Kethledge observed that if the Advisory Committee states its intention for the Rule to "occupy the field" or not, that in itself could constitute taking a position on the inherent-power question. In response, Judge Campbell noted that under the Rules Enabling Act, the rules have the effect of a statute and supersede existing statutes on procedural matters. It may be relevant to a court in addressing its inherent power, in an area where Congress has legislated, to ask whether Congress intended to leave room for courts to develop common law or intended to occupy the field. When Civil Rule 37(e) was adopted in 2015 to deal with spoliation, the intent was to resolve a circuit split in the case law. The committee note stated that the rule amendment intended to foreclose a court from relying on inherent power in that area. Judge Campbell emphasized that the Advisory Committee's intent will likely be a relevant consideration in the future. Professor Coquillette added that if the Advisory Committee addresses exclusivity of the grand jury secrecy exceptions, that should be stated in the rule text rather than in a committee note. A DOJ representative explained that the core of the circuit split is whether courts have inherent authority to deviate from the list of exceptions in Rule 6(e), so avoiding the inherent authority issue in addressing the rule might be impossible.

Judge Kethledge suggested that the Advisory Committee can decide whether the disclosure of historical material is lawful without opining on the existence of inherent authority. He interpreted Justice Breyer's previous statement as encouraging the Advisory Committee to state whether the rule provides for disclosure of historical material, not necessarily whether the courts have inherent authority to do so. Judge Kethledge added that this discussion provides good food for thought as the Advisory Committee considers the Rule 6 proposals.

## REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Livingston and Professor Capra provided the report of the Evidence Rules Advisory Committee, which last met on October 25, 2019, in Nashville, Tennessee. The Advisory Committee did not hold a spring 2020 meeting. Judge Livingston thanked everyone for the opportunity to be a part of the rulemaking process. Professor Capra thanked both Judge Livingston and Judge Campbell for their leadership and counsel over the years.

Judge Livingston noted that the proposed amendment to Rule 404(b) is now before Congress and scheduled to take effect on December 1, 2020, absent congressional action. The Advisory Committee will decide soon whether to bring to the Standing Committee for publication any proposed amendments to Rules 106, 615 or 702.

Judge Livingston indicated that the Advisory Committee continues to seek consensus on a possible amendment to Rule 106, the rule of completeness. The question is whether to propose a narrow or broad revision to Rule 106. Professor Capra added that the Advisory Committee has discussed for years how far an amendment to Rule 106 should go.

Consideration of possible amendments to Rule 615 on excluding witnesses remains ongoing. Professor Capra explained the uncertainty reflected in caselaw concerning whether Rule 615 empowers judges to go beyond simply excluding witnesses from the courtroom. Clarity would benefit all litigants. Professor Capra noted the potential application of the rule to remote trials. Extending a sequestration order beyond the confines of the courtroom raises issues concerning lawyer conduct and professional responsibility. The committee note to any proposed rule amendment would acknowledge that the rule does not address that question.

The Advisory Committee continues its consideration of possible amendments to Rule 702 concerning expert testimony. Judge Livingston noted that the DOJ asked the Advisory Committee to delay any proposed rule amendments to Rule 702 to allow the Department to demonstrate the effectiveness of its recent reforms concerning forensic feature evidence.

The Advisory Committee frequently hears the complaints that many courts treat Rule 702's requirements of sufficient basis and reliable application as questions of weight rather than admissibility, and that courts do not look for these requirements to be proved by a preponderance of the evidence under Rule 104(a). The Advisory Committee has received numerous submissions from the defense bar with citations to cases in which some courts do not apply Rule 702 admissibility standards. Judge Livingston noted that at the symposium held by the Advisory Committee in October 2019, several judges expressed concern regarding potential amendments to Rule 702.

Judge Campbell commented that the Advisory Committee's discussion of *Daubert* motions requiring consideration of the Rule 702 requisites under the Rule 104(a) preponderance-of-the-evidence standard made *Daubert* determinations easier for him. He suggested that clarification of that process – whether in rule text, committee note, or practice guide – will result in clearer *Daubert* briefing and decisions. It was suggested that Rule 702 could be amended to add a cross-reference to Rule 104(a). Judge Livingston responded that the Advisory Committee worries

whether such an amendment would carry a negative inference vis-à-vis other evidence rules (given that there are many rules with requirements that should be analyzed under Rule 104(a)). But perhaps the committee note could explain why a cross-reference to Rule 104(a) would be added in Rule 702 and not in other rules.

## OTHER COMMITTEE BUSINESS

Judge Campbell reported on the five-year update to the *Strategic Plan for the Federal Judiciary*, which is presented in the agenda book as a redlined version of the *Strategic Plan* and is being revised under the leadership of Judge Carl Stewart. Suggestions for improvement are encouraged and will be passed on to Judge Stewart.

Ms. Wilson reported on several legislative developments (in addition to the CARES Act issues that had been discussed at length earlier in the meeting). Ms. Wilson directed the Committee to the legislative tracking chart in the agenda book. Ms. Wilson highlighted that the Due Process Protections Act (S. 1380) would directly amend Criminal Rule 5. Since the last meeting of the Standing Committee, the Senate passed the bill, but the House has taken no action. In anticipation of the House taking up the bill, Judges Campbell and Kethledge submitted a letter to House leadership on May 28 expressing the Rules Committees' preference that any rule amendment occur through the Rules Enabling Act process. The letter also detailed the Criminal Rules Advisory Committee's prior consideration of this issue. In 2012, when legislation on this topic was being considered, the then-Chair of the Criminal Rules Advisory Committee, Judge Reena Raggi, submitted 900 pages of materials reflecting the Criminal Rules Advisory Committee's consideration of the question of prosecutors' discovery obligations.

Ms. Wilson also reported on the Copyright Alternative in Small-Claims Enforcement (CASE) Act of 2019 (H.R. 2426), which would create an Article I tribunal for copyright claims valued at $30,000 or less. Proceedings would be streamlined, and judicial review would be strictly limited. This is similar to the Federal Arbitration Act. The legislation has been passed by the House and a companion bill (S. 1273) has been reported out of the Senate Judiciary Committee. The Office of Legislative Affairs at the Administrative Office expects some movement in the future. The Committee on Federal-State Jurisdiction (Fed-State Committee) has been tracking the CASE Act and has asked the Rules Committees to stay involved. The Fed-State Committee may ultimately recommend that the Judicial Conference adopt a formal position opposing the legislation and, with input from the Rules Committees, suggest alternatives to the creation of a separate tribunal for copyright claims.

Ms. Wilson noted that on June 25, the House Judiciary Committee's Subcommittee on Courts, Intellectual Property, and the Internet will hold a hearing titled "Federal Courts During the COVID-19 Pandemic: Best Practices, Opportunities for Innovation, and Lessons for the Future." Judge Campbell will be the federal judiciary's witness at the hearing. His testimony will include a rules portion that details the Rules Committees' work on emergency rules.

Judge Campbell pointed to the agenda book materials summarizing efforts of federal courts and the Administrative Office to deal with the pandemic. Professor Marcus noted that the report mentions an emergency management staff at the Administrative Office and asked what other types

of emergency situations that staff has focused on in the past. Ms. Womeldorf explained that past efforts have focused on weather-related events, and she will continue to monitor the work of the Administrative Office's COVID-19 Task Force to inform the future work of this Committee.

## CONCLUDING REMARKS

Before adjourning the meeting, Judge Campbell thanked the Committee's members and other attendees for their preparation and contributions to the discussion. The Committee will next meet on January 5, 2021.

Respectfully submitted,

Rebecca A. Womeldorf
Secretary, Standing Committee

# TAB 1E

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**Agenda E-19 (Summary)**
**Rules**
**September 2020**

## SUMMARY OF THE

## REPORT OF THE JUDICIAL CONFERENCE

## COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

The Committee on Rules of Practice and Procedure recommends that the Judicial Conference:

1. Approve the proposed amendments to Appellate Rules 3 and 6, and Forms 1 and 2 as set forth in Appendix A, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law..... pp. 2-4

2. Approve the proposed amendments to Bankruptcy Rules 2005, 3007, 7007.1, and 9036 as set forth in Appendix B, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law..... pp. 5-8

The remainder of the report is submitted for the record and includes the following for the information of the Judicial Conference:

# REPORT OF THE JUDICIAL CONFERENCE

## COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

## TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES:

The Committee on Rules of Practice and Procedure (Standing Committee or Committee) met by videoconference on June 23, 2020, due to the Coronavirus Disease 2019 (COVID-19) pandemic. All members participated.

Representing the advisory committees were Judge Michael A. Chagares, Chair, and Professor Edward Hartnett, Reporter, Advisory Committee on Appellate Rules; Judge Dennis Dow, Chair, Professor S. Elizabeth Gibson, Reporter, and Professor Laura B. Bartell, Associate Reporter, Advisory Committee on Bankruptcy Rules; Judge John D. Bates, Chair, Professor Edward H. Cooper, Reporter, and Professor Richard Marcus, Associate Reporter, Advisory Committee on Civil Rules; Judge Raymond M. Kethledge, Chair, Professor Sara Sun Beale, Reporter, and Professor Nancy J. King, Associate Reporter, Advisory Committee on Criminal Rules; Judge Debra Ann Livingston, Chair, and Professor Daniel J. Capra, Reporter, Advisory Committee on Evidence Rules.

Also participating in the meeting were Professor Catherine T. Struve, the Standing Committee's Reporter; Professor Daniel R. Coquillette, Professor Bryan A. Garner, and Professor Joseph Kimble, consultants to the Standing Committee; Rebecca A. Womeldorf, the Standing Committee's Secretary; Bridget Healy, Scott Myers, and Julie Wilson, Rules Committee Staff Counsel; Allison Bruff, Law Clerk to the Standing Committee; and John S.

Cooke, Director, and Dr. Tim Reagan, Senior Research Associate, of the Federal Judicial Center (FJC).

Elizabeth J. Shapiro, Deputy Director, Federal Programs Branch, Civil Division, and Andrew Goldsmith, National Coordinator of Criminal Discovery Initiatives, represented the Department of Justice (DOJ) on behalf of Deputy Attorney General Jeffrey A. Rosen.

In addition to its general business, including a review of the status of pending rules amendments in different stages of the Rules Enabling Act process and pending legislation affecting the rules, the Committee received and responded to reports from the five rules advisory committees and two joint subcommittees. The Committee also discussed the Rules Committees' work on developing rules for emergencies as directed by the Coronavirus Aid, Relief, and Economic Security (CARES) Act, Pub. L. No. 116-136, 134 Stat. 281. Additionally, the Committee discussed an action item regarding judiciary strategic planning and was briefed on pending legislation that would affect the rules and the judiciary's response to the COVID-19 pandemic.

## FEDERAL RULES OF APPELLATE PROCEDURE

### *Rules and Forms Recommended for Approval and Transmission*

The Advisory Committee on Appellate Rules submitted proposed amendments to Rules 3 and 6, and Forms 1 and 2, with a recommendation that they be approved and transmitted to the Judicial Conference. The amendments were published for public comment in August 2019.

Rule 3 (Appeal as of Right—How Taken), Rule 6 (Appeal in a Bankruptcy Case), Form 1 (Notice of Appeal to a Court of Appeals From a Judgment or Order of a District Court), and Form 2 (Notice of Appeal to a Court of Appeals From a Decision of the United States Tax Court)

The proposed amendment to Rule 3 revises the requirements for a notice of appeal. Some courts of appeals, using an *expressio unius* rationale, have treated a notice of appeal from a final judgment that mentions one interlocutory order but not others as limiting the appeal to that

order, rather than reaching all of the interlocutory orders that merge into the judgment. In order to reduce the loss of appellate rights that can result from such a holding, and to provide other clarifying changes, the proposed amendment changes the language in Rule 3(c)(1)(B) to require the notice of appeal to "designate the judgment—or the appealable order—from which the appeal is taken." The proposed amendment further provides that "[t]he notice of appeal encompasses all orders that, for purposes of appeal, merge into the designated judgment or appealable order. It is not necessary to designate those orders in the notice of appeal." The proposal also accounts for situations in which a case is decided by a series of orders over time and for situations in which the notice is filed after entry of judgment but designates only an order that merged into the judgment. Finally, the proposed amendment explains how an appellant may limit the scope of a notice of appeal if it chooses to do so. The proposed amendments to Forms 1 and 2 reflect the proposed changes to Rule 3. The proposed amendment to Rule 6 is a conforming amendment.

The comments received regarding Rule 3 were split, with five comments supporting the proposal (with some suggestions for change) and two comments criticizing the proposal. No comments were filed regarding the proposed amendments to Rule 6, and the only comments regarding Forms 1 and 2 were style suggestions. Most issues raised in the comments had been considered by the Advisory Committee during its previous deliberations. The Advisory Committee added language in proposed Rule 3(c)(7) to address instances where a notice of appeal filed after entry of judgment designates only a prior order merged into the judgment and added a corresponding explanation to the committee note. The Advisory Committee also expanded the committee note to clarify two issues and made minor stylistic changes to Rule 3 and Forms 1 and 2.

The Standing Committee unanimously approved the Advisory Committee's recommendation that the proposed amendments to Rules 3 and 6, and Forms 1 and 2, be approved and transmitted to the Judicial Conference.

> **Recommendation:** That the Judicial Conference approve the proposed amendments to Appellate Rules 3 and 6, and Forms 1 and 2 as set forth in Appendix A, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

### *Rule Approved for Publication and Comment*

The Advisory Committee submitted a proposed amendment to Rule 25 (Filing and Service), with a request that it be published for public comment in August 2020. The Standing Committee unanimously approved the Advisory Committee's request.

The proposed amendment to Rule 25(a)(5) responds to a suggestion regarding privacy concerns for cases under the Railroad Retirement Act. The proposed amendment would extend the privacy protections afforded in Social Security benefit cases to Railroad Retirement Act benefit cases. The Advisory Committee will identify specific stakeholder groups and seek their comments on the proposed rule amendment.

### *Information Items*

The Advisory Committee met by videoconference on April 3, 2020. Agenda items included continued consideration of potential amendments to Rules 35 (En Banc Determination) and 40 (Petition for Panel Rehearing) in an effort to harmonize the rules. The Advisory Committee decided not to pursue rulemaking to address appellate decisions based on unbriefed grounds. It tabled a suggestion to amend Rule 43 (Substitution of Parties) to require the use of titles rather than names in cases seeking relief against officers in their official capacities, pending inquiry into the practice of circuit clerks. The Advisory Committee also decided to establish two new subcommittees to consider suggestions to regularize the standards and procedures governing

in forma pauperis status and to amend Rule 4(a)(2), the rule that addresses the filing of a notice of appeal before entry of judgment, to more broadly allow the relation forward of notices of appeal.

The Advisory Committee will reconsider a potential amendment to Rule 42 (Voluntary Dismissal) following discussion and comments at the June 23, 2020 Standing Committee meeting. The proposed amendment to Rule 42 was published in August 2019. As published, the proposed amendment would have required the circuit clerk to dismiss an appeal if the parties file a signed dismissal agreement specifying how costs are to be paid and pay any court fees that are due. (The amendment would accomplish this by replacing the word "may" in the current rule with "must.") The proposed amendment would have also added a new paragraph (a)(3) providing that a court order is required for any relief beyond the dismissal of an appeal, and a new subdivision (c) providing that Rule 42 does not alter the legal requirements governing court approval of a settlement, payment, or other consideration. At the Standing Committee meeting, a question was raised concerning the proposed amendment's effect on local circuit rules that impose additional requirements before an appeal can be dismissed. The Advisory Committee will continue to study Rule 42, with a particular focus on the question concerning local rules.

## FEDERAL RULES OF BANKRUPTCY PROCEDURE

### *Rules Recommended for Approval and Transmission*

The Advisory Committee on Bankruptcy Rules submitted proposed amendments to Rules 2005, 3007, 7007.1, and 9036. The amendments were published for public comment in August 2019.

Rule 2005 (Apprehension and Removal of Debtor to Compel Attendance for Examination)

The proposed amendment to Rule 2005(c) replaces the current reference to "the provisions and policies of title 18, U.S.C., § 3146(a) and (b)" – sections that have been repealed

– with a reference to "the relevant provisions and policies of title 18 U.S.C. § 3142" – the section that now deals with the topic of conditions of release. The only comment addressing the proposal supported it. Accordingly, the Advisory Committee unanimously approved the amendment as published.

Rule 3007 (Objections to Claims)

The proposed amendment to Rule 3007(a)(2)(A)(ii) clarifies that the special service method required by Rule 7004(h) must be used for service of objections to claims only on insured depository institutions as defined in section 3 of the Federal Deposit Insurance Act, 12 U.S.C. § 1813. The clarification addresses a possible reading of the rule that would extend such special service not just to banks, but to credit unions as well. The only relevant comment supported the proposed amendment and the Advisory Committee recommended final approval of the rule as published.

Rule 7007.1 (Corporate Ownership Statement)

The proposed amendment extends Rule 7007.1(a)'s corporate-disclosure requirement to would-be intervenors. The proposed amendment also makes conforming and stylistic changes to Rule 7007.1(b). The changes parallel the recent amendment to Appellate Rule 26.1 (effective December 1, 2019), and the proposed amendments to Bankruptcy Rule 8012 (adopted by the Supreme Court and transmitted to Congress on April 27, 2020) and Civil Rule 7.1 (published for public comment in August 2019).

The Advisory Committee made one change in response to the comments. It agreed to retain the terminology "corporate ownership statement" because "disclosure statement" is a bankruptcy term of art with a different meaning. With that change, it recommended final approval of the rule.

Rule 9036 (Notice and Service Generally)

The proposed amendment to Rule 9036 would encourage the use of electronic noticing and service in several ways. The proposed amendment recognizes a court's authority to provide notice or make service through the Bankruptcy Noticing Center ("BNC") to entities that currently receive a high volume of paper notices from the bankruptcy courts. The proposed amendment also reorganizes Rule 9036 to separate methods of electronic noticing and service available to courts from those available to parties. Under the amended rule, both courts and parties may serve or provide notice to registered users of the court's electronic-filing system by filing documents with that system. Both courts and parties also may serve and provide notice to any entity by electronic means consented to in writing by the recipient. But only courts may serve or give notice to an entity at an electronic address registered with the BNC as part of the Electronic Bankruptcy Noticing program.

The proposed amendment differs from the version previously published for comment. The published version was premised in part on proposed amendments to Rule 2002(g) and Official Form 410. As discussed below, the Advisory Committee decided not to proceed with the proposed amendments to Rule 2002(g) and Official Form 410.

The Advisory Committee received seven comments regarding the proposed amendments, mostly from court clerks or their staff. In general, the comments expressed great support for the program to encourage high-volume paper-notice recipients to register for electronic bankruptcy noticing. But commenters opposed several other aspects of the proposed amendment. The concerns fell into three categories: clerk monitoring of email bounce-backs; administrative burden of a proof-of-claim opt-in for email noticing and service; and the interplay of the proposed amendments to Rules 2002(g) and 9036.

The Advisory Committee addressed concerns about clerk monitoring of email bounce-backs by adding a sentence to Rule 9036(d): "It is the recipient's responsibility to keep its electronic address current with the clerk."

The Advisory Committee was persuaded by clerk office concerns that the administrative burden of a proof-of-claim opt-in outweighed any benefits, and therefore decided not to go forward with the earlier proposed amendments to Rule 2002(g) and Official Form 410 and removed references to that option that were in the published version of Rule 9036. This decision also eliminated the concerns raised in the comments about the interplay between the proposed amendments to Rules 2002(g) and 9036. With those changes, the Advisory Committee recommended final approval of Rule 9036.

The Standing Committee unanimously approved the Advisory Committee's recommendation that the proposed amendments to Rules 2005, 3007, 7007.1, and 9036 be approved and transmitted to the Judicial Conference

> **Recommendation:** That the Judicial Conference approve the proposed amendments to Bankruptcy Rules 2005, 3007, 7007.1, and 9036 as set forth in Appendix B, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

***Rules and Official Forms Approved for Publication and Comment***

The Advisory Committee submitted proposed amendments to three categories of rules and forms with a request that they be published for public comment in August 2020. The Standing Committee unanimously approved the Advisory Committee's request.

The three categories are: (1) proposed restyled versions of Parts I and II of the Bankruptcy Rules; (2) republication of the Interim Rule and Official Form amendments previously approved to implement the Small Business Reorganization Act of 2019 (SBRA); and (3) proposed amendments to Rules 3002(c)(6), 5005, 7004, and 8023.

Restyled Rules, Parts I and II

At its fall 2018 meeting, after an extensive outreach to bankruptcy judges, clerks, lawyers and organizations, the Advisory Committee began the process of restyling the bankruptcy rules. This endeavor follows similar projects that produced comprehensive restyling of the Federal Rules of Appellate Procedure in 1998, the Federal Rules of Criminal Procedure in 2002, the Federal Rules of Civil Procedure in 2005, and the Federal Rules of Evidence in 2011. The Advisory Committee now proposes publication of restyled drafts of approximately one third of the full bankruptcy rules set consisting of the 1000 series and 2000 series of rules. The proposed restyled rules are the product of intensive and collaborative work between the style consultants who produced the initial drafts, and the reporters and the Restyling Subcommittee who provided comments to the style consultants on those drafts. In considering the subcommittee's recommendations, the Advisory Committee endorsed the following basic principles to guide the restyling project:

1. *Make No Substantive Changes*. Most of the comments the reporters and the subcommittee made on the drafts were aimed at preventing an inadvertent substantive change in meaning by the use of a different word or phrase than in the existing rule. The rules are being restyled from the version in effect at the time of publication. Future rule changes unrelated to restyling will be incorporated before the restyled rules are finalized.

2. *Respect Defined Terms*. Any word or phrase that is defined in the Code should appear in the restyled rules exactly as it appears in the Code definition without restyling, despite any possible flaws from a stylistic standpoint. Examples include the unhyphenated terms "equity security holder," "small business case," "small business debtor," "health care business," and "bankruptcy petition preparer." On the other hand, when terms are used in the Code but are not defined, they may be restyled in the rules, such as "personal financial-management course," "credit-counseling statement," and "patient-care ombudsman."

3. *Preserve Terms of Art*. When a phrase is used commonly in bankruptcy practice, the Advisory Committee recommended that it not be restyled. Such a phrase that was often used in Part I of the rules was "meeting of creditors."

4. *Remain Open to New Ideas*. The style consultants suggested some different approaches in the rules, which the Advisory Committee has embraced, including making references to specific forms by form number, and listing recipients of notices by bullet points.

5. *Defer on Matters of Pure Style*. Although the subcommittee made many suggestions to improve the drafting of the restyled rules, on matters of pure style the Advisory Committee committed to deferring to the style consultants when they have different views.

The Advisory Committee also decided not to attempt to restyle rules that were enacted by Congress. As a result, the restyled rules will designate current Rule 2002(o) (Notice of Order for Relief in Consumer Case) as 2002(n) as set forth in Section 321 of the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. 98-353, 98 Stat. 357, and the Advisory Committee will not recommend restyling the wording as it was set forth in the Act. Other bankruptcy rules that were enacted by Congress in whole or in part are Rule 2002(f), 3001(g), and 7004(h).

Although the Advisory Committee requested that the Part I and II restyled rules be published for public comment in August 2020, those proposed amendments will not be sent forward for final approval until the remaining portions of the Bankruptcy Rules have been restyled. Work has already begun on a group of rules expected to be published in 2021, and the Advisory Committee anticipates that the final batch of rules will be published for comment in 2022. After all the rules have been restyled, published, and given final approval by the Standing Committee, the Rules Committees hope to present the full set of restyled Bankruptcy Rules to the Judicial Conference for approval at its fall 2023 meeting.

SBRA Rules and Forms

On August 23, 2019, the President signed into law the Small Business Reorganization Act of 2019, Pub. L. No. 116-54, which creates a new subchapter V of chapter 11 for the reorganization of small business debtors, an alternative procedure that small business debtors can elect to use. Upon recommendation of the Standing Committee, on December 16, 2019, the

Executive Committee, acting on an expedited basis on behalf of the Judicial Conference, authorized the distribution of Interim Rules of Bankruptcy Procedure 1007, 1020, 2009, 2012, 2015, 3010, 3011, 3014, 3016, 3017.1, 3017.2, 3018, and 3019 to the courts so they could be adopted locally, prior to the February 19, 2020 effective date of the SBRA, to facilitate uniformity of practice until the Bankruptcy Rules can be revised in accordance with the Rules Enabling Act. The Advisory Committee has now begun the process of promulgating national rules governing cases under subchapter V of chapter 11 by seeking publication of the amended and new rules for comment in August 2020, along with the SBRA form amendments.

The SBRA rules consist of the following:

- Rule 1007 (Lists, Schedules, Statements, and Other Documents; Time Limits),
- Rule 1020 (Small Business Chapter 11 Reorganization Case),
- Rule 2009 (Trustees for Estates When Joint Administration Ordered),
- Rule 2012 (Substitution of Trustee or Successor Trustee; Accounting),
- Rule 2015 (Duty to Keep Records, Make Reports, and Give Notice of Case or Change of Status),
- Rule 3010 (Small Dividends and Payments in Cases Under Chapter 7, Subchapter V of Chapter 11, Chapter 12, and Chapter 13),
- Rule 3011 (Unclaimed Funds in Cases Under Chapter 7, Subchapter V of Chapter 11, Chapter 12, and Chapter 13),
- Rule 3014 (Election Under § 1111(b) by Secured Creditor in Chapter 9 Municipality or Chapter 11 Reorganization Case),
- Rule 3016 (Filing of Plan and Disclosure Statement in a Chapter 9 Municipality or Chapter 11 Reorganization Case),
- Rule 3017.1 (Court Consideration of Disclosure Statement in a Small Business Case),
- new Rule 3017.2 (Fixing of Dates by the Court in Subchapter V Cases in Which There Is No Disclosure Statement),
- Rule 3018 (Acceptance or Rejection of Plan in a Chapter 9 Municipality or a Chapter 11 Reorganization Case), and
- Rule 3019 (Modification of Accepted Plan in a Chapter 9 Municipality or a Chapter 11 Reorganization Case).

The Advisory Committee recommended publishing the SBRA rules as they were recommended to the courts for use as interim rules with some minor stylistic changes to Rule 3017.2.

Unlike the SBRA interim rules, the SBRA Official Forms were issued on an expedited basis under the Advisory Committee's delegated authority to make conforming and technical amendments to official forms (subject to subsequent approval by the Standing Committee and notice to the Judicial Conference, (JCUS-MAR 16, p. 24)). Nevertheless, the Advisory Committee committed to publishing the forms for comment in August 2020, along with the SBRA rule amendments, in order to ensure that the public has an opportunity to review the rules and forms together.

The SBRA Official Forms consist of the following:

- Official Form 101 (Voluntary Petition for Individuals Filing for Bankruptcy),
- Official Form 201 (Voluntary Petition for Non-Individuals Filing for Bankruptcy),
- Official Form 309E-1 (Notice of Chapter 11 Bankruptcy Case (For Individuals or Joint Debtors)),
- Official Form 309E-2 (Notice of Chapter 11 Bankruptcy Case (For Individuals or Joint Debtors under Subchapter V)),
- Official Form 309F-1 (Notice of Chapter 11 Bankruptcy Case (For Corporations or Partnerships)),
- Official Form 309F-2 (Notice of Chapter 11 Bankruptcy Case (For Corporations or Partnerships under Subchapter V)),
- Official Form 314 (Ballot for Accepting or Rejecting Plan),
- Official Form 315 (Order Confirming Plan), and
- Official Form 425A (Plan of Reorganization for Small Business Under Chapter 11).

In addition, the Advisory Committee recommends one additional SBRA-related form amendment to Official Form 122B (Chapter 11 Statement of Your Current Monthly Income). The instructions to that form currently require that it be filed "if you are an individual and are filing for bankruptcy under Chapter 11." This statement is not accurate if the debtor is an individual filing under subchapter V of Chapter 11. The proposed amendment to the form clarifies that it is not applicable to subchapter V cases.

Rules 3002(c)(6), 5005, 7004, and 8023

*Rule 3002 (Filing Proof of Claim or Interest)*. Under Rule 3002(c)(6)(B), an extension of time to file proofs of claim may be granted to foreign creditors if "the notice was insufficient

under the circumstances to give the creditor a reasonable time to file a proof of claim." The Advisory Committee recommended an amendment that would allow a domestic creditor to obtain an extension under the same circumstances.

*Rule 5005 (Filing and Transmittal of Papers).* The Advisory Committee recommended publication of an amendment to Rule 5005(b) that would allow papers to be transmitted to the U.S. trustee by electronic means and would eliminate the requirement that the filed statement evidencing transmittal be verified.

*Rule 7004 (Process; Service of Summons, Complaint).* The Advisory Committee recommended publication of a new subsection (i) to clarify that Rule 7004(b)(3) and Rule 7004(h) permit use of a title rather than a specific name in serving a corporation or partnership, unincorporated association or insured depository institution. Service on a corporation or partnership, unincorporated association or insured depository institution at its proper address directed to the attention of the "Chief Executive Officer," "President," "Officer for Receiving Service of Process," or "Officer" (or other similar titles) or, in the case of Rule 7004(b)(3), directed to the attention of the "Managing Agent," "General Agent," or "Agent" (or other similar titles) suffices, whether or not a name is also used or such name is correct.

*Rule 8023 (Voluntary Dismissal).* The proposed amendment to Rule 8023 would conform the rule to changes currently under consideration for Appellate Rule 42(b). As noted earlier in this report, the proposed amendment to Appellate Rule 42 was published for comment in August 2019, but the amendment is not yet moving forward for final approval because the Advisory Committee will study further the amendments' implications for local circuit provisions that impose additional requirements for dismissal of an appeal. The proposed amendment to Rule 8023 will be published for comment in the meantime.

## *Information Items*

The Advisory Committee met by videoconference on April 2, 2020. In addition to its recommendations for final approval and for public comment discussed above, it recommended five official form amendments and one interim rule amendment in response to the CARES Act.

Notice of Conforming Changes to Official Forms 101, 201, 122A-1, 122B, and 122C-1

The CARES Act made several changes to the Bankruptcy Code, most of them temporary, to provide financial assistance during the COVID-19 pandemic. For the one-year period after enactment, the definition of "debtor" for subchapter V cases is changed, requiring conforming changes to Official Forms 101 and 201. For the same one-year time period, the definitions of "current monthly income" and "disposable" income are amended to exclude certain payments made under the CARES Act. These changes required conforming amendments to Official Forms 122A-1, 122B, and 122C-1. The Advisory Committee approved the necessary changes at its April 2, 2020 meeting pursuant to its authority to make conforming and technical changes to Official Forms subject to retroactive approval by the Standing Committee and notice to the Judicial Conference. The Standing Committee approved the amendments at its June 23, 2020 meeting, and notice is hereby provided to the Judicial Conference. The amended forms are included in Appendix B. These amendments have a duration of one year after the effective date of the CARES Act, at which time the former version of these forms will go back into effect.

Interim Rule 1020 (Chapter 11 Reorganization Case for Small Business Debtors or Debtors Under Subchapter V)

One of the interim rules that was adopted by courts to implement the SBRA, Interim Rule 1020, required a temporary amendment due to the new definition of a Chapter 11, subchapter V debtor that was introduced by the CARES Act.

The Advisory Committee voted unanimously at its spring meeting to approve the proposed amendment to Interim Rule 1020 for issuance as an interim rule for adoption by each

judicial district. By email vote concluding on April 11, the Standing Committee unanimously approved the Advisory Committee's recommendation, and, on April 14, the Executive Committee, acting on an expedited basis on behalf of the Judicial Conference, approved the request. Because the CARES Act definition of a subchapter V debtor will expire in 2021, the temporary amendment to Interim Rule 1020 is not incorporated into the proposed amendments to Rule 1020 that are recommended for public comment (under the Rules Enabling Act, permanent amendments to Rule 1020 to address the SBRA would not take effect before December 1, 2022).

## FEDERAL RULES OF CIVIL PROCEDURE

### *Rules Approved for Publication and Comment*

The Advisory Committee submitted a proposed amendment to Rule 12, as well as new Supplemental Rules for Social Security Actions Under 42 U.S.C. § 405(g), with a request that they be published for public comment in August 2020. The Standing Committee unanimously approved the Advisory Committee's request.

Rule 12 (Defenses and Objections: When and How Presented; Motion for Judgment on the Pleadings; Consolidating Motions; Waiving Defenses; Pretrial Hearing)

The proposed amendment to Rule 12(a)(4) extends the time to respond (after denial of a Rule 12 motion) when a United States officer or employee is sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf. Under the current rule, the time to serve a responsive pleading after notice that the court has denied a Rule 12 motion or has postponed its disposition until trial is 14 days. The DOJ, which often represents federal employees or officers sued in an individual capacity, submitted a suggestion urging that the rule be amended to extend the time to respond in these types of actions to 60 days.

The Advisory Committee agreed that the current 14-day time period is too short. First, personal liability suits against federal officials are subject to immunity defenses, and a denial of a

qualified or absolute immunity defense at the Rule 12 motion-to-dismiss stage can be appealed immediately. The appeal time in such circumstances is 60 days, the same as in suits against the federal government itself. In its suggestion, the DOJ points out that, under the current rule, when a district court rejects an immunity defense, a responsive pleading must be filed before the government has determined whether to appeal the immunity decision.

The suggestion is a logical extension of the concerns that led to the adoption several years ago of Rule 12(a)(3), which sets the time to serve a responsive pleading in such individual-capacity actions at 60 days, and Appellate Rule 4(a)(1)(B)(iv), which sets the time to file an appeal in such actions at 60 days.

Supplemental Rules for Social Security Review Actions Under 42 U.S.C. § 405(g)

The proposal to append to the Civil Rules a set of supplemental rules for Social Security disability review actions under 42 U.S.C. § 405(g) is the result of three years of extensive study by the Advisory Committee.

This project was prompted by a suggestion by the Administrative Conference of the United States that the Judicial Conference "develop for the Supreme Court's consideration a uniform set of procedural rules for cases under the Social Security Act in which an individual seeks district court review of a final administrative decision of the Commissioner of Social Security pursuant to 42 U.S.C. § 405(g)." Section 405(g) provides that an individual may obtain review of a final decision of the Commissioner of Social Security "by a civil action." A nationwide study commissioned by the Administrative Conference revealed widely differing district court procedures for these actions.

A subcommittee was formed to consider the suggestion. The subcommittee's first tasks were to gather additional data and information from the various stakeholders and to determine whether the issues revealed by the Administrative Conference's study could – or should – be

corrected by rulemaking. With input from both claimant and government representatives, as well as the Advisory Committee and Standing Committee, the subcommittee developed draft rules for discussion.

Over time, the draft rules were revised and simplified. During this process, the subcommittee continued to discuss whether a better approach might be to develop model local rules or best practices. Ultimately, with feedback from the Advisory Committee, the Standing Committee, and district and magistrate judges, the subcommittee determined to press forward with developing proposed rules for publication. A continuing question that has been the focus of discussion in both the Advisory Committee and the Standing Committee is whether the benefits of the proposed supplemental rules would outweigh the costs of departing from the usual presumption against substance-specific rulemaking. The federal rules are generally trans-substantive and the Rules Committees have, with limited exceptions, avoided promulgating rules applicable to only a particular type of action.

The proposed supplemental rules – eight in total – are modest and drafted to reflect the unique character of § 405(g) actions. The proposed rules set out simplified pleadings and service, make clear that cases are presented for decision on the briefs, and establish the practice of presenting the actions as appeals to be decided on the briefs and the administrative record. While trans-substantivity concerns remain, the Advisory Committee believes the draft rules are an improvement over the current lack of uniform procedures and looks forward to receiving comments in what will likely be a robust public comment period.

***Information Items***

The Advisory Committee met by videoconference on April 1, 2020. In addition to the action items discussed above, the agenda included a report by the Multidistrict Litigation (MDL) Subcommittee and consideration of suggestions that specific rules be developed for MDL

proceedings. As previously reported, the subcommittee has engaged in a substantial amount of fact gathering, with valuable assistance from the Judicial Panel on Multidistrict Litigation and the FJC. Subcommittee members have also participated in numerous conferences hosted by different constituencies, most recently a virtual conference focused on interlocutory appeal issues in MDLs hosted by the Institute for Complex Litigation and Mass Claims at Emory University School of Law. It is still to be determined whether this work will result in any recommendation for amendments to the Civil Rules.

The Advisory Committee will continue to consider a potential amendment to Rule 7.1, the disclosure rule, following discussion and comments at the June 23, 2020 Standing Committee meeting. The proposed amendment to Rule 7.1(a) was published for public comment in August 2019. The proposed amendment to Rule 7.1(b) is a technical and conforming amendment and was not published for public comment. The proposed amendment to Rule 7.1(a)(1) would require the filing of a disclosure statement by a nongovernmental corporation that seeks to intervene, a change that would conform the rule to the recent amendment to Appellate Rule 26.1 (effective December 1, 2019) and the proposed amendment to Bankruptcy Rule 8012 (adopted by the Supreme Court and transmitted to Congress on April 27, 2020). The proposed amendment to Rule 7.1(a)(2) would create a new disclosure aimed at facilitating the early determination of whether diversity jurisdiction exists under 28 U.S.C. § 1332(a), or whether complete diversity is defeated by the citizenship of a nonparty individual or entity that is attributed to a party.

## FEDERAL RULES OF CRIMINAL PROCEDURE

### *Rule Approved for Publication and Comment*

The Advisory Committee on Criminal Rules submitted a proposed amendment to Criminal Rule 16 (Discovery and Inspection), with a request that it be published for public

comment in August 2020. The Standing Committee unanimously approved the Advisory Committee's request.

The proposed amendment to Rule 16, the principal rule that governs discovery in criminal cases, would expand the scope of expert discovery. The Advisory Committee developed its proposal in response to three suggestions (two from district judges) that pretrial disclosure of expert testimony in criminal cases under Rule 16 should more closely parallel Civil Rule 26.

In considering the suggestions and developing a proposed amendment, the Advisory Committee drew upon two informational sessions. First, at the Advisory Committee's fall 2018 meeting, representatives from the DOJ updated the Advisory Committee on the DOJ's development and implementation of policies governing disclosure of forensic and non-forensic evidence. Second, in May 2019, the Rule 16 Subcommittee convened a miniconference to explore the issue with stakeholders. Participants included defense attorneys, prosecutors, and DOJ representatives who have extensive personal experience with pretrial disclosures and the use of experts in criminal cases. At the miniconference, defense attorneys identified two problems with the current rule: (1) the lack of a timing requirement; and (2) the lack of detail in the disclosures provided by prosecutors.

Over the next year, the subcommittee worked on drafting a proposed amendment. Drafts were discussed at Advisory Committee meetings and at the Standing Committee's January 2020 meeting. The proposed amendment approved for publication addresses the two shortcomings in the current rule identified at the miniconference – the lack of timing and the lack of specificity – while maintaining the reciprocal structure of the current rule. It is intended to facilitate trial preparation by allowing the parties a fair opportunity to prepare to cross-examine expert witnesses who testify at trial and to secure opposing expert testimony if needed.

### *Information Item*

The Advisory Committee met by videoconference on May 5, 2020. In addition to finalizing for publication the proposed amendment to Rule 16, the Advisory Committee formed a subcommittee to consider suggestions to amend the grand jury secrecy provisions in Rule 6 (The Grand Jury), an issue last on the Advisory Committee's agenda in 2012.

The Advisory Committee has received two suggestions that the secrecy provisions in Rule 6(e) be amended to allow for disclosure of grand jury materials under limited circumstances. A group of historians and archivists seeks, in part, an amendment adding records of "historical importance" to the list of exceptions to the secrecy provisions. Another group comprised of media organizations urges that Rule 6 be amended "to make clear that district courts may exercise their inherent supervisory authority, in appropriate circumstances, to permit the disclosure of grand jury materials to the public." In addition to these two suggestions, in a statement respecting the denial of certiorari in *McKeever v. Barr*, 140 S. Ct. 597 (2020), Justice Breyer pointed out a conflict among the circuit courts regarding whether the district court retains inherent authority to release grand jury materials in "appropriate cases" outside of the exceptions enumerated in Rule 6(e). *Id.* at 598 (statement of Breyer, J.). He stated that "[w]hether district courts retain authority to release grand jury material outside those situations specifically enumerated in the Rules, or in situations like this, is an important question. It is one I think the Rules Committee both can and should revisit." *Id.*

## FEDERAL RULES OF EVIDENCE

### *Information Items*

The Advisory Committee did not hold a spring 2020 meeting, but is continuing its consideration of several issues, including: various alternatives for an amendment to Rule 106 (the rule of completeness); Rule 615 and the problems raised in case law and in practice

regarding the scope of a Rule 615 order; and forensic expert evidence, *Daubert*, and possible amendments to Rule 702. The DOJ has asked that the Rules Committees hold off on amending Rule 702 in order to allow time for the DOJ's new policies regarding forensic expert evidence to take effect. The Advisory Committee will discuss this request along with other issues related to Rule 702 at its upcoming meetings.

**OTHER ITEMS**

An additional action item before the Committee was a request by the Judiciary Planning Coordinator that the Committee review a draft update to the *Strategic Plan for the Federal Judiciary* for the years 2020-2025. The Committee did so and had no changes to suggest.

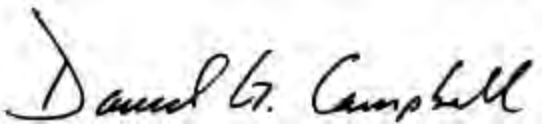
The Committee was also updated on the work of two joint subcommittees: the E-filing Deadline Joint Subcommittee, formed to consider a suggestion that the electronic filing deadlines in the federal rules be changed from midnight to an earlier time of day, such as when the clerk's office closes in the court's respective time zone; and the Appeal Finality After Consolidation Joint Civil-Appellate Subcommittee, which is considering whether the Appellate and Civil Rules should be amended to address the effect (on the final-judgment rule) of consolidating separate cases. Both subcommittees have asked the FJC to gather empirical data to assist in determining the need for rules amendments.

Finally, the Committee discussed the CARES Act, including its impact on criminal proceedings and its directive to consider the need for court rules to address future emergencies. On March 29, 2020, on the joint recommendation of the chairs of this Committee and the Committee on Court Administration and Case Management, the Judicial Conference found that emergency conditions due to the national emergency declared by the President under the National Emergencies Act, 50 U.S.C. §§ 1601-1651, with respect to the COVID-19 pandemic will materially affect the functioning of the federal courts. Under § 15002(b) of the CARES Act,

this finding allows courts, under certain circumstances, to temporarily authorize the use of video or telephone conferencing for certain criminal proceedings.

Section 15002(b)(6) of the CARES Act directs the Judicial Conference to develop measures for the courts to address future emergencies. In response to that directive, the Committee heard reports on the subcommittees formed by each advisory committee to consider possible rules amendments that would provide for procedures during future emergencies. As a starting point, the advisory committees solicited public comments on challenges encountered during the COVID-19 pandemic in state and federal courts from lawyers, judges, parties, or the public, and on solutions developed to deal with those challenges. The committees were particularly interested in hearing about situations that could not be addressed through the existing rules or in which the rules themselves interfered with practical solutions. Over 60 substantive comments were received. The Standing Committee asked each advisory committee to identify rules that should be amended to account for emergency situations and to develop discussion drafts of proposed amendments at the committees' fall meetings for consideration by the Standing Committee at its January 2021 meeting.

Respectfully submitted,



David G. Campbell, Chair

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| Jesse M. Furman | Carolyn B. Kuhl |
| Daniel C. Girard | Patricia A. Millett |
| Robert J. Giuffra Jr. | Gene E.K. Pratter |
| Frank M. Hull | Jeffrey A. Rosen |
| William J. Kayatta Jr. | Kosta Stojilkovic |
| Peter D. Keisler | Jennifer G. Zipps |

# TAB 1F

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**Legislation that Directly or Effectively Amends the Federal Rules**
**116th Congress**
**(January 3, 2019 – January 3, 2021)**

| Name | Sponsor/ Co-Sponsor(s) | Affected Rule | Text, Summary, and Committee Report | Actions |
|---|---|---|---|---|
| **Protect the Gig Economy Act of 2019** | **H.R. 76**<br><br>*Sponsor:*<br>Biggs (R-AZ) | CV 23 | **Bill Text:**<br>https://www.congress.gov/116/bills/hr76/BILLS-116hr76ih.pdf<br><br>**Summary (authored by CRS):**<br>This bill amends Rule 23 of the Federal Rules of Civil Procedure to expand the preliminary requirements for class certification in a class action lawsuit to include a new requirement that the claim does not allege misclassification of employees as independent contractors.<br><br>**Report:** None. | • 1/3/19: introduced in the House; referred to Judiciary Committee; Judiciary Committee referred to its Subcommittee on the Constitution, Civil Rights, and Civil Justice |
| **Injunctive Authority Clarification Act of 2019** | **H.R. 77**<br><br>*Sponsor:*<br>Biggs (R-AZ)<br><br>*Co-Sponsors:*<br>Meadows (R-NC)<br>Rose (R-TN)<br>Roy (R-TX)<br>Wright (R-TX) | CV | **Bill Text:**<br>https://www.congress.gov/116/bills/hr77/BILLS-116hr77ih.pdf<br><br>**Summary (authored by CRS):**<br>This bill prohibits federal courts from issuing injunctive orders that bar enforcement of a federal law or policy against a nonparty, unless the nonparty is represented by a party in a class action lawsuit.<br><br>**Report:** None. | • 1/3/19: introduced in the House; referred to Judiciary Committee; Judiciary Committee referred to its Subcommittee on Crime, Terrorism, and Homeland Security<br>• 2/25/20: hearing held by Senate Judiciary Committee on same issue ("Rule by District Judge: The Challenges of Universal Injunctions") |
| **Litigation Funding Transparency Act of 2019** | **S. 471**<br><br>*Sponsor:*<br>Grassley (R-IA)<br><br>*Co-Sponsors:*<br>Cornyn (R-TX)<br>Sasse (R-NE)<br>Tillis (R-NC) | CV 23 | **Bill Text:**<br>https://www.congress.gov/116/bills/s471/BILLS-116s471is.pdf<br><br>**Summary:**<br>Requires disclosure and oversight of TPLF agreements in MDL's and in "any class action."<br><br>**Report:** None. | • 2/13/19: introduced in the Senate; referred to Judiciary Committee |

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| **Due Process Protections Act** | **S. 1380**<br><br>*Sponsor:*<br>Sullivan (R-AK)<br><br>*Co-Sponsors:*<br>Booker (D-NJ)<br>Cornyn (R-TX)<br>Durbin (D-IL)<br>Lee (R-UT)<br>Paul (R-KY)<br>Whitehouse (D-RI) | CR 5 | **Bill Text:**<br>https://www.congress.gov/116/bills/s1380/BILLS-116s1380es.pdf<br><br>**Summary:**<br>This bill would amend Criminal Rule 5 (Initial Appearance) by:<br>1. redesignating subsection (f) as subsection (g); and<br>2. inserting after subsection (e) the following:<br>"(f) Reminder Of Prosecutorial Obligation. --<br>(1) IN GENERAL. -- In all criminal proceedings, on the first scheduled court date when both prosecutor and defense counsel are present, the judge shall issue an oral and written order to prosecution and defense counsel that confirms the disclosure obligation of the prosecutor under Brady v. Maryland, 373 U.S. 83 (1963) and its progeny, and the possible consequences of violating such order under applicable law.<br>(2) FORMATION OF ORDER. -- Each judicial council in which a district court is located shall promulgate a model order for the purpose of paragraph (1) that the court may use as it determines is appropriate."<br><br>**Report:** None. | • 5/8/19: introduced in the Senate; referred to Judiciary Committee<br>• 5/20/20: reported out of Judiciary Committee and passed Senate without amendment by unanimous consent<br>• 5/22/20: received in the House<br>• 5/28/20: letter from Rules Committee Chairs sent to Judiciary Committee Chairman and Ranking Member<br>• 9/21/20: passed House without amendment by voice vote |
| **Assessing Monetary Influence in the Courts of the United States Act (AMICUS Act)** | **S. 1411**<br><br>*Sponsor:*<br>Whitehouse (D-RI)<br><br>*Co-Sponsors:*<br>Blumenthal (D-CT)<br>Hirono (D-HI) | AP 29 | **Bill Text:**<br>https://www.congress.gov/116/bills/s1411/BILLS-116s1411is.pdf<br><br>**Summary:**<br>In part, the legislation would require certain amicus curiae to disclose whether counsel for a party authored the brief in whole or in part and whether a party or a party's counsel made a monetary contribution intended to fund the preparation or submission of the brief.<br><br>**Report:** None. | • 5/9/19: introduced in the Senate; referred to Judiciary Committee |

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| | **H.R. 3993**<br><br>*Sponsor:*<br>Johnson (D-GA)<br><br>*Co-Sponsors:*<br>Cohen (D-TN)<br>Lieu (D-CA) | AP 29 | Identical to Senate bill (see above) | • 7/25/19: introduced in the House; referred to Judiciary Committee<br>• 8/28/19: Judiciary Committee referred to its Subcommittee on Courts, Intellectual Property, and the Internet |
| **Back the Blue Act of 2019** | **S. 1480**<br><br>*Sponsor:*<br>Cornyn (R-TX)<br><br>*Co-Sponsors:*<br>Barrasso (R-WY)<br>Blackburn (R-TN)<br>Blunt (R-MO)<br>Boozman (R-AR)<br>Capito (R-WV)<br>Cassidy (R-LA)<br>Cruz (R-TX)<br>Daines (R-MT)<br>Fischer (R-NE)<br>Hyde-Smith (R-MS)<br>Isakson (R-GA)<br>Perdue (R-GA)<br>Portman (R-OH)<br>Roberts (R-KS)<br>Rubio (R-FL)<br>Tillis (R-NC) | § 2254<br>Rule 11 | **Bill Text:**<br>https://www.congress.gov/116/bills/s1480/BILLS-116s1480is.pdf<br><br>**Summary:**<br>Section 4 of the bill is titled "Limitation on Federal Habeas Relief for Murders of Law Enforcement Officers." It adds to § 2254 a new subdivision (j) that would apply to habeas petitions filed by a person in custody for a crime that involved the killing of a public safety officer or judge.<br><br>Section 4 also amends Rule 11 of the Rules Governing Section 2254 Cases in the United States District Courts -- the rule governing certificates of appealability and time to appeal -- by adding the following language to the end of that Rule: "Rule 60(b)(6) of the Federal Rules of Civil Procedure shall not apply to a proceeding under these rules in a case that is described in section 2254(j) of title 28, United States Code."<br><br>**Report:** None. | • 5/15/19: introduced in the Senate; referred to Judiciary Committee |
| | **H.R. 5395**<br><br>*Sponsor:*<br>Bacon (R-NE)<br><br>*Co-Sponsors:*<br>Cook (R-CA)<br>Graves (R-LA)<br>Johnson (R-OH)<br>Stivers (R-OH) | | Identical to Senate bill (see above). | • 12/11/19: introduced in House; referred to Judiciary Committee<br>• 1/30/20: Judiciary Committee referred to its Subcommittee on Crime, Terrorism, and Homeland Security |

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| **Justice in Forensic Algorithms Act of 2019** | **H.R. 4368**<br><br>*Sponsor:*<br>Takano (D-CA)<br><br>*Co-Sponsors:*<br>Evans (D-PA)<br>Johnson (D-GA) | | **Bill Text:**<br>https://www.congress.gov/116/bills/hr4368/BILLS-116hr4368ih.pdf<br><br>**Summary:**<br>The stated purpose of the bill is, in part, "[t]o prohibit the use of trade secrets privileges to prevent defense access to evidence in criminal proceedings . . . ."<br><br>The bill amends the Evidence Rules by adding two new rules and amends Criminal Rule 16(a)(1) by adding a new paragraph (H):<br><br>• Evidence Rule 107. Inadmissibility of Certain Evidence that is the Result of Analysis by Computational Forensic Software. In any criminal case, evidence that is the result of analysis by computational forensic software is admissible only if—<br>(1) the computational forensic software used has been submitted to the Computational Forensic Algorithm Testing Program of the Director of the National Institute of Standards and Technology and there have been no material changes to that software since it was last tested; and<br>(2) the developers and users of the computational forensic software agree to waive any and all legal claims against the defense or any member of its team for the purposes of the defense analyzing or testing the computational forensic software.<br><br>• Evidence Rule 503. Protection of Trade Secrets in a Criminal Proceeding. In any criminal case, trade secrets protections do not apply when defendants would otherwise be entitled to obtain evidence.<br><br>• Criminal Rule 16(a)(1)(H). Use of Computational Forensic Software. Any results or reports resulting from analysis by computational forensic software shall be provided to the defendant, and the defendant shall be accorded access to an executable copy of the version of the computational forensic software, as well as earlier versions of the software, | • 9/17/19: introduced in the House; referred to Judiciary Committee and the Committee on Science, Space, and Technology<br>• 10/2/19: Judiciary Committee referred to its Subcommittee on Courts, Intellectual Property, and the Internet |

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| | | | necessary instructions for use and interpretation of the results, and relevant files and data, used for analysis in the case and suitable for testing purposes. Such a report on the results shall include—<br>(i) the name of the company that developed the software;<br>(ii) the name of the lab where test was run;<br>(iii) the version of the software that was used;<br>(iv) the dates of the most recent changes to the software and record of changes made, including any bugs found in the software and what was done to address those bugs;<br>(v) documentation of procedures followed based on procedures outlined in internal validation;<br>(vi) documentation of conditions under which software was used relative to the conditions under which software was tested; and<br>(vii) any other information specified by the Director of the National Institute of Standards and Technology in the Computational Forensic Algorithm Standards.<br><br>**Report:** None. | |

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| **CARES Act** | **H.R. 748** | CR (multiple) | **Bill Text (as enrolled):** https://www.congress.gov/116/bills/hr748/BILLS-116hr748enr.pdf<br><br>**Summary:**<br>Section 15002 applies to the federal judiciary. Subsection (b)(1)(5) authorizes videoconferencing for criminal proceedings if determined that emergency conditions due to COVID-19 will materially affect court. Proceedings include detention hearings, initial appearances, preliminary hearings, waivers of indictments, arraignments, revocation proceedings, felony pleas and sentencings.<br><br>Subsection (b)(6) directs the Judicial Conference and the Supreme Court to consider rules amendments that address emergency measures courts can take when an emergency is declared under the National Emergencies Act.<br><br>**Report:** None. | • 3/27/20: became Public Law No. 116-136<br>• Spring 2020: Advisory Committees form subcommittees to study rules amendments to address emergency situations |
| **Abuse of the Pardon Prevention Act** | **H.R. 7694**<br><br>*Sponsor:*<br>Schiff (D-CA)<br><br>*Co-Sponsor:*<br>Nadler (D-NY) | CR 6 | **Bill text:**<br>https://www.congress.gov/116/bills/hr7694/BILLS-116hr7694ih.pdf<br><br>**Summary:**<br>Under Section 2, subsection (a), when the President grants an individual a pardon for a covered offense, within 30 days the Attorney General must provide Congress with "all materials obtained or prepared by the prosecution team, including the Attorney General and any United States Attorney, and all materials obtained or prepared by any investigative agency of the United States government, relating to the offense for which the individual was so pardoned." Subsection (b) states that "Rule 6(e) [which addresses recording and disclosing of grand jury proceedings] of the Federal Rules of Criminal Procedure may not be construed to prohibit the disclosure of information required by subsection (a) of this section."<br><br>**Report:** None.<br><br>**Related Bills:** H.R. 1627 (introduced 4/12/19) and S. 2090 (introduced 7/11/19) | • 7/21/20: introduced in House; referred to Judiciary Committee<br>• 7/23/20: mark-up session held; reported out of Judiciary Committee |

# TAB 2

# TAB 2A

**FORDHAM**

**University School of Law**

Lincoln Center, 150 West 62nd Street, New York, NY 10023-7485

Daniel J. Capra
Philip Reed Professor of Law

Phone: 212-636-6855
e-mail:dcapra@law.fordham.edu

Memorandum To: Advisory Committee on Evidence Rules
From: Daniel J. Capra and Liesa A. Richter
Re: Possible Amendment to Rule 702
Date: October 1, 2020

The Advisory Committee has been considering possible amendments to Rule 702 for the last six meetings. A subcommittee, chaired by Judge Schroeder, assisted the Committee in narrowing the issues. By the time of the last meeting, the Committee's focus had narrowed to two possible changes:

1. An amendment that would prevent an expert from overstating the results that could be reliably obtained from the method used by the expert --- or to put it another way, possibly, the limitation would be that the expert would not be allowed to express an opinion with a "degree of confidence" that is not supported by the foundation for the expert's testimony.

2. An amendment clarifying that the questions of sufficiency of facts or data and reliable application of method are questions for the court, and must be proved to the court by a preponderance of the evidence under Rule 104(a).

This memorandum further develops the matters that the Committee wished to continue discussing, and addresses some of the questions raised at the last few meetings. It is divided into three parts. Part One is a discussion of the overstatement problem and whether an amendment might be useful. Part Two is a discussion of the admissibility/weight problem. Part Three sets forth drafting alternatives, and a draft Committee Note.

**In addition, an extensive digest on recent case law on forensic evidence is set forth in the agenda book immediately after this memo. (It was previously part of the memo but it got so lengthy that I thought it would be better now as a freestanding document).**

Finally, the agenda book under this tab reproduces: 1) Judge Schroeder's recent article in the Notre Dame Law Review on the Rule 104(a)/104(b) questions; and 2) a number of reports from the defense bar advocating the adoption of an amendment that would specify that the reliability requirements of Rule 702 be established by a preponderance of the evidence.

Is should be emphasized that none of the proposals discussed in this memo are to be voted on at this meeting. The vote on the Rule 702 proposal will take place at the Spring 2021 meeting.

## I. The Problem of Overstatement

### *A. Overstatement of Results in Forensics*

Many speakers at the Boston College Symposium in 2017 argued that one of the major problems with forensic experts is that they overstate their conclusions --- examples include testimony of a "zero error rate" or a "practical impossibility" that a bullet could have been fired from a different gun; or that the witness is a "scientist" when the forensic method is not scientific. Expert overstatement was a significant focus of the PCAST report. And a report from the National Commission on Forensic Sciences addresses overstatement, with its proposal that courts should forbid scientific experts from stating their conclusion to a "reasonable degree of [field of expertise] certainty," because that term is an overstatement, has no scientific meaning and serves only to confuse the jury.

Notably, the DOJ has issued a prohibition on use of the "reasonable degree of certainty" language by forensic experts, as well as important limitations on testimony regarding rates of error (as discussed below).

Both the National Academy of Science and PCAST reports emphasize that forensic experts have overstated results and that the courts have done little to prevent this practice --- the courts are often relying on precedent rather than undertaking an inquiry into whether an expert's opinion overstates the results of the forensic test.

The forensic case law digest sets forth many cases in which experts sought to testify to a conclusion that was not supported by the results that could be reliably reached by the forensic method. As the digest notes, there are a few cases in which courts have limited overstatement --- particularly with respect to ballistics testimony. But by and large the courts have allowed forensic experts to testify, essentially, to a match --- such as that the bullet fragment came from the defendant's gun, or that the latent fingerprint is that of the defendant. Some "protective" courts prohibit such a definitive conclusion, but nonetheless allow the expert to testify to a reasonable degree of certainty, or to a "practical impossibility" that it is anyone other than the defendant that is the source of the evidence.

Judge Rakoff, at the Boston Symposium, suggested that a provision prohibiting an expert from overstating results should be added to Rule 702 --- and that this would be a meaningful change because the courts generally have not relied on any language in the existing rule to control the problem of overstatement. The participants at the Vanderbilt symposium were not of one mind

as to the need for a specific limitation on overstatement. But the discussion essentially concluded that: 1) a limit on overstatement can already be teased out of the existing language of the rule (i.e., reliable method reliably applied); and 2) it could nonetheless be helpful to the courts to add a specific limitation on overstatement, as it could be directly relied upon.

It goes without saying that most of the problems of forensic overstatement occur at the state level --- and especially this may be so going forward, given the DOJ's attempts at quality control at the federal level. But the case law digest on federal cases, set forth in the agenda book after this memo, supports the notion that overstatement of forensic results is a *federal* problem as well, and remains a problem even in the recent cases.

And, as discussed below, there is an argument that problems remain with forensic "identification" testimony even under the DOJ protocols. Thus, it would seem that there is some reason to seek to control overstatement, especially in forensic evidence cases. The question for the Committee is whether this "control" should come from a rule amendment or rather should be left to DOJ protocols, cross-examination, and judicial education.

## *B. Can Overstatement by Forensic Experts be Controlled Without an Amendment?*

Assuming that overstatement by forensic experts is a problem --- a pretty good assumption looking at the case law digest --- are there other sources of regulation that might make an amendment unnecessary?

Five possible sources might exist: 1) Court regulation under existing law; 2) Education efforts; 3) DOJ efforts to regulate forensic experts; 4) Cross-examination; and 5) Providing for more robust discovery of expert opinions. These are discussed in turn.

***1. Court Regulation:*** The case digest demonstrates that some courts are making efforts to control overstatement. But it is only a handful that are really doing so. Many courts *think* they are doing so by prohibiting experts from testifying to a zero error rate. But those courts as an alternative are allowing experts to testify to a reasonable degree of scientific or professional certainty, which is a meaningless and yet misleading standard. Given that most courts rely on precedent in this area, and that the *best* precedent is to allow testimony to a reasonable degree of scientific or professional certainty, there seems to be little hope for meaningful regulation by the courts any time soon.

***2. Education:*** It might be thought that the NAS report, the PCAST report, and other sources would lead to more regulation of overstatement of forensic experts. But the case digest indicates that these reports have made very little practical impact on the courts. The National Commission

on Forensic Science report attacking the "reasonable degree of certainty" standard was issued several years ago[1] and has been widely distributed, but courts are still happily using that "reasonable degree" standard as if it has solved the problem of overstatement. Judicial training through FJC may well be useful, but will it be as impactful as a rule amendment? Given the fact that courts rely heavily on precedent in evaluating forensic testimony, it would seem that for a *court* to act, a change of law is, at the least, an important means of effectuating change in accompaniment with judicial education.

Another possibility is to educate *defense counsel* about the reliability and overstatement concerns addressed in the NSF and PCAST report. It appears to be the case that defense counsel often do not even cross-examine forensic experts, and the ones that do are not often using the PCAST and NSF reports to do so. (There are exceptions to this statement, as shown in a few cases included in the forensic case digest.) Perhaps a report on what the Advisory Committee has found concerning forensic evidence, sent to defense counsel organizations, might be helpful.

But the thing is, even if defense counsel do raise issues, there are plenty of indications that they are not being credited by the courts. So, while education along these lines might be helpful, it seems to remain the case that it should probably serve as supplement to, as opposed to a substitution for, a rule amendment.[2]

***3. DOJ:*** The Department has been making extensive efforts to control some of the problems that have been evident in the testimony of forensic experts. Apropos of overstatement, a DOJ directive instructs Department analysts working in federal laboratories --- and United States attorneys --- to refrain from using the phrase "reasonable degree of scientific certainty" when testifying, and to disclose other limitations on their results. There are a number of directives, each targeted toward a specific forensic discipline, but they all provide regulation on overstatement of results. An example is the directive regarding toolmark testimony, in pertinent part as follows:

> ● An examiner shall not assert that two or more fractured items were once part of the same object unless they physically fit together or when a microscopic comparison of the surfaces of the fractured items reveals a fit.
>
> ● When offering a fracture match conclusion, an examiner shall not assert that two or more fractured items originated from the same source to the exclusion of all other sources. This may wrongly imply that a fracture match conclusion is based upon

[1] See https://www.justice.gov/ncfs/file/795146/download (concluding that "the term 'reasonable degree of scientific [or discipline] certainty' has no place in the judicial process").

[2] Beyond education on forensic issues: At the Vanderbilt Conference, participants discussed the possibility of the Committee encouraging or taking part in efforts to educate courts and litigants more broadly on *Daubert* questions. Suggestions included developing a list of "red flags" for courts to consider in evaluating expert testimony. The Committee may wish to discuss such possibilities at the meeting. There was no indication in the Vanderbilt discussion that any of these broader educational efforts would be tied to rulemaking.

statistically-derived or verified measurement or an actual comparison to all other fractured items in the world, rather than an examiner's expert opinion.

● An examiner shall not assert that examinations conducted in the forensic firearms/toolmarks discipline are infallible or have a zero error rate.

● An examiner shall not provide a conclusion that includes a statistic or numerical degree of probability except when based on relevant and appropriate data.

● An examiner shall not cite the number of examinations conducted in the forensic firearms/toolmarks discipline performed in his or her career as a direct measure for the accuracy of a proffered conclusion. An examiner may cite the number of examinations conducted in the forensic firearms/toolmarks discipline performed in his or her career for the purpose of establishing, defending, or describing his or her qualifications or experience.

● An examiner shall not use the expressions "reasonable degree of scientific certainty," "reasonable scientific certainty," or similar assertions of reasonable certainty in either reports or testimony, unless required to do so by a judge or applicable law.

These standards addressed directly to overstatement obviously represent an important advance and they are an excellent development. ***But despite these efforts there remains an argument that an amendment limiting overstatement will be useful and even necessary.*** This is so for a number of reasons:

● There are questions of implementation of the DOJ protocols, as the edict has been in effect since 2016 and experts are still overstating their conclusions, according to the case digest. For example, a case from 2018, discussed in the case digest, indicates that a ballistics expert was prepared to testify that it was a "practical impossibility" for the bullet to be fired from a different gun. And ProPublica has done a study which raises questions about whether the DOJ standards are working. The ProPublica report concludes as follows:

The bureau's lab technicians and scientists had long testified in court that they could determine what fingertip left a print and which scalp grew a hair "to the exclusion of all others." Research and exonerations by DNA analysis have repeatedly disproved those claims, and the U.S. Department of Justice no longer permits its forensic scientists to make such unequivocal statements.

ProPublica found that examiners on the Forensic Audio, Video and Image Analysis Unit, based at the FBI Lab in Quantico, Virginia, continue to use similarly flawed methods and to testify to the precision of these methods, according to a review of court records and examiners' written reports and published articles. At ProPublica's request, several statisticians and forensic science experts reviewed the unit's methods. The experts

identified numerous instances of examiners overstating their techniques' precision and said some of their assertions defied logic.[3]

● There are significant questions about the impact of the DOJ standards on witnesses from state labs, or from state law enforcement agencies. In one case in the digest, *United States v. Shipp,* it was an NYPD detective who was prepared to testify to a ballistics match. And at the Vanderbilt symposium, Judge Sargus noted a recent case of his in which the expert, from ICE, testified to a zero rate of error for fingerprint identification.

This is not at all to understate the DOJ efforts. It is just to say that there may be room for court regulation to supplement these efforts.

● Even if the "reasonable degree" language is eradicated --- and it may not be because judges may require it --- there remains debate about what an expert *can* testify to as an alternative.[4] One can argue that courts should be controlling such an important debate, the outcome of which can literally be the difference between freedom and a prison sentence.

● Leaving protections up to the DOJ means that any failure in compliance is not actionable—even though the result might be an unjust conviction, or a guilty plea that would not otherwise have been entered.

● Adding something to Rule 702 that the Department is assertedly already doing should not be burdensome on the Department. Indeed there is precedent for such an approach --- the proposed amendments to the notice provisions of Rule 404(b), according to the Department, impose no obligations on U.S. attorneys that they are not already doing. Yet the Committee unanimously determined that there is definite value to the system in codifying obligations in the Evidence Rules, rather than leaving them to internal DOG guidelines.

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[3] https://www.propublica.org/article/a-key-fbi-photo-analysis-method-has-serious-flaws-study-says

The ProPublica report also notes that it is not just those feature-comparison analyses addressed in PCAST that are problematic. The report also discusses research done by experts at UC Berkeley challenging the reliability of testimony that jeans worn by the defendant match the jeans in a photo or video. The premise of the testimony is that jeans have unique wear marks around their seams. Government experts have testified to a match in bank robbery cases. But the reviewing experts conclude that the premise of uniqueness in wear marks is without foundation. They found a significant risk of false positives.

[4] The National Commission on Forensic Science has this to say about alternatives to the "reasonable degree of certainty language:

> Additional work is needed in both the scientific and legal communities to identify appropriate language that may be used by experts to express conclusions and opinions to the trier of fact based on observations of evidence and data derived from evidence. Rather than use "reasonable…certainty" terminology, experts should make a statement about the examination itself, including an expression of the uncertainty in the measurement or in the data. The expert should state the bases for that opinion (e.g., the underlying information, studies, observations) and the limitations relating to the results of the examination.

● The Department's reforms, as salutary as they are, would not affect overstatement by experts called by any litigants other than the government in a criminal case (including experts for the criminal defense).

● There is no guarantee that the Department's protocols will remain in place --- administrations change, objectives change, and nobody has a right to enforce an existing DOJ protection. With an amendment to Rule 702, there is a pretty strong guarantee that limitations on overstatement will remain in place.

● It is possible that a court will permit testimony contravening the DOJ guidelines. This has actually happened. In *United States v. Hunt,* 2020 WL 2842844 (W.D.Okla), the defendant asked the court "to place limitations on the Government's firearm toolmark experts because the jury will be unduly swayed by the experts if not made aware of the limitations on their methodology." The Government responded that "no limitation is necessary because Department of Justice guidance sufficiently limits a firearm examiner's testimony." The court recognized and quoted those limitations --- including the prohibition of testimony to a reasonable degree of certainty. But nonetheless it concluded as follows:

> [T]he Court will permit the Government's experts to testify that their conclusions were reached to a reasonable degree of ballistic certainty, a reasonable degree of certainty in the field of firearm toolmark identification, or any other version of that standard.

Thus, the court in *Hunt* allowed the expert to testify to a reasonable degree of certainty even though it is not permitted under the DOJ guidelines. The DOJ guidelines have an exception for when the expert *is required* to so testify. But that exception should not apply here --- the court permitted the expert to testify to a reasonable degree of certainty, but certainly did not require it.

I have not been able to determine whether the expert in *Hunt* actually testified in violation of the DOJ guidelines. There is some indication that the DOJ is taking such judicial authorization as an *order* to testify in violation of the guidelines. But in any case, the fact that the court permitted such testimony in violation of the guidelines surely raises some question about their efficacy in controlling overstatement.

● Finally and most importantly, there are legitimate questions, previously discussed by the Committee, on whether the testimony that is permitted by the DOJ guidelines remains an overstatement, given the fact that the forensic inquiry is rife with subjective determinations. The guidelines allow an expert to testify that a comparison of two or more specific patterns indicate that they *originated from the same source.* As stated in previous memos, the DOJ Uniform Language for Testimony and Reports ***attempts to walk a fine line between allowing the forensic***

***expert to testify to identity of the source of a crime scene sample and disavowing any certainty that this is in fact the case.***[5]

The DOJ explanation is as follows: While the forensic examiner is allowed to conclude that the fingerprints or toolmarks originated from the same source, this conclusion is then subject to qualifications that such a conclusion should not be interpreted as indicating that the examiner *has in fact* identified the source of the crime scene pattern. According to the Uniform Language, a "source identification" of, say, a toolmark means only that the examiner has seen sufficient pattern agreement to "provide extremely strong support for the proposition that the two toolmarks came from the same source and extremely weak support for the proposition that the two toolmarks came from different sources." While this sounds as though the strength of the evidence is based on a statistical assessment, the Uniform Language makes clear that this is *merely the examiner's opinion*, and has no statistical foundation.

But how is a jury to make sense of this fine distinction? Why would a jury not think that when the expert is providing a source identification, she is saying that "there is a match"? Is it not completely confusing to say, "I am making a source identification, but not to the exclusion of all other sources?" As the PCAST report concluded:

> Without appropriate estimates of accuracy, an examiner's statement that two samples are similar—or even indistinguishable—is scientifically meaningless: it has no probative value, and considerable potential for prejudicial impact. Nothing—not training, personal experience nor professional practices—can substitute for adequate empirical demonstration of accuracy

The American Association for the Advancement of Science has expressed its concern about the DOJ standards on testimony about "identifying" a fingerprint:

> There is no scientific basis for estimating the number of individuals who might have a particular pattern of features; therefore, there is no scientific basis on which an examiner

[5] Reporter's Note: This fine line (or fuzzy line) was evident in the explanations provided by the DOJ at the Denver Miniconference: See 87 Fordham L.Rev. at 1370-71 (explaining that a statement of identification is permissible because "it is not an empirical claim on the external world. . . The claim is simply based on identification, and identification is different than individualization and uniqueness.").

Moreover, at previous Committee meetings, some of the Committee's discussion indicated confusion and concern about the DOJ's line between "identification" and "match". For example, the Minutes of the Spring 2019 meeting provide the following account:

> Judge Campbell queried how an examiner logically could state that a mark came from a particular defendant without saying it *didn't* come from another person.
>
> Another Committee member expressed similar confusion about the DOJ characterization of "source identification." While this Committee member understood the expert's inability to claim infallibility, he expressed confusion about how the DOJ testimony allowed for a "source identification" without "individualizing" the opinion. He emphasized the logical inability to identify one source *without excluding other sources*.

> might form an expectation of whether an arrangement comes from the same source. The [DOJ Uniform Standard] fails to acknowledge the uncertainty that exists regarding the rarity of particular fingerprint patterns. Any such expectations that an examiner asserts necessarily rest on speculation, rather than scientific evidence.
>
> *As there is no empirical basis for examiners to estimate the frequency of any particular pattern observable in a print, the term identification or, in [the] proposed language source identification, should not be used.*

The AAAS report suggests the following testimony by a fingerprint examiner:

> The latent print on Exhibit ## and the record print bearing the name XXX have a great deal of corresponding ridge detail with no differences that would indicate they were made by different fingers. There is no way to determine how many other people might have a finger with a corresponding set of ridge features, but it is my opinion that this set of features would be unusual.

The 2018 Report of the American Statistical Association on Statistical Statements for Forensic Evidence supports the argument that the DOJ-sanctioned statement of "identification" raises the possibility of a problematic overstatement of an expert's conclusions. The Association states as follows:

> The ASA strongly discourages statements to the effect that a specific individual or object is the source of the forensic science evidence. Instead, the ASA recommends that reports and testimony make clear that, even in circumstances involving extremely strong statistical evidence, it is possible that other individuals or objects may possess or have left a similar set of observed features. We also strongly advise forensic science practitioners to confine their evaluative statements to expressions of support for stated hypotheses: e.g., the support for the hypothesis that the samples originate from a common source and support for the hypothesis that they originate from different sources.

The ASA report is addressing, in the above passage, the very concerns that support an amendment prohibiting overstatement. The ASA further states that "a comprehensive report by the forensic scientist should report the limitations and uncertainty associated with measurements, and the inferences that could be drawn from them" --- again, directed straight to the concerns that animate an amendment prohibiting overstatement.

In sum, even if the DOJ Guidelines are perfectly implemented, an argument remains for an amendment to Rule 702 that would specifically preclude an expert from overstating a conclusion.

***Side Issue on the Validation of Ballistics Testimony***

The validity of ballistics testimony was questioned by the PCAST report. PCAST concluded that ballistics lacked empirical data supporting its reliability. PCAST recognized that one black box study had been conducted on ballistics identification, but recommended that another black box study be conducted. The DOJ has reported that another study, which it claims meets PCAST's requirements, has been conducted, and that it establishes an extremely low rate of error for ballistics identification --- indeed a zero rate of error.

That study is called the Keisler study. I don't have the expertise to determine whether the study meets the requirements of a black box study, as defined by PCAST. I sought advice from Dr. Timothy Lau of the Federal Judicial Center, and this is what he concludes:

> In response to your question about whether Keisler 2018 (the study you forwarded me) satisfies the standard of a black box validation study as defined within the PCAST Report, my answer is no. Please understand that I can only provide an informational response based on my training as a scientist and engineer, applying the standard defined within the PCAST Report. I am not an expert in firearm analysis, and I offer no opinion about the propriety of the standard itself.

The PCAST Report states in relevant part:

> The central question with respect to firearms analysis is whether examiners can associate spent ammunition with a *particular* gun, not simply with a particular *make* of gun. To answer this question, studies must assess examiners' performance on ammunition fired from different guns of the *same make* ("within-class" comparisons) rather than from guns of *different makes* ("between-class" comparison); the latter comparison is much simpler because guns of different makes produce marks with distinctive "class" characteristics (due to the design of the gun), whereas guns of the same make must be distinguished based on "randomly acquired" features of each gun (acquired during rifling or in use). p.112 n.335 (emphasis original).

According to Table 1 of Keisler 2018, the study involved six models of guns from three different manufacturers:

| Make | Model | Caliber | Serial number |
|---|---|---|---|
| Glock | 22 | 40 | BTK137 |
| Glock | 23 | 40 | ACZ682 |
| Glock | 23 | 40 | BZR800 |
| Glock | 27 | 40 | DGV668 |
| HK | USP Compact | 40 | 26-011212 |
| Smith & Wesson | SW40V | 40 | PAZ5764 |
| Smith & Wesson | SW40V | 40 | PAW6619 |
| Smith & Wesson | SW40VE | 40 | PAY4932 |
| Smith & Wesson | SW40V | 40 | PAM5409 |

**Table 1: Firearms used in research**

While Keisler 2018 did involve two Glock 23's and three Smith & Wesson SW40V's, it did not separately report examiners' performance on analyzing ammunition fired from guns of these two makes. Instead, the study lumps all results together, regardless of the make of the gun. Accordingly, on this factor alone, I would say that Keisler 2018 does not qualify as a black box validation study as defined within the PCAST Report. *See also* PCAST Report p.112 n.335 (stating that a study did not meet the standard of a black box validation study for using "a mixture of within- vs. between-class comparisons, with the substantial majority being the simpler between-class comparisons" and for "not distinguish[ing] between within- and between-class comparisons").

I also asked Dr. Karen Kafadar, an expert on statistics and forensics at the University of Virginia, for her take on the statistical analysis in the Keisler study:

I have my doubts about the statistical analysis. This research included eighteen within-class comparisons and two out-of-class comparisons in each kit. So far as I can tell, the "statistical analysis" did not account for "within-class comparisons." Nor did it account for the effect of the 126 different examiners. They are assuming you can just collapse everything together.

The report states: "A confidence interval could not be tabulated for the results due to non-normal distributions observed in reported data." That sentence virtually proves lack of statistical understanding. A confidence interval for a binomial proportion is easily calculated - even if they don't account for effects of class and examiner. Students in their very first statistics class learn how to do this.

There is no information on the level of difficulty of the tests - except these lines:

> "The sample kits that the two examiners used were also completed by other participants who came to definitive conclusions, indicating that the level of difficulty of the sample kits was not the issue."
>
> But how does that confirm "level of difficulty"?
>
> and
>
> "The two out-of-class comparisons contained an easy exclusion for examiners based on a difference in class characteristics (ex: hemispherical firing pin impression versus an elliptical firing pin impression)."
>
> But how many other "easy cases" were there (just not acknowledged]?

So, in sum, I am not impressed.

So there is at least some doubt that ballistics has been properly validated in such a way that there would be no risk of overstatement if the expert testified to a match and an infinitesimal error rate. And in any case, even if ballistics has been validated, that leaves many other forensic disciplines subject to a risk of overstatement.

### *4. Cross-examination as a Solution to the Overstatement Problem*

At previous meetings, it has been asserted that the question of overstatement of expert opinion can be adequately handled by cross-examination. For example, if a forensic expert says that he has determined, by a reasonable degree of scientific certainty, that there is a match between a trace substance and the defendant, the defense counsel can attack that testimony on cross-examination --- defense counsel can contradict the conclusion by referring to the PCAST report, or the DOJ standards; counsel might establish through cross-examination the subjective choices that the expert made. And so forth.

Whether cross-examination is a sufficient device to regulate overstatement is a difficult question to assess. There are few data points to rely on, although at least one empirical study has indicated that cross-examination has little impact on the jury when a forensic expert overstates a conclusion. See Dawn McQuiston-Surrett & Michael J. Saks, *Communicating Opinion Evidence in the Forensic Identification Sciences: Accuracy and Impact,* 59 Hastings L.J. 1159, 1167-69 (2008) (explaining that "[w]hether or not jurors were informed about the limitations of microscopic hair examination on cross-examination or by the judge had little measurable or meaningful impact on their judgments about the likelihood that the defendant was the source of the crime-scene hair or their perceived understanding of the expert's testimony").

Perhaps another data point is all the criminal convictions in which forensic experts overstated their conclusions (including the hair identification scandal in which the DOJ admitted that experts overstated their results in hundreds of cases that resulted in conviction). Apparently, cross-examination was *not* a sufficient regulator in all of these cases --- including the very recent cases set forth in the case digest.

Moreover, reviews of cases involving forensic evidence indicate that *forensic experts often don't get cross-examined at all.* For example, forensic experts were not cross-examined in almost half of the wrongful convictions that have been documented by the Innocence Project. So if cross-examination is the answer to overstatement, it hasn't often been employed that way.

Perhaps another way to think about cross-examination as a remedy is to compare the overstatement issue to the issues of sufficiency of basis, reliability of methodology, and reliable application of that methodology. As we know, those three factors must be shown by a preponderance of the evidence. The whole point of Rule 702 --- and the *Daubert*-Rule 104(a) gatekeeping function --- is that these issues *cannot* be left to cross-examination. The underpinning of *Daubert* is that an expert's opinion could be unreliable and the jury could not figure that out, *even given cross-examination and argument*, because the jurors are deferent to a qualified expert (i.e., the white lab coat effect). The premise is that cross-examination cannot undo the damage that has been done by the expert who has power over the jury. This is because, for the very reason that an expert is needed (because lay jurors need assistance) the jury may well be unable to figure out even after cross-examination whether the expert has a sufficient basis, is using reliable methodology, and it reliably applying it.

The real question, then, is whether the dangers of juror mistakes regarding overstatement are any different from the dangers of being unable to assess insufficient basis, unreliability of methodology, and unreliable application. Why would cross-examination be insufficient for the latter yet sufficient for the former?

It is hard to see any difference between the risk of overstatement and the other risks that are regulated by Rule 702. When an expert says that they are certain of a result --- when they cannot be --- how is that easier for the jury to figure out than if an expert says something like "I relied on four scientifically valid studies concluding that PCB's cause small lung cancer."[6] When an expert says he employed a "scientific methodology" when that is not so, how is that different from an expert saying "I employed a reliable methodology" when that is not so?

Judge Rakoff, in *United States v. Glynn,* 578 F.Supp.2d 567, 574 (S.D.N.Y. 2008), when evaluating the admissibility of ballistics evidence, directly addressed the need for a gatekeeper when it comes to overstatement:

[6] That was the expert's testimony in *Joiner* and the Supreme Court held that the trial judge correctly exercised the gatekeeping function in excluding the testimony, because the studies did not actually support a conclusion of causation. But why wasn't it sufficient that the lack of support could have been brought up on cross-examination? The answer is, the gatekeeping function assumes that cross-examination will be insufficient when there is an analytical gap between the expert's methodology and the expert's conclusion.

> The problem is how to admit [the expert opinion] into evidence without giving the jury the impression—always a risk where forensic evidence is concerned—that it has greater reliability than its imperfect methodology permits. The problem is compounded by the tendency of ballistics experts . . . to make assertions that their matches are certain beyond all doubt, that the error rate of their methodology is "zero," and other such pretensions. *Although effective cross-examination may mitigate some of these dangers, the explicit premise of Daubert and Kumho Tire is that, when it comes to expert testimony, cross-examination is inherently handicapped by the jury's own lack of background knowledge, so that the Court must play a greater role, not only in excluding unreliable testimony, but also in alerting the jury to the limitations of what is presented.*

It should also be noted that cross-examination has its work cut out for it when it comes to experts expressing unjustified confidence in an opinion. Research on juries (including post-trial interviews) indicates that the greater the expert's confidence in her conclusion, the more the expert's testimony is likely to sway the jury. If this confidence is unfounded, the risk of inaccurate verdicts runs high.[7] Moreover, there is research on juries demonstrating that even when jurors are apprised of the problems with forensic evidence on cross-examination, that information has little impact on their decisionmaking.[8]

In sum, it seems difficult to argue that cross-examination is the solution for overstatement, while gatekeeping is required for the related questions of reliable methodology and reliable application.

### *5. Fortified Discovery?*

Perhaps the effectiveness of cross-examination would be increased --- and the argument for including a prohibition on overstatement accordingly less compelling --- if criminal discovery were improved.[9] The question of the adequacy of criminal discovery was addressed by Judge

[7] See, e.g, Vidmar, *Expert Evidence, the Adversary System, and the Jury,* 95 American J. of Pub. Health, S137 (2005) (finding that an expert's confidence in an opinion was a critical factor in assessing the weight of the expert's testimony).

[8] See, e.g., McQuiston-Surrett & Saks, *Communicating Opinion Evidence in the Forensic Identification Sciences: Accuracy and Impact,* 59 Hastings L.J. 1159, 1167-69 (2008) ("Whether or not jurors were informed about the limitations of microscopic hair examination on cross-examination or by the judge had little measurable or meaningful impact on their judgments about the likelihood that the defendant was the source of the crime-scene hair or their perceived understanding of the expert's testimony.").

[9] This whole issue of cross-examination as the remedy is based on the premise that defense counsel, if adequately notified, will in fact cross-examine effectively. To hear many judges tell it, that premise is not empirically supported.

Grimm at the 2017 Symposium at Boston College. Judge Grimm argued that because criminal discovery is so truncated, and late in the day, defense counsel are unduly hampered in cross-examining forensic experts.

Judge Grimm and Judge Rakoff both proposed that the Criminal Rules Committee undertake efforts to amend Criminal Rule 16 to provide for greater and more timely discovery related to expert testimony in criminal cases. The Criminal Rules Committee has proposed changes that would, according to the draft Committee Note, address "two shortcomings of the prior provisions: the lack of adequate specificity regarding what information must be disclosed, and the lack of an enforceable deadline for disclosure." The Criminal Rules Committee's proposed amendment is currently out for public comment.

Currently the prosecution must provide only a summary of the expert's testimony. The proposed amendment requires disclosure of a complete statement of all opinions that the government will elicit from the witness in its case-in-chief as well as the bases and reasons for those opinions. It also adds to the current rule a requirement of a disclosure of the witness's publications and prior cases in which the expert testified. Finally, it requires that the witness approve and sign the disclosure, unless the government states that it could not obtain the witness's signature.

As to timeliness, the amendment requires that the court or a local rule must set a time for the government to make the disclosure. The time must be "sufficiently before trial to provide a fair opportunity for the defendant to meet the government's evidence."

At a miniconference on Rule 16 held by the Criminal Rules Committee, the DOJ representative argued that whatever changes might be made to Rule 16, none were necessary in the forensic area. That was because, under DOJ policy, the prosecutor ordinarily has an obligation to turn over the forensic report. This is due to a 2017 memorandum issued by Sally Yates. That memorandum states that the prosecution must obtain the forensic expert's lab report and that "[i]n most cases the best practice is to turn over the forensic expert's report to the defense if requested." The Yates memo also sets forth further requirements:

> ● "The prosecutor should disclose to the defense, if requested, a written summary for any forensic expert the government intends to call as an expert at trial. This statement should summarize the analyses performed by the forensic expert and describe any conclusions reached."
>
> ● "[I]f requested, the prosecutor should provide the defense with . . . the laboratory or forensic expert's 'case file' . . . . This information . . . normally will describe the facts or data considered by the forensic expert, include the underlying documentation of the examination or analysis performed, and contain the material necessary for another expert to understand the expert's report. The exact material contained in a case file varies depending on the type of forensic analysis performed. It may include such items as a chain-

And it is also based on the assumption that even the most effective cross-examination of forensic testimony will have an impact on the jury --- which, as discussed above, is subject to doubt.

of-custody log; photographs of physical evidence; analysts' worksheets or bench notes; a scope of work; an examination plan; and data, charts and graphs that illustrate the results of the tests conducted."

● "[T]he prosecution should provide to the defense information on the expert's qualifications. Typically, this material will include such items as the expert's curriculum vitae, highlighting relevant education, training and publications, and a brief summary that describes the analyst's synopsis of experience in testifying as an expert at trial or by deposition."

So there will probably in the future be improvements in disclosure of information that will be relevant to cross-examination of experts generally; and there are already internal standards at the DOJ in place for disclosure pertinent to cross-examination of forensic experts.[10]

There are strong arguments, however, that even assuming that cross-examination is a remedy for overstatement, the discovery obligations imposed by the Yates memo are insufficient to guarantee effective cross-examination. In a reply email to me, Chris Fabricant of the Innocence Project came up with a list of information that would be necessary for effective cross-examination of a forensic expert, beyond what is currently provided under the Yates memo:

> Going into a cross-examination, I would want the analyst's bench notes, their personnel file, all proficiency tests, prior transcripts, validation/calibration documentation of any instrument used, a list of publication that support's the analyst's opinion - OSAC standards should provide a list of publications; "peer review" info (expert disagreement), and all communication between the prosecution and the forensic analyst, as it relates to contextual bias influencing expert opinion). From the lab, I would want accreditation audits (on-sight assessments and self-reported) and any/all "corrective actions" related to expert testifying and the specific unit within the lab. Note that sometimes labs claim these last two items are confidential accreditation documents. But the Houston crime lab posts these online, so the confidentiality claim is simply a policy to avoid disclosure.

It should also be noted that a number of states require a more robust disclosure for forensic experts than would be required by the Yates memo or an amended Rule 16. For example, New York requires disclosure not only of the forensic expert's report but also "all proficiency tests and results administered or taken within the past ten years." N.Y. Crim. Pro. 245.20 (1)(f). Proficiency records are especially important because, given the subjectivity of most forensic comparisons, the expert's proficiency needs to be disclosed to the jury for it to properly weigh the expert's opinion.

[10] Of course, the internal regulations are not legally enforceable and they can be abrogated.

Also note that the DOJ argued that *no* changes to Rule 16 were necessary because internal efforts were being made to provide more effective discovery than required by the existing Rule 16. That is the same argument that the DOJ has made to the Evidence Rules Committee regarding overstatement by forensic experts. It appears that the Criminal Rules Committee was not persuaded by that argument in the context of criminal discovery.

See Brandon Garrett and Gregory Mitchell, *The Proficiency of Experts,* 166 Univ. Penn. L.Rev. 901, 909 (2018):

> An expert who uses a subjective method is a "black box" into which data is fed and out of which magically pops an answer. Such an expert can never be shown definitively to have erred in applying a method because that method cannot be observed and applied by others. However, if proficiency data for such "black-box experts" exists, then we can assess their basic levels of proficiency, which provides important information about their ability to provide accurate and reliable information. Experts reaching conclusions using subjective methods may be highly reliable. But walking through the courtroom door is unlikely to transform an "expert" who regularly receives low scores on proficiency tests into a highly reliable source of information in the case at hand.

Thus, even if cross-examination is the answer, and discovery standards are being fortified, there is still debate about whether defense counsel will get enough information, in sufficient time, to effectively cross-examine a forensic expert. This is not to criticize the admirable efforts being taken by the Criminal Rules Committee and the DOJ. It is just to say that there is debate on whether these discovery advances are the complete answer to the overstatement problem.

Most importantly, even perfect discovery does not guarantee that cross-examination of expert overstatement will be effective, for reasons and data discussed in the previous section.

It can surely be argued that it is not one or the other, i.e., better and faster discovery *or* an amendment to the Evidence Rules to prohibit overstatement. There is a good argument that *both* changes are necessary. Better and faster discovery will allow the defense an improved chance at convincing the judge at a *Daubert* hearing that the government's expert is overstating the conclusion that can be fairly drawn from the methodology employed. An amendment to Rule 702 will highlight to defense lawyers that they should look for "overstatements" while an amendment to Rule 16 will give them the information to make that argument, and better discovery will arm the trial judge with the specific basis for excluding overstated testimony.

## *C. Isn't an Overstatement Limitation Already in the Rule?*

One argument against an overstatement amendment that has been expressed at a prior Committee meeting is that an amendment is not necessary because overstatement is simply an aspect of existing requirements in the rule: reliable methodology reliably applied. For example, an expert who testifies that "I am certain that there is a match" might be using a reliable methodology (e.g., ballistics), but is not applying it reliably (because the methodology is subjective and so not error-free). So why add a requirement to the rule that can already be teased out of the existing language?

The response to that question might be that it could be useful to break overstatement out as a separate factor, in order to draw attention to it --- because the case digest shows that courts

are *not* regulating overstatement as seriously as they are the three reliability factors set forth in the text of Rule 702. This appeared to be the conclusion of most of the panelists at the Vanderbilt conference.

I asked Professor Ed Imwinkelried, the greatest living scholar on Evidence, for his thoughts on an overstatement amendment --- specifically directed to its necessity given that it can likely be teased out of the existing requirements. This is what he had to say:

> Given the fact that in the past so many courts have tolerated and admitted overstated opinions, I agree that it would be helpful to explicitly send trial judges a message that as part of their admissibility analysis, they need to police the manner in which the expert expresses his or her degree of confidence in the opinion.
>
> I see the counterargument that it's technically unnecessary to amend 702 to explicitly include the limitation if you can tease the limitation out of the current wording of (d). However, that counterargument isn't persuasive here. After decades in which judges had to merely count noses under *Frye*, we're now asking judges to roll up their sleeves and learn the rudiments of expert methodology. You could argue that in 2000 it was unnecessary to insert 702(c); that requirement was surely implicit in *Daubert's* reliability test which purported to derive from the original rule's simple reference to "scientific . . . knowledge." However, the judicial treatment of expert testimony is evolving. Your Committee proposed adding 702(c) to nudge the evolution in the right direction and help judges refine their analysis under *Daubert* and 702. Similarly, this amendment would signal the judges that as "gatekeepers," they have to scrutinize the level of confidence stated in any opinions they admit through the gate. In these situations I tend to fall back on the wisdom: "When in doubt, be insultingly explicit."

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## *D. Support for a Proposal to Regulate Overstatement*

As discussed in prior memos, the Reporter contacted some individuals involved with the PCAST report to determine whether the working draft amendment addressed to overstatement --- developed over the last few meetings --- was on the right track. They were asked their thoughts about whether the proposed amendment will effectively address at least some of the concerns expressed about forensic expert testimony. (There was no attempt to be comprehensive in this outreach, because broader input is part of the public comment process).

***Professor Brandon Garrett,*** an expert on forensic evidence at Duke Law School, reviewed the proposed amendment on overstatement and submitted this opinion:

> I write to strongly endorse the revision presently under consideration to Rule 702, regarding the testimony of expert witnesses. My research includes work in law and in psychology, as well as collaborations with statisticians, and with forensic crime laboratories, regarding scientific evidence. I should note that the views expressed in this letter do not reflect those of Duke University or Duke School of Law, where I work, or that of the Center for Statistics and Applications to Forensic Evidence (CSAFE), a research center that I participate in.
>
> The proposed revision would add a new subsection (e), providing that an expert may not overstate the conclusions that may reasonably be drawn from the principles and methods used. I strongly favor this proposal. The central problem that this proposal addresses is that experts may reach conclusions that are not supported by the facts or by the method employed and that there has been a tendency in many disciplines to overstate conclusions.
>
> Testimonial overstatement has contributed to large numbers of wrongful convictions. Experts have made such claims of infallibility, together with other unscientific and invalid claims, in a disturbing number of cases in which persons were later exonerated by post-conviction DNA testing. Brandon L. Garrett & Peter J. Neufeld, *Invalid Forensic Science Testimony and Wrongful Convictions*, 95 Va. L. Rev. 1, 1 (2009) (exploring "the forensic science testimony by prosecution experts in the trials of innocent persons, all convicted of serious crimes, who were later exonerated by post-conviction DNA testing").
>
> Nor is it an isolated problem. Entire disciplines have been plagued by testimonial overstatement. A massive FBI review of almost 3,000 cases involving microscopic hair comparison found that over 96% involved testimony flawed by overstatement of several different types. FBI/DOJ Microscopic Hair Comparison Analysis Review, at https://www.fbi.gov/services/laboratory/scientific-analysis/fbidoj-microscopic-hair-comparison-analysis-review. Indeed, 33 of those cases involving testimonial overstatement had been death penalty cases; in nine of those cases, the defendants had already been executed and five died of natural causes, as of March 2015.
>
> Moreover, when such testimonial overstatement has occurred and has been brought to the attention of judges, in response, judges have often viewed their responsibility to regulate expert testimony as limited to the methods used and the admissibility of the type of expertise. Judges have sometimes viewed (incorrectly, in my view) the conclusions reached and how those conclusions are expressed as a matter for the jury to assess, rather than an integral feature of the expert's work. In my view, the ultimate conclusion reached is an integral feature of the expert's work and it must be reviewed as part of the judge's

gatekeeping responsibilities. This proposal valuably addresses what has become, in practice, a very important and troubling gap in the coverage of Rule 702.

Obviously more could be done to address the problem that experts may draw conclusions that are overstated and do not follow from the facts or their methods. However, I also want to highlight the importance of the notes accompanying this proposal, which help to explain the concept of non-overstatement of conclusions. Perhaps most important is what the Committee Note says regarding failure to mention error rates. No conclusion can be reached about a method without qualification or discussion of error rates, because there is no type of expertise that does not have some error rate. No technique that involves human interpretation or judgment is error free. And if a type of analysis was so reliable that no human judgment was involved, one would likely not need an expert to explain it and reach conclusions about it. The entire purpose of an expert is to contribute judgment, experience, and use of sound scientific methods to analysis of facts relevant in a case. In research conducted in collaboration with Greg Mitchell, we have found that error-rate information is highly salient to lay jurors. See, e.g. Brandon L. Garrett and Gregory Mitchell, *How Jurors Evaluate Fingerprint Evidence: The Relative Importance of Match Language, Method Information and Error Acknowledgement*, 10 J. Empirical Legal Stud. 484 (2013).

In the past, unfortunately, experts have made false and startling statements, like that there was a "zero error" rate in their type of expert work. See, e.g. Simon A. Cole, *More Than Zero: Accounting for Error in Latent Fingerprint Identification*, 95 J. Crim. L. & Criminology 985, 1043, 1048 (2005). For example, the American Association for the Advance of Science (AAAS) report descried "decades of overstatement by latent print examiners." Am. Ass'n for the Advancement of Sci., *Latent Fingerprint Examination: A Quality and Gap Analysis* 11 (2017). Zero error rates do not exist but asserting infallibility would predictably impact the jury powerfully.

Not only should experts be barred from claiming infallibility, but they must disclose the actual error rates, if they have been adequately measured. If error rates for a method have not been adequately measured using sound "black box" studies under realistic conditions, then experts must disclose that their technique is of unknown validity and reliability (and in such situations, other prongs of Rule 703 and Rule 403 may each bar admissibility of the expert testimony).

Expert evidence should never be presented in court without evidence of its error rates and of the proficiency or reliability of not just the method, but the particular examiner using the method. *See* President's Council of Advisors on Sci. & Tech., Exec. Office of the President, *Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods* 9–11 (2016). Such proficiency testing should involve tests of realistic difficulty and such testing should be done blind, so that the participant does not know that it is a test. Jonathan J. Koehler, *Proficiency Tests to Estimate Error Rates in the Forensic Sciences*, 12 Law, Prob. & Risk 89, 94 (2013) ("Blind proficiency testing has been used in some forensic science areas, including the Department of Defence's forensic

urine drug testing programme and the HIV testing programme."); Joseph L. Peterson et al., *The Feasibility Of External Blind DNA Proficiency Testing. II. Experience With Actual Blind Tests*, 48 J. Forensic Sci. 1, 8 (2003).

Jurors should hear about the proficiency of the particular expert, and of that person's reliability in reaching conclusions using a method. Brandon L. Garrett and Gregory Mitchell, *The Proficiency of Experts*, 166 U. Penn. L. Rev. 901 (2018); see also Gary Edmond, *Forensic Science Evidence and the Conditions for Rational (Jury) Evaluation*, 39 Melb. U. L. Rev. 77, 85-86 (2015) ("[R]egardless of qualifications and experience, rigorous proficiency testing tells us whether the forensic analyst performs a task or set of tasks better than non-experts or chance. A significantly enhanced level of performance is precisely what it means to be an expert.").

* * *

In the past, scientific experts have also used vague terminology like "identification" or "match" – and the Committee Note could valuably note that there are additional types of problematic conclusion testimony apart from the use of terms like "reasonable scientific certainty." The AAAS report, for example, noted that terms like "match," "identification," "individualization," and other synonyms should not be used by examiners, nor should they make any conclusions that "claim or imply" that only a "single person" could be the source of a print. AAAS Report at 11.

The Committee Note could also address claims of experience – which can be used to bolster statements that something the expert observes is rare or common based on one's experience, without citing to any empirically valid support. The Department of Justice's Model Uniform Language on Latent Fingerprint Evidence, for example, explicitly cautions against the use of such experience-based claims to suggest probabilities connected with a conclusion, as does the protocol for the FBI's review of microscopic hair evidence. FBI/DOJ Microscopic Hair Comparison Analysis Review, at https://www.fbi.gov/services/laboratory/scientific-analysis/fbidoj-microscopic-hair-comparison-analysis-review.

I also note that some experts testify about general research, and are therefore cautious about connecting general research to the facts in a case, and therefore may be much less likely to risk overstatement. For example, experts may also testify about more general scientific research to provide a "framework" to educate factfinders, and they may explain industry or professional norms as well. *See* Laurens Walker & John Monahan, *Social Frameworks: A New Use of Social Science in Law*, 73 VA. L. REV. 559, 570 (1987).

I hope that these views are of use as you consider this important proposal. Please feel free to contact me at your convenience if I can be of further assistance.

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***Other PCAST Participants***

In addition, a number of experts involved in the PCAST report have reported that the amendment, and especially the Committee Note, would be useful in regulating what that PCAST found to be a significant problem of overstatement. Among those who have reviewed the draft amendment are Dr. Eric Lander (who provided some suggestions on the Committee Note), Judge Patti Saris, and Dr. Karen Kafadar. All thought that the amendment and the Note would be an important tool in addressing a real problem.

***Other Jurisdictions***

Some support for an amendment regarding overstatement can be found in the United Kingdom. U.K. Rule of Criminal Procedure 19 governs the procedural and evidentiary aspects of expert witness testimony in British criminal trials.

Rule 19.4 states that the expert report must include:

> (f) where there is a range of opinion on the matters dealt with in the report— (i) summarise the range of opinion, and (ii) give reasons for the expert's own opinion;
>
> (g) if the expert is not able to give an opinion without qualification, state the qualification;[11]

On the other hand, it should be noted that none of the state versions of Rule 702 contain language addressed to the problem of overstatement. The closest that the states get to regulating forensic expert testimony is Ohio Rule 702, which has language specifically addressed to reports of a procedure, test or experiment (that would presumably cover forensic expert testimony). Ohio 702 provides as follows:

> A witness may testify as an expert if all of the following apply:
>
> (A) The witness' testimony either relates to matters beyond the knowledge or experience possessed by lay persons or dispels a misconception common among lay persons;
>
> (B) The witness is qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony;
>
> (C) The witness' testimony is based on reliable scientific, technical, or other specialized information. *To the extent that the testimony reports the result of a procedure, test, or experiment, the testimony is reliable only if all of the following apply:*

[11] Thanks to Dr. Tim Lau for drawing the UK rule to my attention.

*(1) The theory upon which the procedure, test, or experiment is based is objectively verifiable or is validly derived from widely accepted knowledge, facts, or principles;*

*(2) The design of the procedure, test, or experiment reliably implements the theory;*

*(3) The particular procedure, test, or experiment was conducted in a way that will yield an accurate result.*

## *E. Trial Court Evaluations of an Expert's "Credibility"*

At the Fall, 2018 meeting, during the discussion of the proposed amendment on overstatement, the thought was expressed that the amendment might lead to the court assessing the "credibility" of an expert, and that this was inappropriate. The example discussed was an expert testifying that he was "certain" of his opinion; under the draft amendment, it was thought that the trial judge might have to exclude the testimony if she found that the testimony of "certainty" was an overstatement given the underlying data and method that the expert used. The thought was expressed that such an exclusion would amount to a credibility determination, and the credibility of the expert is to be left to the jury.

But the process that the judge used in this hypothetical would be no different than that used to judge any of the other admissibility requirements currently in Rule 702. For example, if an expert states that he relied on sufficient data, and the judge finds that the data is not sufficient to support the opinion, the judge must exclude the evidence. Is the judge in that case wrong because she does not believe the expert's assertion? If "credibility" assessments are prohibited in that circumstance, then logically the judge cannot disagree with *any* of the expert's assertions or conclusions, because to do so would challenge the expert's credibility.

In fact a *Daubert* hearing today is rife with "credibility" determinations --- as Judge Vance pointed out at the Vanderbilt conference. If an expert states that he relied on a report, but the judge determines that the expert could not have so relied and come to the opinion he did, then the judge should disregard the expert's assertion and review the expert's basis accordingly. Similarly, under the proposed amendment, if the expert states that there is a zero rate of error when a forensic methodology applies, that assertion is demonstrably untrue --- incredible --- and the expert should be prohibited from testifying to that overstatement.

The role of "credibility" determinations at a *Daubert* hearing is complicated, but credibility determinations are clearly not always barred. If the expert says that he employed a reliable method, or that his conclusion is not an overstatement, it may be that the expert did not in fact employ reliable methods, or did in fact overstate the conclusion. If the trial judge does not intervene, this would mean that the jury would hear unreliable expert testimony, contrary to the principle of *Daubert*.

Judge Becker considered the complex relationship between expert credibility and reliability in *Elcock v. Kmart Corp.*, 233 F.3d 734, 750–751 (3d Cir. 2000). The trial judge in *Elcock* held a *Daubert* hearing and determined that one of the plaintiff's experts did not pass the reliability threshold. The judge relied in part on the fact that the expert had engaged in criminal acts involving fraud, and so was not a credible witness; the fraudulent activity was not in any way related to the expert's professional life, however. Judge Becker found the trial court's reliance on these bad acts to be error, and stated that on remand "the district court should not consider Copemann's likely credibility as a witness when assessing the reliability of his methods." Judge Becker added, however, the following important qualification:

> We do not hold … that a district court can never consider an expert witness's credibility in assessing the reliability of that expert's methodology under Rule 702. ***Such a general prohibition would be foreclosed by the language of Rule 104(a), which delineates the district court's fact-finding responsibilities in the context of an in limine hearing on the Daubert reliability issue. Indeed, consider a case in which an expert witness, during a Daubert hearing, claims to have looked at the key data that informed his proffered methodology, while the opponent offers testimony suggesting that the expert had not in fact conducted such an examination. Under such a scenario, a district court would necessarily have to address and resolve the credibility issue raised by the conflicting testimony in order to arrive at a conclusion regarding the reliability of the methodology at issue.*** We therefore recognize that, under certain circumstances, a district court, in order to discharge its fact-finding responsibility under Rule 104(a), may need to evaluate an expert's general credibility as part of the Rule 702 reliability inquiry.

While Judge Becker properly concluded that credibility determinations would have to be made at a *Daubert* hearing, he emphasized that those determinations are limited to testimony *about how the expert reached her opinion*, as opposed to witness-credibility more generally:

> Although *Daubert* assigns to the district court a preliminary gatekeeping function—requiring the court to act as a specialized fact-finder in determining whether the methodology relied upon by an expert witness is reliable—it does not necessarily follow that the court should be given free rein to employ its assessment of an expert witness's *general credibility* in making the Rule 702 reliability determination. To conclude otherwise would be to permit the district court, acting in its capacity as a *Daubert* gatekeeper, to improperly impinge on the province of the ultimate fact-finder, to whom issues concerning the general credibility of witnesses are ordinarily reserved.

Thus the distinction as articulated by Judge Becker is between credibility determinations bearing *directly* on the expert's methods and application, and general credibility issues that apply to all witnesses. Judge Becker posited the following example:

> For instance, in situations involving an attempt to attack an expert witness's credibility on the basis of prior bad acts or convictions, at least one prominent evidence commentator has noted that an expert's prior dishonesty or misconduct should not qualify

> as an appropriate factor in assessing methodological reliability *when the acts are wholly unrelated to the expert's use of a particular methodology*, but that a court should take such dishonesty or misconduct into account when the nexus between the acts and the expert's methodology is more direct, e.g., when the prior dishonest acts involve fraud committed in connection with the earlier phases of a research project that serves as the foundation for the expert's proffered opinion. *See* Edward J. Imwinkelreid, *Trial Judges—Gatekeepers or Usurpers? Can the Trial Judge Critically Assess the Admissibility of Expert Testimony Without Invading the Jury's Province to Evaluate the Credibility and Weight of the Testimony*, 84 Marq. L. Rev. 1, 39 (2000). Under this approach, for instance, the fact that an expert witness falsely reported his salary on an income tax return has little if any bearing on the reliability of a diagnostic test he frequently employs, but the fact that the expert lied about whether his methodology had been subjected to peer review, or ***intentionally understated the test's known rates of error, is a different matter entirely.***

It would seem that the Becker quote above is spot-on for answering concerns about "credibility" determinations made by a judge ruling on possible overstatement of an expert's conclusions. If the expert overstates the certainty of a conclusion (understates the rate of error) then *Daubert* obligates the judge to prohibit such an unreliable assertion from being made at trial.

On the other hand, if the attack on credibility has nothing to do with the expert's methods, but only with a general character for truthfulness, the issue of credibility should be left to the jury—the opponent can bring impeachment evidence before the jury by way of cross-examination as with any witness. As applied to the facts of *Elcock*, the credibility evidence should not have been used by the trial court, because it related to acts of dishonesty and fraud completely outside the expert's work in the particular case.[12] In contrast, if the expert in *Elcock* were found to have misstated or even lied about doing a test in this particular case, the trial court must disregard the expert's conclusion that is purportedly based on the test. If that is a "credibility" determination, then so be it.

It should be noted that while a trial court is considering credibility when evaluating an admissibility requirement under Rule 702 (such as sufficiency of basis), the addition of an overstatement requirement would not, and should not, be a vehicle allowing the trial judge to nitpick an expert into oblivion. Nothing in an amendment limiting overstatement requires the judge to get into the difference between "highly likely" and "very likely" for example. The preponderance standard of Rule 702 does not require that the expert be absolutely correct or completely precise. The draft Committee Note, infra, emphasizes this point.

In sum, the proposed amendment limiting overstatement is no different from any of the existing admissibility requirements of 702 insofar as there is concern that trial judges will

[12] *See also Cruz-Vazquez v. Mennonite Gen. Hosp. Inc.,* 613 F.3d 54 (1st Cir. 2010) (error to exclude expert because he was biased in favor of plaintiffs in medical cases and was generally affiliated with plaintiffs' lawyers; those considerations are for the jury in assessing the weight of the expert's testimony).

improperly make "credibility" determinations. If the judge finds that the expert overstated the opinion, then the trial judge should prohibit the opinion.

## *F. Should a Rule on Overstatement Apply Beyond Forensics?*

While overstatement by experts in areas other than forensics is less publicized, there are arguments that any amendment regulating overstatement should apply to all expert testimony. Those arguments are:

1) the term "forensic" is hard to define in rule text, as it goes beyond feature-comparison (for example to arson investigations) and there are disputes about just which disciplines are forensic;

2) there is no other Federal Rule of Evidence that focuses specifically on a subset of witnesses;

3) if it is a good idea to require a court to regulate overstatement, it could be a good idea to have that tool available outside the forensic disciplines;

4) There is an incentive for an expert to overstate a conclusion in a civil case --- they are financially beholden to the party. *Judge Kaplan explains it like this:*

> Lawyers want experts who will express unwavering certainty about their conclusions: Eighty-four percent of lawyers surveyed in a recent study said that the adamancy of an expert's support for the lawyer's position was an important consideration in the expert selection process. Experts are well aware of this overwhelming preference. The same study showed that sixty-four percent of experts believe that the willingness to draw firm conclusions was important to being retained. ***The desire to please lawyers often leads experts to overstate the certainty of their conclusions and to gloss over important nuances in an effort to present the most uncompromising support for the lawyers' position.***[13]

**5**) ***Most importantly, there are a number of reported cases in which an expert appears to have gotten away with a conclusion that overstates what they could fairly say based on the methodology employed. That is, there is a problem of overstatement outside the forensic area. And while it is not as evident as in the forensic area, overstatement does exist. What follows is a case digest of some representative cases***:

[13] Hon. Lewis Kaplan, *Experts in the Courthouse: Problems and Opportunities,* 2006 Colum. Bus. L.Rev. 247 (2006). The study Judge Kaplan cites is by Daniel Shurman et. al., *An Empirical Examination of the Use of Expert Witnesses in the Courts --- Part II: A Three-City Study,* 34 Jurimetrics 193 (1994).

## *Case Digest on Overstatement by Non-Forensic Experts*[14]

### 1. Expert Overstatement Permitted

In some federal cases, non-forensic expert opinion testimony is admitted that appears to overstate the conclusions that reliably flow from the expert's methodology. Here are some recent examples:

- ***United States v. Chikvashvili***, 859 F.3d 285, 292-93 (4th Cir. 2017) (government expert in prosecution for healthcare fraud resulting in death was permitted to testify that the misreading of patient x-rays was the "but-for cause" of two patients' deaths and that standard medical procedures "would have averted" their deaths. Doctor also opined that one patient's elective surgery "would have been postponed" with an accurate reading of his x-ray).
- ***United States v. Campbell,*** 963 F.3d 309 (4th Cir. 2020) (expert allowed to testify categorically that "the cause of [the victim's death] was heroin intoxication" and that "but for the heroin, she would have lived").
- ***Puga v. RCX Solutions, Inc.,*** 922 F.3d 285 (5th Cir. 2019) (police officer who arrived at an accident was properly permitted to testify that a truck driver "must have been driving too fast" even though he did not examine the truck, the brakes, the weight of the truck, or attempt to estimate his speed).
- ***United States v. Tingle,*** 880 F.3d 850, 855 (7th Cir. 2018) (no error in allowing law enforcement expert to testify that the amount of drugs found in the defendant's residence was "definitely for distribution" and that the gun found in residence "was utilized by [the defendant] to protect himself and/or the methamphetamine and the currency.").
- ***United States v. Johnson,*** 916 F.3d 579 (7th Cir. 2019): In a trial on charges of possessing a handgun in furtherance of a drug trafficking crime, an expert on drug dealers was allowed to testify that "where there's guns, there's drugs, and where there's drugs, there's guns."
- ***Adams v. Toyota***, 867 F.3d 903, 916 (8th Cir. 2017) (affirming admission of expert testimony in which an engineer "ruled out" pedal misapplication as a potential cause of a sudden acceleration accident).
- ***United States v. Lopez***, 880 F.3d 974 (8th Cir. 2018) (affirming admission of a DEA agent's expert testimony that "illegal drugs entering the market are of such high purity that it has

[14] This digest is not intended to be comprehensive. It collects a representative example of cases. The digest was prepared with the substantial help of Professor Liesa Richter.

become physically impossible even for seasoned addicts to consume large amounts of methamphetamine").

- ***Wendell v. Glaxo Smith Kline***, LLC, 858 F.3d 1227 (9th Cir. 2017) (the district court erred in excluding medical expert's opinions that prescription drug caused the plaintiff's rare cancer even though the expert testified to "a one in six million chance" that the plaintiff would have developed the cancer without exposure to the drug).
- ***United States v. Wells,*** 879 F.3d 900 (9th Cir. 2018) (affirming the admission of expert testimony by a tire expert to refute a murder defendant's alibi that he was not at work at the time of the murders because he got a flat tire; the expert concluded that the nail in the tire "had been inserted" in the tire "manually" rather than picked up while driving).
- ***United States v. Lozano***, 711 Fed. App'x 934 (11th Cir. 2017) (permitting the government's drug trafficking expert to testify that the defendant's "blind mule theory" had "no factual basis").
- ***U.S. Information Systems, Inc. v. International Broth. of Elec. Workers Local Union No. 3, AFL-CIO,*** 313 F.Supp.2d 213 (S.D.N.Y. 2004): An expert in antitrust economics testified to damages, and the opponent argued that the claims were overstated, because he used a discounting factor that was unsupported. The court held that the expert could testify, concluding that while "the accuracy of Dr. Dunbar's figures may be open to dispute, his methodology with respect to damages is sound."
- ***Flavel v. Svedala Indus.,*** 875 F.Supp. 550 (E.D.Wi. 1994) (in an age discrimination action, the fact that a statistics expert artificially inflated his findings by using employee ages as of a certain date raised a question for the jury, not the court).
- ***Etherton v. Owners Ins. Co***., 35 F. Supp.3d 1360, 1364, 1368 (D. Colo. 2014), aff'd 829 F.3d 1209 (10th Cir. 2016) (rejecting a challenge to expert testimony that the plaintiff's many injuries "were entirely caused" by a collision and that "every single rear-end collision that has ever occurred" is a plausible mechanism for causing lumbar disc injury).
- ***In re Trasylol Prod***. ***Liab. Litig.,*** 2010 WL 8354662 (S.D.Fla.) (the expert was allowed to testify, on the basis of a differential diagnosis, that the use of a drug was a contributor "in all medical certainty" to a kidney injury, despite conceding "scientific unknowns").

**2. Expert Overstatement Regulated**

There are a number of reported cases in which it appears that courts are regulating expert attempts to overstate their results (sometimes by appellate court correction):

- ***United States v. Machado-Erazo,*** 901 F.3d 326 (D.C. 2018): The government offered an expert on cellphone location. The disclosure under Rule 16 was deficient, because the "report" was nothing but pictures of cellphone towers. (!) At a hearing the government assured the trial judge that the expert would offer testimony about only the "general location" of cell phones, rather than precise locations. At trial, before a different judge, the expert testified to precise locations. The court of appeals found that it was error to admit this testimony --- and that there was a violation of Rule 16 --- but found the error to be harmless.

- ***United States v. Naranjo-Rosaro***, 871 F.3d 86, 96 (1st Cir. 2017) (the trial court erred in allowing the agent handling a drug-sniffing dog to testify as a lay witness, but the error was harmless where the agent's testimony would have been admissible expert opinion and where the agent conceded that the dog's alerts to drugs "did not establish the presence of drugs in the house").

- ***In re Vivendi Sec. Litig***., 838 F.3d 223, 256 (2nd Cir. 2016) (affirming admissibility of expert testimony based upon an event study about artificial inflation in a company's stock price due to misapprehension of a company's liquidity risk; emphasizing that the expert did not purport to establish that the company's fraud *caused* the misapprehension).

- ***Nease v. Ford Motor Co.,*** 848 F.3d 219, 225 (4th Cir. 2017) (reversing a verdict for the plaintiff in a product liability action due to the district court's erroneous admission of testimony by the plaintiff's expert "to a reasonable degree of engineering certainty" that the throttle on the plaintiff's truck contained a design defect that caused an acceleration accident; the expert's opinion was not supported by the information he had and the methodology he used).

- ***Rheinfrank v. Abbott Labs, Inc.,*** 680 Fed. App'x 369, 376 (6th Cir. 2017) (finding no error in the district court's ruling refusing to allow the plaintiff's regulatory expert to testify that "DepoKote was known to be the most teratogenic drug"; the expert was not in a position to evaluate the relative risks of epilepsy drugs).

- ***Abrams v. Nucor Steel Marion, Inc.,*** 694 Fed. App'x 974 (6th Cir. 2017) (affirming exclusion of an opinion by a toxicological expert that persons who reside ".25 to .50 miles" from the defendant's plant "for a period of ten years or more" will suffer harm from chronic exposure to manganese; the opinion was an overstatement).

- ***United States v. Pembrook***, 876 F.3d 812 (6th Cir. 2017) (affirming admission of expert testimony regarding cell tower location analysis because the government did not attempt to put defendant's cell phone in a very "specific" or "precise" location, but rather attempted to show the general geographical proximity to the locations of the robberies at the pertinent times; the court stated that the disclaimers about the limits of the methodology would have been good fodder for cross-examination of the expert).

- ***United States v. Reynolds,*** 626 Fed. App'x 610 (6th Cir. 2015) (affirming admission of expert testimony concerning cell tower location analysis because the agent did not purport

to rely on data to place the defendant *in* the home when child pornography was downloaded, but rather used data to *exclude* the presence of other members of the household during relevant times, because the cell phones of other individuals connected to cell towers were far away from home during downloads).

- ***Krik v. Exxon Mobile Corp***., 870 F.3d 669, 675 (7th Cir. 2017) (affirming exclusion of a toxicological expert's testimony that asbestos exposure is "either zero or it's substantial; there's no such thing as not substantial exposure," as unsupported by dose-dependent causation of cancer).

- ***United States v. Lewisbey***, 843 F.3d 653, 659-60 (7th Cir. 2016) (affirming admission of expert testimony about the general location of the defendant's cell phone based on call records and cell tower data, where the district court appropriately barred the agent "from couching his testimony in terms that would suggest that he could pinpoint the exact location of Lewisbey's phones.").

- ***United States v. Hill***, 818 F.3d 289, 295 (7th Cir. 2016): The court held that cell site analysis expert testimony should include a "disclaimer" regarding accuracy. The expert should not "overpromise on the technique's precision or fail to account for its flaws." The court affirmed the admission of cell site analysis testimony by an FBI agent where the agent made it clear that the defendant's phone records were "consistent" with him being at or near relevant locations at relevant times, but clarified that he could not state whether a phone was "absolutely at a specific address."

- ***Murray v. Southern Route Maritime, S.A., et al.,*** 870 F.3d 915 (9th Cir. 2017) (affirming the district court's admission of expert testimony about the theory of low-voltage diffuse electrical injury, where the district court highlighted the narrow nature of the expert's opinion about the theory, and did not permit the expert to testify that the plaintiff's injuries were *caused* by low-voltage shock).

### 3. The "Reasonable Degree of Certainty" Standard in Civil Cases

A rule prohibiting overstatement in forensic evidence cases would likely result in prohibiting an expert from testifying to a "reasonable degree of [field] certainty" of a feature-comparison match. As stated above, the DOJ has abandoned the standard, it has been rejected by scientific panels, and it is a classic example of overstatement --- but many courts are still using it.

In civil cases, there is a complication in rejecting the reasonable degree of certainty standard. Civil litigants frequently object that the expert testimony offered by their opponents is unreliable and insufficient due to the experts' *failure* to opine "to a reasonable degree of certainty." Moreover, some states appear to require a reasonable certainty standard as a matter of state substantive law --- which is controlling in diversity cases, assuming that in fact it is substantive.

*See, e.g., Antrim Pharmaceutical LLC v. Bio-Pharm., Inc.,* 310 F. Supp.3d 934 (N.D. Ill. 2018) (explaining that Illinois law permits plaintiffs to recover lost profits only if they can establish them "to a reasonable degree of certainty"; finding expert testimony sufficient to establish lost profits to the requisite degree of certainty); *Miranda v. Count of Lake,* 900 F.3d 335 (7th Cir. 2018) ("In Illinois, proximate cause must be established by expert testimony to a reasonable degree of medical certainty."); *Day v. United States*, 865 F.3d 1082 (8th Cir. 2017) (Under Arkansas law, a medical expert must testify that "the damages would not have occurred" without the defendant's negligence; expert's opinion "must be stated within a reasonable degree of medical certainty or probability.").

At the Spring, 2019 meeting, the Committee resolved that if anything is specifically said about the reasonable degree of certainty standard in a Committee Note, it should be limited to the topic of forensic evidence. The Committee Notes set forth in Part Three of this memo are written with the intent to be so limited.

## G. How Would a Rule Regulating Overstatement Affect Experience-Based Experts?

One concern expressed by some Committee members at previous meetings is that an amendment regulating overstatement would be difficult to apply to the testimony of some experts who testify on the basis of experience. To address this concern, and to consider how a bar on overstatement could operate on experience-based experts, it might be best to proceed by example.

Let's take the facts of *Maryland Cas. Co. v. Therm-O-Disc., Inc.,* 137 F.3d 780 (4th Cir. 1998), a case involving a dispute over what caused a fire in a building. An electrician was allowed to testify that the fire was "caused by a malfunction in a thermostat" manufactured by the defendant. The expert stated that his opinion was based on "examination of the conditions inside the disputed switch and the application of principles of electrical engineering to those conditions." He also cited numerous works of technical literature in support of his methodology and explained how his experience led to his conclusion. The court of appeals found this testimony properly admitted. Would there be a different result under an amendment prohibiting overstatement? Specifically, would the statement "in my opinion, the fire was caused by a malfunction in a thermostat" be an overstatement?

It seems unlikely that such an opinion is an overstatement if it is properly grounded in a sufficient basis of information and based on accepted principles in the field --- as the court found. The whole point of the grounding of the opinion in experience and supporting literature is that the expert has a sufficient basis and proper methodology to opine on causation of an event.

So what would be the role of a prohibition on overstatement for such experience-based testimony? Let's take the same example, with the same grounding, but the expert tacks on extravagant claims, such as "without a doubt," or "to a scientific certainty," or "there is no

possibility of an alternate cause." Without knowing much about the area of expertise, it's still probably safe to assume that the expert's grounding in experience and supporting literature is not enough to opine on causation with absolute certainty (just as a forensic expert's grounding in experience is not enough to allow a conclusion of "scientific certainty").

Here is another example: *Kieffer v. Weston Land, Inc.,* 90 F.3d 1496 (10th Cir. 1996), in which the plaintiff alleged that he received an electrical shock from a Pepsi machine, that resulted in a burn and a broken shoulder. The Pepsi machine was removed from the site, and the plug removed, so it could not be tested by the plaintiff. The plaintiff's expert electrical engineer testified that if the wrong type of plug had been attached to the machine, "it could have produced a shock sufficient to cause" the plaintiff's injuries. The court found that testimony properly admitted under *Daubert*. It noted that the expert did not testify that the soda machine *actually* caused the injuries, (because the expert did not have a sufficient factual basis to make that conclusion). Rather, the expert merely theorized circumstances under which the machine could have created an electrical shock sufficient to cause the injuries. That opinion was permissible *because* it did not overstate the results. Given what the expert knew (and did not know), the only thing he could say was that the wrong type of plug could have caused the injuries. If he had stated, given his limited basis of information, that "the plaintiff's injuries had to be caused by the wrong type of plug on the Pepsi machine," that would have been an overstatement and excludable as such.

These examples show that an overstatement amendment can be usefully employed to reject extravagant claims by an experience-based expert. The court can look at principles, methods, and basis, and then determine whether the opinion as expressed by the expert goes beyond the foundation. Of course there will be line-drawing involved. But that can't be the sole reason for rejecting an amendment. Virtually all questions of evidentiary admissibility require some kind of line-drawing.

The Committee Notes to the drafting alternatives below add a paragraph discussing how a regulation on overstatement might apply to experience-based testimony.

## H. Suggestion for a Change to Rule 702(d)

Judge Kuhl, the Liaison from the Standing Committee, has suggested a change to Rule 702(d) (reliable application) that is directed toward the problem of overstatement. That suggestion is as follows:

> (d) the ~~expert has reliably applied~~ expert's opinion reflects a reliable application of the principles and methods to the facts of the case.

Here is Judge Kuhl's explanation for her suggestion:

> It's not a large change to subpart (d), obviously. But by making the expert's conclusion the subject of the sentence, the language more clearly empowers the court to pass judgment on that conclusion. It seems clear (to me) that overstatement cannot be said to arise from *reliable* application of acceptable principles and methods.

Judge Schroeder has suggested a slightly different fix to Rule 702(d) based upon the same reasoning. His proposed language reads:

> (d) the ~~expert has reliably applied~~ testimony [opinion] is limited to a reliable application of the principles and methods to the facts of the case.

***Reporter's Comment:***

A change along these lines could be a helpful emphasis not only to get the court to focus on the overstatement problem, but more generally about the importance of looking at the expert's conclusion as well as the methodology --- the point made by the Supreme Court in *Joiner.* It could also serve to emphasize that the supportability of the conclusion is an admissibility requirement rather than a question of weight.

It is, as Judge Kuhl states, a minor change, so there is a question of whether it will be enough to address the problem of overstatement. But at a minimum it seems to be a very good complement to any new subdivision that addresses overstatement. On that possibility, it is included within the drafting alternatives at the end of this memo.

The difference between "reflects" and "is limited to" is, I think, largely one of style preference. Arguably "limited to" emphasizes that the language is, in fact, limiting, and so that might be useful.

## II. A Discussion of the Admissibility/Weight Problem

As stated above, the Committee has been considering the possibility of an amendment to Rule 702 that would emphasize that the questions of sufficiency of basis (subdivision (b)) and reliability of application (subdivision (d)) are questions of admissibility and not weight. The Chair appointed a Rule 702 Subcommittee to study this matter and report to the Committee. That report was submitted to the Committee at the Fall, 2018 meeting.

The Committee's inquiry was in response to a law review article highlighting a number of cases that appear not to have read the Rule as it is intended. The Rule provides that the requirements of sufficient basis and reliable application must be treated as questions of admissibility, and so must be established by a preponderance of the evidence under Rule 104(a). But the cases cited in the law review article appeared to be treating these admissibility requirements as questions of weight.

A previous memo to the Committee on this subject took a deep dive into the cases that have been cited as the leading examples of courts ignoring the Rule 104(a) standard for questions of sufficiency of basis and reliability of application. The takeaway points from the case law survey were as follows:

● A court's declaration that sufficiency of basis and reliability of application are "questions of weight" is not necessarily a misapplication of Rule 702/104(a) in a particular case. That is because even under 104(a) there are disputes that will go to weight and not admissibility. When the proponent has met the preponderance standard and the opponent responds with some deficiency that does not sufficiently detract from the proponent's showing of a preponderance, then that deficiency is a question of weight and not admissibility --- under the preponderance standard.

● Because there remain questions of weight under Rule 104(a), one must be cautious in jumping to the conclusion that a court is ignoring Rule 702/104(a) when it states something like "the defendant's challenges to the expert's opinion present questions of weight and not admissibility." That is a different statement than a *broader* one such as "challenges to the sufficiency of an expert's basis raise questions of weight and not admissibility" (a misstatement made by circuit courts in a disturbing number of cases). But even where that broader statement is made, it does not mean that an error is being made in the specific case. It depends on what the challenges are and what the court *actually* has found in terms of the expert's basis and application. A court that makes the broader statement might actually have found both basis and application by a preponderance, even if the court does not say so. The fact that the court makes an overbroad, generalized statement is not ideal, but it's only dictum if the court actually ended up finding the standards to be met by a preponderance. Though, it could be argued that broad misstatements of the law can have a pernicious effect beyond the specific case.

● There is no doubt that in some circuits the courts routinely state the misguided notion that arguments about sufficiency of basis and reliability of application almost always go to weight and not admissibility. But in many of the reviewed cases, the expert arguably satisfied the Rule 104(a) standard anyway, so the court's cavalier treatment of Rule 702(b) and (d) appears to make no difference to the result. In other cases, it cannot be determined whether the court used the 104(a) or the 104(b) standard in assessing sufficiency of basis and application. Evaluation of the cases is muddled by two complications: 1) courts rarely specifically articulate the standard of proof that they are employing; and, more importantly, 2) there will be a line to draw for admissibility and weight no matter what standard of proof is employed.[15]

●That said, there are certainly a number of cases in which the court not only misstates the appropriate standard, but also misapplies it in the specific case--- by allowing experts to testify even though the proponent has not established more likely than not that there is a sufficient basis for the opinion and/or that the methodology has been reliably applied.

● While there surely are courts that are applying the Rule 104(b) standard to questions of basis and application, there are also courts that apply Rule 104(a) faithfully. For example, in *In re Wholesale Grocery Products Antitrust Litig.,* 946 F.3d 995 (8th Cir. 2019), the appellant argued that the trial court erred in evaluating the basis that the expert used to make a conclusion. The appellant argued that once the trial court found the methodology to be reliable (in this case, multiple regression analysis) any remaining issues were for the jury. But the court disagreed, stating that the gatekeeper must find that the expert had a proper factual foundation, and also had "an obligation to discern whether this particular methodology and reasoning, as it was being applied to these facts, passed muster." The court found no error in the trial court's exclusion of the expert testimony for failure to satisfy Rule 702(b) and (d). *See also Perez v. K & B Transportation, Inc.* (7th Cir. 2020) (expert on accident reconstruction was properly excluded --- *sua sponte* ---- because the report cited "barely any case specific evidence" and so was not supported by sufficient facts or data).

[15] A rough count of the cases highlighted in the law review article as being problematic (along with a number of recent cases decided after its publication) found the following: 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 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.

Since the last meeting, the defense bar has submitted to the Committee several lengthy studies, as well as a number of letters, analyzing the case law and concluding that the admissibility requirements of Rule 702(b) and (d) have been ignored by many courts --- both in terms of statements of the law, and in application. Those reports and letters are attached to this memorandum.

## *Discussion at Previous Committee Meetings:*

At previous meetings a number of Committee members observed that it would be useful to educate the courts that it is incorrect to make broad statements that sufficiency of basis and reliable application are questions of weight and not admissibility. Members also stated that it would be useful if courts could be encouraged to articulate the standard of proof that they were actually applying. But Committee members have not to date voted in favor of amending the text of the Rule to emphasize that the Rule 104(a) standard applies to all admissibility requirements of Rule 702.

The confounding problem of amending the text is that the Rule 104(a) standard *already* applies to these admissibility requirements --- as the court itself makes clear in *Daubert* and *Bourjaily.* Adding the preponderance standard to the text of the rule may raise questions about its applicability to all the other rules --- the Rule 104(a) standard applies to almost all the admissibility requirements in the Federal Rules, but it is not specifically stated in the text of any of them.

But there is also a counterargument: While Rule 104(a) applies to most FRE admissibility requirements, there is nothing in Rule 702 *itself* that directs the parties or the court to the preponderance standard. Indeed, there is *nothing in Rule 104(a) itself* that speaks to a preponderance standard --- that construct of Rule 104(a) comes from *Bourjaily* and from a footnote in *Daubert.* So a lot of thinking (and reading outside the Rules) needs to be done to get to applying the preponderance standard to the Rule 702(b) and (d) admissibility requirements. And while it is true that Rule 104(a) applies well beyond the admissibility requirements of Rule 702, it is in applying Rule 702 that most of the problems have occurred. (There is not much in the reported cases about disputes over the standard of proof in the admissibility requirements of the excited utterance exception, for example). So, if there is a problem that the courts are having in applying the general requirement to Rule 702 specifically, it makes sense to change the specific rule to remind the courts that the general requirement applies. And a proviso could be put in the Committee Note to say that no change is intended for any other rule, and that the Committee simply found it necessary to remind courts about the Rule 702 admissibility requirement because many courts have ignored them.

In previous meetings, the Committee seemed more receptive to the possibility that if Rule 702 were amended to deal with overstatement, the Committee Note to that amendment could provide instruction on the Rule 104(a) question --- including encouraging courts to specify that they are applying that standard.

Accordingly, the drafts set forth in Part Three below add Rule 104(a)-related instructions to the Committee Note that would accompany an amendment regarding overstatement. And, to continue discussion and in light of changes in Committee personnel, one of the drafting alternatives is to add language to Rule 702 specifically incorporating the Rule 104(a) standard.

## *Possible Confusion About the Helpfulness Standard in Rule 702*

Beyond the issues surrounding the reliability requirements of Rule 702 (b)-(d), discussed above, there is a question in the case law about the application of the "helpfulness" standard of Rule 702(a). Rule 702(a) requires the court to find that the expert's testimony will "help the trier of fact to understand the evidence or determine a fact in issue." The operative word is "help". But there are some courts that have read into the rule a requirement that the testimony not only help, but "appreciably help" the trier of fact. *See, e.g., Cunningham v. Wong*, 704 F.3d 1143, 1167 (9th Cir. 2013) ("Admissible expert testimony is meant to provide the jury with 'appreciable help' in their determinations."); *United States v. Amaral,* 488 F.2d 1148 (9th Cir. 1973) (expert testimony on the unreliability of identifications was properly excluded as it did not "appreciably help" the jury). Courts following this potentially higher standard have cited to Wigmore's treatise on evidence to establish the "appreciable help" requirement as the "essential question" of expert admissibility. See *Keys v. Wash. Metro. Area Transit Auth.,* 577 F. Supp. 2d 283, 286 (D.D.C. 2008) ("As Professor Wigmore stated, the admissibility of expert testimony is guided by one essential question: 'On this subject can a jury from this person receive appreciable help?'") (citing WIGMORE ON EVIDENCE § 1923 (3d ed. 1940)). *See also Sullivan v. Alcatel-Lucent USA, Inc.,* 2014 U.S. Dist. LEXIS 97011, at *15 (N.D. Ill.*)* ("[T]he crucial question is, on this subject can a jury from this person receive appreciable help?'"); *Cage v. City of Chicago*, 979 F. Supp. 2d. 787, 834 (N.D. Ill. 2013) (expert must appreciably help).

Other courts, however, have found that there is no heightened standard of helpfulness for expert testimony that satisfies the other requirements of the rule. *See, e.g., United States ex rel. Morsell v. Symantec Corp.,* 2020 U.S. Dist. LEXIS 54847, *12 (D.D.C. 2020) ("[T]he 'help' requirement [from Rule 702] is satisfied where the expert testimony advances the trier of fact's understanding to any degree.") (quoting 29 Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 6264.1 (2015)); *United States v. Lamarre*, 248 F.3d 642, 648 (7th Cir. 2001) (testimony of the defendant's mental disability was helpful in a fraud case: "Trial courts are not compelled to exclude all expert testimony merely because it overlaps with matters within the jury's experience."); *United States v. King,* 898 F.3d 797, 805–06 (8th Cir. 2018) (in a pill mill case, the court uses the "to any degree" standard, and states: "While Dr. Roman acknowledged that he could not definitively state that any particular prescription was illegitimate absent more information, his opinion on the general operation of the clinic based on the accumulated evidence was still relevant. On the whole, Dr. Roman's opinion on the PMP charts advanced the trier of

fact's understanding of the clinical practices at KJ and Artex and how they differed from ordinary medical facilities."); *United States v. Archuleta*, 737 F.3d 1287, 1297 (10th Cir. 2013) (expert testimony about the operation of a gang was properly admitted: "At bottom, Archuleta simply fails to explain how relevant evidence, which no other witness covered, was unhelpful to the jury's understanding of the implications of his membership in the Tortilla Flats. See 29 Charles Alan Wright & Victor James Gold, Federal Practice and Procedure: Evidence § 6265, at 250 (1997) ("[T]he 'assist' requirement is satisfied where expert testimony advances the trier of fact's understanding to any degree.").").

There is some doubt about whether there is any daylight between "help" and "appreciably help" in the case results. For example, in *Keys,* the court quoted the Wigmore "appreciably help" language but ultimately excluded the expert's testimony because it was "irrelevant" --- it was offered to prove a fact that the opponent had conceded. And in *Sullivan, supra,* the "appreciably help" standard was employed but it was quite clear that the expert's testimony was not helpful at all --- as he just read out documents and applied his interpretation without any indication of how he came to those interpretations. The "conflict" appears to be more about what treatise a court uses rather than a real difference in the standard. The "appreciable help" cases quote Wigmore, while the "any help" cases quote Wright and Gold.

I haven't seen a case where a court held the following: "I find that the expert's testimony is helpful, but not appreciably so, and therefore I am excluding the evidence." Nor have I seen a case in which the court declared the reverse: "I am admitting the evidence because I find it helpful, though I cannot say it is appreciably helpful." In some sense, the problem of figuring out whether there is any difference in the standards as applied is similar to the admissibility/weight question: different standards are bandied about but in many cases it makes no difference to the result.

That said, it is troublesome that courts say they are applying a standard that is not supported by the text of the rule. The wayward language problem that applies to the admissibility/weight question is also an issue here. It is probably not problematic enough to justify an amendment to Rule 702 on its own, but it may be something to address as an "add-on." As discussed in the Rule 615 memo, an "add-on" is often a good idea because otherwise a mild improvement to a rule might never be made --- and if you get essentially one shot at a particular rule every decade or so, you might as well try to improve what you can.

So let us assume that the Committee finds it worthwhile to address the "help vs. appreciable help" question. Which of the two is the correct standard? It seems clear that the correct standard is "help" rather than "appreciably help" --- the obvious reason being that "appreciably" is not in the text of the Rule. Wigmore is the fountainhead of the "appreciably help" line of cases, and the problem with Wigmore as a source is that he was not construing the text of Rule 702 (unlike Wright

and Gold). The original Committee Note to Rule 702, while citing Wigmore, pointedly does not give any imprimatur to an "appreciably help" standard. The Committee Note states that the standard is whether the opinion "assist[s] the trier" and states that when expert opinions are excluded, "it is because they are unhelpful and therefore superfluous and a waste of time." So there is nothing in the text or note that supports a higher standard than "helpfulness."

Moreover, as a matter of policy, it would appear that an "appreciably help" standard is too strict (if actually applied as a higher threshold). It would allow a court to exclude reliable and helpful expert testimony on the mushy ground that it wasn't helpful *enough.* That would leave a lot to the discretion of a trial judge, and would make review quite difficult. Given all the other requirements for expert testimony (especially if Rule 104(a) is correctly applied to them), there is a risk that an "appreciable help" standard could operate as an extra hurdle that could make it too difficult to admit relevant and reliable expert testimony.

Now let us assume that something in the amendment should reject the "appreciable help" standard. How should the issue be addressed? It is pretty clear that it *cannot* be addressed in the text of the amendment. That is because the "appreciably help" courts have *added* a word that is not in text. So you can't cut anything out. And you definitely do not want to take out the word "help" for some other word, as there is a lot of case law on that word. And you definitely don't want to add something like:

> the expert's . . . knowledge will help . . . but it need not appreciably help.

It should be noted here that the problem to be addressed is not exactly the same as with the admissibility/weight question. As found above, some courts have read a preponderance of the evidence requirement out of Rule 702(b) and (d). But in fact there is nothing explicit about the standard of proof in Rule 702. To get to the preponderance of the evidence requirement, you have to read *Daubert, Bourjaily,* etc. So, adding text that specifies the preponderance of the evidence requirement can be thought to be a clarifying improvement. In contrast, as to the "appreciable help" requirement, courts are adding a requirement that is not in the text. There seems to be little to do in the text to clarify its meaning or to correct the error.

What this means is that if the "appreciable help" standard is to be addressed, it should probably be in the Note. **Here is some language that might work in the Note.**

> Rule 702 requires that the expert's knowledge must "help" the trier of fact to understand the evidence or to determine a fact in issue. Unfortunately, some courts have required the expert's testimony to "appreciably help" the trier of fact. Applying a higher standard than helpfulness to otherwise reliable expert testimony is unnecessarily strict.

This language appears in brackets in the drafting alternatives below.

## III. Drafts of a Possible Amendment to Rule 702

Part III sets forth a number of drafting options. Part III.A includes three draft amendments that would deal with the overstatement issue only. Part III.B contains two drafts that would address the Rule 104(a) weight/admissibility issue in rule text. Finally, Part III.C puts the preceding drafts together into a potential amendment that would address both the overstatement issue and the weight/admissibility issue.

### *A. Draft Amendments Addressing Overstatement*

There are three drafts addressing overstatement. All three drafts would limit overstatement for all expert witnesses. Draft One attempts to limit overstatement with minor changes to the language in existing Rule 702(d) (the suggestion from Judge Kuhl and Judge Schroeder). Draft Two seeks to prevent an expert from "overstating" the conclusions that reliably may be drawn from his methods with the addition of a new subsection (e). Draft Three would preclude an expert from expressing a "degree of confidence" that is not supported by a reliable application of principles and methods in an alternate new subsection (e). Drafts Two and Three contain the minor change to Rule 702(d) included in Draft One.

The Committee Notes are slightly different given the different language addressed to overstatement. But each Committee Note provides the same guidance on the Rule 104(a)/104(b) question.

#### *1. Draft One --- Modifying Rule 702(d) Only*

Draft One would attempt to regulate expert overstatement through subtle changes to the language of Rule 702(d):

**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:

(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~~and~~

(d) the ~~expert has reliably applied~~ expert's opinion [reflects] [is limited to] a reliable application of the principles and methods to the facts of the case.

**Reporter's Note:**

As stated above, "reflects" and "is limited to" are both nicely directed to overstatement, because they focus on the opinion as opposed to the application of a method; the latter, "is limited to" sounds slightly more proscriptive.

## Draft Committee Note

Rule 702(d) has been amended to provide that a trial judge should exercise gatekeeping authority with respect to the opinion ultimately expressed by a testifying expert to ensure that it stays within the bounds of what can be concluded by a reliable application of the expert's methodology. Testimony that overstates the conclusion that an expert's methods can reliably support undermines the purposes of the Rule and requires intervention by the judge. Just as jurors are unable to evaluate meaningfully the reliability of scientific and other methods underlying expert opinion, jurors lack a basis for assessing critically the conclusions of an expert that go beyond what the expert's methodology may reliably support.

The amendment is especially pertinent to testimony of forensic experts. Forensic experts often (explicitly or implicitly) express opinions about probabilities – for example, when comparing features to assess the possible origin of an evidence sample. It is important that the expert accurately inform the factfinder of the meaning of the results that are reached. A forensic expert who states or implies that a method or conclusion is "infallible," "certain," or "error-free" will by definition be stating an opinion that cannot reasonably be drawn, because such statements cannot be empirically supported. Also, many forensic processes do not comport with the scientific method, so testimony that such a process is "scientific" is not supported --- and is prohibited under this amendment. Under the amendment the expert must accurately state the meaning of the results found by the expert. Accurate testimony will ordinarily include a fair assessment of the rate of error of the methodology employed, based where appropriate on empirical studies of how often the method produces correct results, as well as other relevant limitations inherent in the methodology. Claims of a match, or of probabilities based only on the expert's experience, without empirically valid support, would not be admissible because they are not reasonably drawn from the method used.

Claims that a forensic expert expresses an opinion to a "reasonable degree of [scientific/forensic] certainty" should be strictly scrutinized under the amendment. That phrase has no scientific meaning; it was developed by lawyers, not scientists. See National Commission on Forensic Science, *Testimony Using the Term "Reasonable Scientific Certainty", https://www.justice.gov/ncfs/file/795146/download* ("Rather than use 'reasonable…certainty' terminology, experts should make a statement about the examination itself, including an expression of the uncertainty in the measurement or in the data. The expert should state the bases for that opinion (e.g., the underlying information, studies, observations) and the limitations relating

to the results of the examination."). Examples of properly verified conclusions, when supported by the data and methodology, include statements such as "cannot be ruled out" or "more likely than not." Of course this amendment does not bar testimony that satisfies a state law standard of proof in cases where state law provides the rule of decision.

Nothing in the amendment requires the court to nitpick an expert's opinion in order to reach a perfect expression of what the basis and methodology can support. The Rule 104(a) standard does not require perfection. On the other hand, it does not permit the expert to make extravagant claims that are clearly unsupported by the expert's basis and methodology.

The admissibility requirements of Rule 702, are evaluated by the court under Rule 104(a), so the proponent must establish that the admissibility standards are met by a preponderance of the evidence. *See Bourjaily v. United States,* 483 U.S. 171 (1987). Unfortunately many courts have held or declared that the critical questions of the sufficiency of an expert's basis, and the application of the expert's methodology, are generally questions of weight and not admissibility. These rulings are an incorrect application of Rules 702 and 104(a).

Of course some challenges to expert testimony will raise matters of weight rather than admissibility even under the Rule 104(a) standard. For example, if the court finds by a preponderance of the evidence that an expert has relied on sufficient studies to support an opinion, the fact that the expert has not read every single study that exists will likely 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 *generally* go to weight and not admissibility. Rather it means that once the court has found the admissibility requirement to be met by a preponderance of the evidence, any remaining attack by the opponent will go only to the weight of the evidence. In order to avoid confusion on this subject, it is useful for the trial court to specify that it is applying the Rule 104(a) preponderance standard to all the admissibility requirements of Rule 702.

[Rule 702 requires that the expert's knowledge must "help" the trier of fact to understand the evidence or to determine a fact in issue. Unfortunately, some courts have required the expert's testimony to "appreciably help" the trier of fact. Applying a higher standard than helpfulness to otherwise reliable expert testimony is unnecessarily strict.]

### *2. Draft Two -- "Overstatement" Limitation in New Rule 702(e)*

Draft Two would seek to limit "overstatement" more overtly through the addition of a new subsection (e):

**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:

(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] [is limited to] a reliable application of the principles and methods to the facts of the case; and

(e) the expert does not overstate the conclusions that reasonably may be drawn from a reliable application of the expert's principles and methods.

## Draft Committee Note

Rule 702 has been amended to provide that an expert may "not overstate" the conclusions that reasonably may be drawn from a reliable application of the expert's principles and methods, and emphasizes that the court must regulate conclusions of experts even if they are employing a reliable method. Testimony that inaccurately states the conclusion that an expert's methods can reliably support undermines the purposes of the Rule and requires intervention by the judge as gatekeeper. Just as jurors are unable to evaluate meaningfully the reliability of scientific and other methods underlying expert opinion, jurors lack a basis for assessing critically the claims of an expert that overstate what that the expert's methodology may reliably support.

The amendment is especially pertinent to testimony of forensic experts. Forensic experts often (explicitly or implicitly) express opinions about probabilities – for example, when comparing features to assess the possible origin of an evidence sample. It is important that the expert accurately inform the factfinder of the meaning of the results that are reached. A forensic expert who states or implies that a method or conclusion is "infallible," "certain," or "error-free" will by definition be stating an opinion that cannot reasonably be drawn, because such statements cannot be empirically supported. Also, many forensic processes do not comport with the scientific method, so testimony that such a process is "scientific" is not supported --- and is prohibited under this amendment. Under the amendment the expert must accurately state the meaning of the results found by the expert. Accurate testimony will ordinarily include a fair assessment of the rate of error of the methodology employed, based where appropriate on empirical studies of how often the method produces correct results, as well as other relevant limitations inherent in the

methodology. Claims of a match, or of probabilities based only on the expert's experience, without empirically valid support, would not be admissible because they are not reasonably drawn from the method used.

Claims that a forensic expert expresses an opinion to a "reasonable degree of [scientific/forensic] certainty" should be strictly scrutinized under the amendment. That phrase has no scientific meaning; it was developed by lawyers, not scientists. See National Commission on Forensic Science, *Testimony Using the Term "Reasonable Scientific Certainty", https://www.justice.gov/ncfs/file/795146/download* ("Rather than use 'reasonable…certainty' terminology, experts should make a statement about the examination itself, including an expression of the uncertainty in the measurement or in the data. The expert should state the bases for that opinion (e.g., the underlying information, studies, observations) and the limitations relating to the results of the examination."). Examples of properly verified conclusions, when supported by the data and methodology, include statements such as "cannot be ruled out" or "more likely than not." Of course this amendment does not bar testimony that satisfies a state law standard of proof in cases where state law provides the rule of decision.

Nothing in the amendment requires the court to nitpick an expert's opinion in order to reach a perfect expression of what the basis and methodology can support. The Rule 104(a) standard does not require perfection. On the other hand, it does not permit the expert to make extravagant claims that are clearly unsupported by the expert's basis and methodology.

A requirement of a conclusion that does not overstate the results is integrally related to the admissibility requirements of Rule 702(b)-(d), all of which are intended to assure that an expert's opinion is helpful. In this regard, Rule 702(d) has been amended slightly to emphasize that the trial court has an obligation to assure that an expert's conclusion must be soundly based in sufficient facts or data and a reliable methodology, reliably applied.

The admissibility requirements of Rule 702, are evaluated by the court under Rule 104(a), so the proponent must establish that the admissibility standards are met by a preponderance of the evidence. *See Bourjaily v. United States,* 483 U.S. 171 (1987). Unfortunately many courts have held or declared that the critical questions of the sufficiency of an expert's basis, and the application of the expert's methodology, are generally questions of weight and not admissibility. These rulings are an incorrect application of Rules 702 and 104(a).

Of course some challenges to expert testimony will raise matters of weight rather than admissibility even under the Rule 104(a) standard. For example, if the court finds by a preponderance of the evidence that an expert has relied on sufficient studies to support an opinion, the fact that the expert has not read every single study that exists will likely 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 *generally* go to weight and not admissibility. Rather it means that once the court has found the admissibility requirement to be met by a preponderance of the evidence, any remaining attack by the opponent will go only to the weight of the evidence. In order to avoid confusion on this subject, it is useful for the trial court to specify that it is applying the Rule 104(a) preponderance standard to all the admissibility requirements of Rule 702.

[Rule 702 requires that the expert's knowledge must "help" the trier of fact to understand the evidence or to determine a fact in issue. Unfortunately, some courts have required the expert's testimony to "appreciably help" the trier of fact. Applying a higher standard than helpfulness to otherwise reliable expert testimony is unnecessarily strict.]

**Reporter's Comment:**

If there is a separate subdivision on overstatement, is it useful to retain the proposed change to (d) --- that the opinion reflects or is limited to the reliable application of the method? Arguably the answer is yes, for purposes of emphasis, and also as a reminder more broadly that a court must police conclusions as well as methodology, as *Joiner* instructs. So a paragraph was added to the note, above, to explain why it is in the rule in addition to the language on overstatement.

### *3. Draft Three – "Degree of Confidence" Limit in New Rule 702(e)*

Draft Three would also add a new subsection (e) to Rule 702, this time focused on the "degree of confidence" expressed by an expert:

**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:

(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] [is limited to] a reliable application of the principles and methods to the facts of the case; and

(e) the expert does not express a degree of confidence that is unsupported by a reliable application of the principles and methods.

## Draft Committee Note

Rule 702 has been amended to provide that an expert may not express a degree of confidence in an opinion that is unsupported by a reliable application of the expert's principles and methods, and emphasizes that the court must regulate opinions of experts even if they are

employing a reliable method. Testimony that inaccurately states the conclusion that an expert's methods can reliably support undermines the purposes of the Rule and requires intervention by the judge as gatekeeper. Just as jurors are unable to evaluate meaningfully the reliability of scientific and other methods underlying expert opinion, jurors lack a basis for assessing critically the claims of an expert that overstate what the expert's methodology may reliably support.

The amendment is especially pertinent to testimony of forensic experts. Forensic experts often (explicitly or implicitly) express opinions about probabilities – for example, when comparing features to assess the possible origin of an evidence sample. It is important that the expert accurately inform the factfinder of the meaning of the results that are reached. A forensic expert who states or implies that a method or conclusion is "infallible," "certain," or "error-free" will by definition be stating an opinion that cannot reasonably be drawn, because such statements cannot be empirically supported. Also, many forensic processes do not comport with the scientific method, so testimony that such a process is "scientific" is not supported --- and is prohibited under this amendment. Under the amendment the expert must accurately state the meaning of the results found by the expert. Accurate testimony will ordinarily include a fair assessment of the rate of error of the methodology employed, based where appropriate on empirical studies of how often the method produces correct results, as well as other relevant limitations inherent in the methodology. Claims of a match, or of probabilities based only on the expert's experience, without empirically valid support, would not be admissible because they are not reasonably drawn from the method used.

Claims that a forensic expert expresses an opinion to a "reasonable degree of [scientific/forensic] certainty" should be strictly scrutinized under the amendment. That phrase has no scientific meaning; it was developed by lawyers, not scientists. See National Commission on Forensic Science, *Testimony Using the Term "Reasonable Scientific Certainty", https://www.justice.gov/ncfs/file/795146/download* ("Rather than use 'reasonable…certainty' terminology, experts should make a statement about the examination itself, including an expression of the uncertainty in the measurement or in the data. The expert should state the bases for that opinion (e.g., the underlying information, studies, observations) and the limitations relating to the results of the examination."). Examples of properly verified conclusions, when supported by the data and methodology, include statements such as "cannot be ruled out" or "more likely than not." Of course this amendment does not bar testimony that satisfies a state law standard of proof in cases where state law provides the rule of decision.

Nothing in the amendment requires the court to nitpick an expert's opinion in order to reach a perfect expression of what the basis and methodology can support. The Rule 104(a) standard does not require perfection. On the other hand, it does not permit the expert to make extravagant claims that are clearly unsupported by the expert's basis and methodology.

A requirement that testimony does not overstate an expert's degree of confidence is integrally related to the admissibility requirements of Rule 702(b)-(d), all of which are intended to assure that an expert's opinion is helpful. In this regard, Rule 702(d) has been amended slightly to emphasize that the trial court has an obligation to assure that an expert's conclusion must be soundly based in sufficient facts or data and a reliable methodology, reliably applied.

The admissibility requirements of Rule 702, are evaluated by the court under Rule 104(a), so the proponent must establish that the admissibility standards are met by a preponderance of the evidence. *See Bourjaily v. United States,* 483 U.S. 171 (1987). Unfortunately many courts have held or declared that the critical questions of the sufficiency of an expert's basis, and the application of the expert's methodology, are generally questions of weight and not admissibility. These rulings are an incorrect application of Rules 702 and 104(a).

Of course some challenges to expert testimony will raise matters of weight rather than admissibility even under the Rule 104(a) standard. For example, if the court finds by a preponderance of the evidence that an expert has relied on sufficient studies to support an opinion, the fact that the expert has not read every single study that exists will likely 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 *generally* go to weight and not admissibility. Rather it means that once the court has found the admissibility requirement to be met by a preponderance of the evidence, any remaining attack by the opponent will go only to the weight of the evidence. In order to avoid confusion on this subject, it is useful for the trial court to specify that it is applying the Rule 104(a) preponderance standard to all the admissibility requirements of Rule 702.

[Rule 702 requires that the expert's knowledge must "help" the trier of fact to understand the evidence or to determine a fact in issue. Unfortunately, some courts have required the expert's testimony to "appreciably help" the trier of fact. Applying a higher standard than helpfulness to otherwise reliable expert testimony is unnecessarily strict.]

## *B. Clarifying the Applicability of the Rule 104(a) Preponderance Standard to the Rule 702 Admissibility Requirements in Rule Text*

Let's assume that the Committee decides to specify in text that a preponderance standard applies to its admissibility requirements. How best to implement the change?

It would seem that the most effective way to highlight the standard of proof is to put it at the beginning or the end of the Rule, so that it clearly applies to *all* the Rule's admissibility requirements. Adding the preponderance standard only to subdivisions (b) and (d) could create the negative inference that the standard does *not* apply to the other requirements, such as qualifications, helpfulness, and reliable methodology.

On the other hand, restating the Rule 104(a) preponderance standard at the beginning of all other requirements would significantly alter the existing structure of Rule 702 by taking the expert's qualification out of the introductory sentence and placing it in its own new subsection at the very end of the Rule. As an alternative, adding language to the existing introductory sentence immediately following the qualification requirement would target only the current (a)-(d) requirements (thus excluding the qualification requirement from the clarified standard of proof) and would result in less disruption in the familiar structure of the Rule. Because the preponderance standard already applies to all the requirements of Rule 702 via Rule 104(a), emphasizing the standard only with respect to requirements (a)-(d) for which federal courts have failed to apply it would not necessarily create a negative inference with respect to the qualification requirement and could be a viable alternative. Two draft amendments that follow reflect these alternatives.

### *1. Draft One – Adding Preponderance Language to All Rule 702 Requirements*

If the Committee wanted to pursue a preponderance amendment that captures all Rule 702 requirements, , it would seem optimal to locate the amended language at the beginning of the Rule. Placing the standard at the beginning provides a stronger highlight, and moreover placing the standard at the end would mean that it would probably have to be in its own hanging paragraph. And restylists hate a hanging paragraph.

Placing the preponderance standard at the beginning would look like this:

**Rule 702. Testimony by Expert Witnesses.**

> For a witness to testify as an expert in the form or an opinion or otherwise, the court must find the following requirements to be established by a preponderance of the evidence: ~~A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form or an opinion or otherwise, if:~~

(a) the ~~expert's~~ witness'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~~ witness has reliably applied the principles and methods to the facts of the case~~.~~ ; and

(e) the witness is qualified as an expert by knowledge, skill, experience, training, or education.

**Comments:**

1. The change has the collateral benefit of clarifying that qualification is an admissibility requirement governed by Rule 104(a). The current rule buries the qualification requirement in the introductory sentence to the rule.

2. As an admissibility requirement, we placed qualifications at the end. Logically, perhaps, it should go in the front. That's what the restylist suggested. But to do so would disrupt electronic searches on a rule that has been cited hundreds of times. Specifically, since 2000, appellate cases only: more than 800 citations to 702(a); more than 600 citations to Rule 702(b); more than 400 citations to 702(c); and more than 150 citations to Rule 702(d).

## Draft Committee Note

Rule 702 has been amended to clarify and emphasize that the admissibility requirements set forth in the Rule must be established by a preponderance of the evidence. *See* Rule 104(a). Of course the Rule 104(a) standard applies to most of the admissibility requirements set forth in the Evidence Rules. *See Bourjaily v. United States,* 483 U.S. 171 (1987). But unfortunately 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 generally questions of weight and not admissibility. These rulings are an incorrect application of Rules 702 and 104(a), and are rejected by this amendment.

There is no intent to raise any negative inference as to the applicability of the Rule 104(a) standard of proof for other rules. The Committee concluded that emphasizing the preponderance standard in Rule 702 specifically was made necessary by the courts that have ignored it when applying that Rule.

Of course some challenges to expert testimony will raise matters of weight rather than admissibility even under the Rule 104(a) standard. For example, if the court finds by a preponderance of the evidence that an expert has relied on sufficient studies to support an opinion, the fact that the expert has not read every single study that exists will raise a question of weight and not admissibility. But this does not mean, as certain courts have held, that arguments about the sufficiency of an expert's basis *generally* go to weight and not admissibility. Rather it means that once the court has found the admissibility requirement to be met by a preponderance of the evidence, any attack by the opponent will go only to the weight of the evidence.

[Rule 702 requires that the expert's knowledge must "help" the trier of fact to understand the evidence or to determine a fact in issue. Unfortunately, some courts have required the expert's testimony to "appreciably help" the trier of fact. Applying a higher standard than helpfulness to otherwise reliable expert testimony is unnecessarily strict.]

## *2. Draft Two – Emphasizing the Preponderance Standard for Subsections (a)-(d) Only (Excluding Expert Qualification from Clarified Standard)*

**Rule 702. Testimony by Expert Witnesses.**

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the proponent demonstrates by a preponderance of the evidence that:

(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

(b) the testimony is based on sufficient facts or data;

(c) the testimony is the product of reliable principles and methods; and

(d) the expert has reliably applied the principles and methods to the facts of the case.

**Comments:**

1. The benefit of this draft is that the qualification requirement remains at the very beginning of the Rule where it logically belongs and that the clarified standard is added without disrupting the existing structure of Rule 702 with which courts and litigants are familiar.
2. The downside of this amendment is that the textual preponderance standard does not apply to the qualification requirement that precedes it. If this draft were chosen, the Committee

note would need to emphasize the trial judge's continuing obligation to determine qualification by a preponderance pursuant to Rule 104(a).

## Draft Committee Note

Rule 702 has been amended to clarify and emphasize that the admissibility requirements set forth in the Rule must be established by a preponderance of the evidence. *See* Rule 104(a). Of course the Rule 104(a) standard applies to most of the admissibility requirements set forth in the Evidence Rules. *See Bourjaily v. United States,* 483 U.S. 171 (1987). But unfortunately 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 generally questions of weight and not admissibility. These rulings are an incorrect application of Rules 702 and 104(a), and are rejected by this amendment.

Although the clarifying amendment emphasizes the application of the preponderance standard to the requirements of sufficiency of basis and application of the expert's methodology where some courts have failed to apply it, the Rule 104(a) preponderance standard continues to govern a trial judge's determination of the expert's qualifications as well. Likewise, there is no intent to raise any negative inference as to the applicability of the Rule 104(a) standard of proof for other rules by clarifying the standard with respect to Rule 702. The Committee concluded that emphasizing the preponderance standard as to Rule 702(b)-(d) specifically was made necessary by the courts that have ignored it when applying those provisions.

Of course some challenges to expert testimony will raise matters of weight rather than admissibility even under the Rule 104(a) standard. For example, if the court finds by a preponderance of the evidence that an expert has relied on sufficient studies to support an opinion, the fact that the expert has not read every single study that exists will raise a question of weight and not admissibility. But this does not mean, as certain courts have held, that arguments about the sufficiency of an expert's basis *generally* go to weight and not admissibility. Rather it means that once the court has found the admissibility requirement to be met by a preponderance of the evidence, any attack by the opponent will go only to the weight of the evidence.

[Rule 702 requires that the expert's knowledge must "help" the trier of fact to understand the evidence or to determine a fact in issue. Unfortunately, some courts have required the expert's testimony to "appreciably help" the trier of fact. Applying a higher standard than helpfulness to otherwise reliable expert testimony is unnecessarily strict.]

### *C. Regulating Overstatement And Articulating the Preponderance Standard in Rule Text*

Finally, the Committee could propose an amendment to Rule 702 that would regulate the problem of expert overstatement and add an explicit preponderance standard to the text of the Rule. There are several possibilities for combining the above-described drafts. The two drafts below illustrate the ways in which both changes could be combined in a proposed amendment.

#### *1. Draft One – Making the Preponderance Standard Applicable to All Rule 702 Admissibility Requirements and Adding an Overstatement Limitation*

**Rule 702. Testimony by Expert Witnesses.**

For a witness to testify as an expert in the form or an opinion or otherwise, the court must find the following requirements to be established by a preponderance of the evidence: ~~A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form or an opinion or otherwise, if:~~

(a) the ~~expert's~~ witness'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~~ witness's ~~has reliably applied~~ opinion [reflects] [is limited to] a reliable application of the principles and methods to the facts of the case~~.~~ ;

(e) the witness does not overstate the conclusions that reasonably may be drawn from a reliable application of the principles and methods [or the expert does not express a degree of confidence that is unsupported by a reliable application of the principles and methods];and

(f) the witness is qualified as an expert by knowledge, skill, experience, training, or education.

## Draft Committee Note

Rule 702 has been amended in two respects. First, the Rule has been amended to clarify and emphasize that the admissibility requirements set forth in the Rule must be established by a preponderance of the evidence. *See* Rule 104(a). Of course the Rule 104(a) standard applies to most of the admissibility requirements set forth in the Evidence Rules. *See Bourjaily v. United States,* 483 U.S. 171 (1987). But unfortunately 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 generally questions of weight and not admissibility. These rulings are an incorrect application of Rules 702 and 104(a), and are rejected by this amendment. There is no intent to raise any negative inference as to the applicability of the Rule 104(a) standard of proof for other rules. The Committee concluded that emphasizing the preponderance standard in Rule 702 specifically was made necessary by the courts that have ignored it when applying that Rule.

Of course some challenges to expert testimony will raise matters of weight rather than admissibility even under the Rule 104(a) standard. For example, if the court finds by a preponderance of the evidence that an expert has relied on sufficient studies to support an opinion, the fact that the expert has not read every single study that exists will raise a question of weight and not admissibility. But this does not mean, as certain courts have held, that arguments about the sufficiency of an expert's basis *generally* go to weight and not admissibility. Rather it means that once the court has found the admissibility requirement to be met by a preponderance of the evidence, any attack by the opponent will go only to the weight of the evidence.

Rule 702 has also been amended to provide that an expert may "not overstate" the conclusions that reasonably may be drawn from a reliable application of the expert's principles and methods [or "to provide that an expert may not express a degree of confidence that cannot be supported by a reliable application of the expert's principles and methods."], and emphasizes that the court must regulate conclusions of experts even if they are employing a reliable method.. Testimony that inaccurately states the conclusion [or "the degree of confidence"] that an expert's methods can reliably support undermines the purposes of the Rule and requires intervention by the judge as gatekeeper. Just as jurors are unable to evaluate meaningfully the reliability of scientific and other methods underlying expert opinion, jurors lack a basis for assessing critically the conclusions that an expert's methodology may reliably support [or "for assessing critically the degree of confidence an expert's methodology can support"].

The amendment is especially pertinent to testimony of forensic experts. Forensic experts often (explicitly or implicitly) express opinions about probabilities – for example, when comparing features to assess the possible origin of an evidence sample. It is important that the expert accurately inform the factfinder of the meaning of the results that are reached. A forensic expert who states or implies that a method or conclusion is "infallible," "certain," or "error-free" will by definition be stating an opinion that cannot reasonably be drawn, because such statements cannot be empirically supported. Also, many forensic processes do not comport with the scientific method, so testimony that such a process is "scientific" is not supported --- and is prohibited under this amendment. Under the amendment the expert must accurately state the meaning of the results found by the expert. Accurate testimony will ordinarily include a fair assessment of the rate

of error of the methodology employed, based where appropriate on empirical studies of how often the method produces correct results, as well as other relevant limitations inherent in the methodology. Claims of a match, or of probabilities based only on the expert's experience, without empirically valid support, would not be admissible because they are not reasonably drawn from the method used.

Claims that a forensic expert expresses an opinion to a "reasonable degree of [scientific/forensic] certainty" should be strictly scrutinized under the amendment. That phrase has no scientific meaning; it was developed by lawyers, not scientists. See National Commission on Forensic Science, *Testimony Using the Term "Reasonable Scientific Certainty", https://www.justice.gov/ncfs/file/795146/download* ("Rather than use 'reasonable…certainty' terminology, experts should make a statement about the examination itself, including an expression of the uncertainty in the measurement or in the data. The expert should state the bases for that opinion (e.g., the underlying information, studies, observations) and the limitations relating to the results of the examination."). Examples of properly verified conclusions, when supported by the data and methodology, include statements such as "cannot be ruled out" or "more likely than not." Of course this amendment does not bar testimony that satisfies a state law standard of proof in cases where state law provides the rule of decision.

Nothing in the amendment requires the court to nitpick an expert's opinion in order to reach a perfect expression of what the basis and methodology can support. The Rule 104(a) standard does not require perfection. On the other hand, it does not permit the expert to make extravagant claims that are clearly unsupported by the expert's basis and methodology.

A requirement of a conclusion that does not overstate the expert's results [or "A requirement that testimony does not overstate an expert's degree of confidence"] is integrally related to the admissibility requirements of Rule 702(b)-(d), all of which are intended to assure that an expert's opinion is helpful. In this regard, Rule 702(d) has been amended slightly to emphasize that the trial court has an obligation to assure that an expert's conclusion must be soundly based in sufficient facts or data and a reliable methodology, reliably applied.

[Rule 702 requires that the expert's knowledge must "help" the trier of fact to understand the evidence or to determine a fact in issue. Unfortunately, some courts have required the expert's testimony to "appreciably help" the trier of fact. Applying a higher standard than helpfulness to otherwise reliable expert testimony is unnecessarily strict.]

### *2. Draft Two -- Emphasizing Preponderance Standard for Subsections (a)-(d) Only (Excluding Expert Qualification from Clarified Standard) And Regulating Overstatement*

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A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the proponent demonstrates by a preponderance of the evidence that:

(a) the ~~expert's~~ witness's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

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## Draft Committee Note

Rule 702 has been amended in two respects. First, the Rule has been amended to clarify and emphasize that the admissibility requirements set forth in the Rule must be established by a preponderance of the evidence. *See* Rule 104(a). Of course the Rule 104(a) standard applies to most of the admissibility requirements set forth in the Evidence Rules. *See Bourjaily v. United States,* 483 U.S. 171 (1987). But unfortunately 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 generally questions of weight and not admissibility. These rulings are an incorrect application of Rules 702 and 104(a), and are rejected by this amendment. Although the clarifying amendment emphasizes the application of the preponderance standard to the requirements of sufficiency of basis and application of the expert's methodology where some courts have failed to apply it, the Rule 104(a) preponderance standard continues to govern a trial judge's determination of the expert's qualifications as well. Likewise, there is no intent to raise any negative inference as to the applicability of the Rule 104(a) standard of proof for other rules by clarifying the standard with respect to Rule 702. The Committee concluded that emphasizing the preponderance standard in Rule 702 specifically was made necessary by the courts that have ignored it when applying that Rule.

Of course some challenges to expert testimony will raise matters of weight rather than admissibility even under the Rule 104(a) standard. For example, if the court finds by a preponderance of the evidence that an expert has relied on sufficient studies to support an opinion, the fact that the expert has not read every single study that exists will raise a question of weight and not admissibility. But this does not mean, as certain courts have held, that arguments about the sufficiency of an expert's basis *generally* go to weight and not admissibility. Rather it means that once the court has found the admissibility requirement to be met by a preponderance of the evidence, any attack by the opponent will go only to the weight of the evidence.

Rule 702 has also been amended to provide that an expert may "not overstate" the conclusions that reasonably may be drawn from a reliable application of the expert's principles and methods [or "to provide that an expert may not express a degree of confidence that cannot be supported by a reliable application of the expert's principles and methods."], and emphasizes that the court must regulate conclusions of experts even if they are employing a reliable method.. Testimony that inaccurately states the conclusion [or "the degree of confidence"] that an expert's methods can reliably support undermines the purposes of the Rule and requires intervention by the judge as gatekeeper. Just as jurors are unable to evaluate meaningfully the reliability of scientific and other methods underlying expert opinion, jurors lack a basis for assessing critically the conclusions that an expert's methodology may reliably support [or "for assessing critically the degree of confidence an expert's methodology can support"].

The amendment is especially pertinent to testimony of forensic experts. Forensic experts often (explicitly or implicitly) express opinions about probabilities – for example, when comparing features to assess the possible origin of an evidence sample. It is important that the expert accurately inform the factfinder of the meaning of the results that are reached. A forensic expert who states or implies that a method or conclusion is "infallible," "certain," or "error-free" will by definition be stating an opinion that cannot reasonably be drawn, because such statements cannot be empirically supported. Also, many forensic processes do not comport with the scientific method, so testimony that such a process is "scientific" is not supported --- and is prohibited under this amendment. Under the amendment the expert must accurately state the meaning of the results found by the expert. Accurate testimony will ordinarily include a fair assessment of the rate of error of the methodology employed, based where appropriate on empirical studies of how often the method produces correct results, as well as other relevant limitations inherent in the methodology. Claims of a match, or of probabilities based only on the expert's experience, without empirically valid support, would not be admissible because they are not reasonably drawn from the method used.

Claims that a forensic expert expresses an opinion to a "reasonable degree of [scientific/forensic] certainty" should be strictly scrutinized under the amendment. That phrase has no scientific meaning; it was developed by lawyers, not scientists. See National Commission on Forensic Science, *Testimony Using the Term "Reasonable Scientific Certainty", https://www.justice.gov/ncfs/file/795146/download* ("Rather than use 'reasonable…certainty' terminology, experts should make a statement about the examination itself, including an expression of the uncertainty in the measurement or in the data. The expert should state the bases

for that opinion (e.g., the underlying information, studies, observations) and the limitations relating to the results of the examination."). Examples of properly verified conclusions, when supported by the data and methodology, include statements such as "cannot be ruled out" or "more likely than not." Of course this amendment does not bar testimony that satisfies a state law standard of proof in cases where state law provides the rule of decision.

Nothing in the amendment requires the court to nitpick an expert's opinion in order to reach a perfect expression of what the basis and methodology can support. The Rule 104(a) standard does not require perfection. On the other hand, it does not permit the expert to make extravagant claims that are clearly unsupported by the expert's basis and methodology.

A requirement of a conclusion that does not overstate the expert's results [or "A requirement that testimony does not overstate an expert's degree of confidence"] is integrally related to the admissibility requirements of Rule 702(b)-(d), all of which are intended to assure that an expert's opinion is helpful. In this regard, Rule 702(d) has been amended slightly to emphasize that the trial court has an obligation to assure that an expert's conclusion must be soundly based in sufficient facts or data and a reliable methodology, reliably applied.

[Rule 702 requires that the expert's knowledge must "help" the trier of fact to understand the evidence or to determine a fact in issue. Unfortunately, some courts have required the expert's testimony to "appreciably help" the trier of fact. Applying a higher standard than helpfulness to otherwise reliable expert testimony is unnecessarily strict.]

# TAB 2B

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**FORENSIC CASE DIGEST**

**2008-Present**

**Prepared by Daniel J. Capra**

Several Committee members have expressed an interest in development of a case digest on forensic expert testimony, as a way to evaluate the scope of the problem --- particular the problem of an expert opinion that overstates the conclusion that can reliably be drawn from the methodology. The Reporter has prepared a digest on federal appellate cases and federal district court cases. The digests run from 2008 to date --- 2008 was picked because that was when the first challenges in the scientific community were voiced. (I threw in a couple of older cases that I wrote up for other projects).

The case digest has gotten so large that I decided to put it in its own file.

## *A. Federal Appellate Cases on Forensic Evidence*

**Acid-phosphate testing: *United States v. Rodriguez,*** 581 F.3d 775 (8th Cir. 2009): The court affirmed a conviction for kidnapping resulting in death, finding no abuse of discretion in permitting a government pathologist to testify about acid-phosphate tests on the victim's body, indicating the presence of semen. The pathologist "did not invent acid-phosphate testing; he testified to attending national medical conferences and reviewing scientific literature on the topic." The expert's conclusion was based on living people, and the defendant pointed out that there was uncertainty about the timing of the chemical process on a corpse. But the court found that this variable went to weight and not admissibility.

**Ballistics --- Overstatement Problem: *United States v. Williams,*** 506 F.3d 151 (2nd Cir. 2007): The court found no abuse of discretion in allowing a ballistics expert to testify to a "match." The court found that the district court was not required to hold a *Daubert* hearing on the admissibility of ballistics evidence, as the district court had relied on precedent:

> We think that *Daubert* was satisfied here. When the district court denied a separate hearing it went through the exercise of considering the use of ballistic expert testimony in other cases. Then, before the expert's testimony was presented to the jury, the government provided an exhaustive foundation for Kuehner's expertise including: her service as a firearms examiner for approximately twelve years; her receipt of "hands-on training" from her section supervisor; attendance at seminars on firearms identification, where firearms examiners from the United States and the international community gather to present papers on current topics within the field; publication of her writings in a peer review journal; her obvious expertise with toolmark identification; her experience examining approximately

> 2,800 different types of firearms; and her prior expert testimony on between 20 and 30 occasions. Under the circumstances, we are satisfied that the district court effectively fulfilled its gatekeeping function under *Daubert.*

The court did impose a qualification on admitting ballistics testimony:

> We do not wish this opinion to be taken as saying that any proffered ballistic expert should be routinely admitted. *Daubert* [did not] "grandfather" or protect from *Daubert* scrutiny evidence that had previously been admitted under *Frye*. Thus, expert testimony long assumed reliable before Rule 702 must nonetheless be subject to the careful examination that *Daubert* and *Kumho Tire* require. * * * Because the district court's inquiry here did not stop when the separate hearing was denied, but went on with an extensive consideration of the expert's credentials and methods, the jury could, if it chose to do so, rely on her testimony which was relevant to the issues in the case. We find that the gatekeeping function of *Daubert* was satisfied and that there was no abuse of discretion.

**Ballistics: *United States v. Mikos,*** 539 F.3d 706 (7th Cir. 2008): The court found no error in admitting the testimony of a ballistics expert that the defendant's revolver was one of the models that could have been the murder weapon. The expert disclosed that at least 15 other models could have fired the bullets, *so he did not overstate his findings*. The expert reliably applied the data he obtained to conclude that the rifling on the bullets did not rule out the defendant's make and model of gun.

**Ballistics --- testimony of a match allowed without comment: *United States v. Brown*,** 2020 WL 5088074 (7th Cir. Aug. 28, 2020): Here is the court's description of the testimony of four ballistics experts (three state experts and one from the FBI):

> Pomerance examined 9mm cartridge casings that were recovered from the area where Cordale Hampton and his uncle were shot. He compared them to 9mm cartridge casings from an October 2005 shooting. The individual characteristics ***were the same on both, and so he determined that they were fired by the same firearm***. Pomerance also compared a 5.7 x 28mm cartridge casing from the Eddie Jones shooting to a 5.7 x 28mm cartridge casing from the Simmons shooting. ***The markings matched.*** Murray ***found a match*** between 5.7 x 28mm casings from the Jonte Robinson shooting and comparable casings from the Simmons shooting. Murray also found that a firearm seized from Bush's storage locker ***fired the cartridge casings*** from the Eddie Jones shooting. Stevens ***found a match*** between .40 caliber cartridge casing from the Wilber Moore murder and the same type from the October 2005 shooting. ***Jiggets testified that the .45 caliber cartridge casings recovered from the Bluitt/Neeley murder scene matched casings*** found at the Daniels murder scene.

The defendants challenged the ballistics match testimony by relying on the PCAST report. The Court of Appeals stated that the trial court "chose not to give it dispositive effect, and that choice was within its set of options."

As to the reliability of ballistics testing, the court declared that it has "almost uniformly accepted by federal courts." See, *e.g.*, *Cazares*, 788 F.3d at 989. It noted that "several reliability studies have been conducted on it" and although the error rate varies from study to study, "overall it is low—in the single digits." So the court found no abuse of discretion in admitting the testimony. The court did not comment at all on the overstatements made by the experts.

**Ballistics --- some limitation on overstatement: *United States v. Parker***, 871 F.3d 590 (8th Cir. 2017): In a trial on charges of illegal possession of firearms, the defendant argued that the trial court erred in allowing testimony of a ballistics expert. The trial court prohibited the expert from testifying that she was "100% sure" or "certain" that the relevant guns matched the relevant shell casings. The defendant argued that the expert violated that restriction by describing the general reliability of the ballistics testing process. But the court, after reviewing the trial transcript, concluded that the expert's testimony "stayed within the bounds set by the district court."

**Ballistics --- Overstatement--- reasonable degree of ballistics certainty: *United States v. Johnson,*** 875 F.3d 1265 (9th Cir. 2017): In a felon-gun possession case, the expert testified that two bullets matched to a "reasonable degree of ballistics certainty." The court found that this "qualification" was sufficient to justify admission of the expert testimony – i.e., the expert did not state, categorically that there was a match. The court rejected the defendant's argument --- based on a report and recommendation from National Commission of Forensic Science --- that the "reasonable degree of ballistics certainty" test was itself insupportable and misleading. The court did not address the Commission report but instead simply relied on lower court cases employing the standard and stated that there was "only one case in which a 'reasonable degree of ballistics certainty' was found to be too misleading." That case is *United States v. Glynn*, 578 F.Supp.2d 567 (S.D.N.Y. 2008). Finally, the court rejected the defendant's argument that ballistics is inherently unreliable and fails to satisfy the *Daubert* factors. But instead of rebutting the defendant's attack on ballistics as unscientific, the court simply relied on precedent and stated that the defendant had not cited a case in which ballistics testimony was "excluded altogether."

**Cell Site Location --- regulation of overstatement: *United States v. Hill,*** 818 F.3d 289 (7th Cir. 2017): The court held that the science and methods supporting historical cell site location are understood and well-documented. But the court found it important that the trial expert "emphasized that Hill's cell phone's use of a cell site did not mean that Hill was right at that tower or at any particular spot near that tower." It concluded that the expert's disclaimer "save[d] his testimony" because historical cell-site analysis can only "show with sufficient reliability that a phone was in a general area, especially in a well-populated area."

Because the *Hill* court was concerned that a jury might overestimate the meaning of the information provided by historical cell-site analysis, it cautioned the Government "not to present historical cell-site evidence without clearly indicating the level of precision—or imprecision—with which that particular evidence pinpoints a person's location at a given time." And it warned that "[t]he admission of historical cell-site evidence that overpromises on the technique's precision—or fails to account adequately for its potential flaws—may well be an abuse of discretion."

**Comparative bullet lead analysis: *Kennedy v. Peele***, 552 Fed. Appx. 787 (10th Cir. 2014): The plaintiff sought damages for suffering a wrongful conviction. The defendant, an agent with the FBI, conducted comparative bullet-lead analysis ("CBLA") linking the plaintiff to multiple murders. The plaintiff argued that CBLA is unreliable (an argument since validated), and that the defendant knew "there was a question regarding the scientific reliability of the lead matching theory," but failed to disclose that the CBLA method lacked a statistical and scientific basis. The court held that the defendant was entitled to qualified immunity. It stated that it could not "ignore the fact that CBLA was widely accepted at the time of the events at issue." And the plaintiff's attack was on CBLA in general rather than any specific misconduct by the defendant.

**DNA mixed source sample: *United States v. Kelsey*,** 917 F.3d 740 (D.C. Cir. 2019): In a prosecution for sexual assault, the government relied at trial on a DNA match taken from the victim's sexual assault kit. One witness, Shana Mills, testified as to the processing of DNA swabs from the kit – i.e., taking cuttings from swabs, placing them in test tubes, and loading them into a machine called a genetic analyzer which produced electropherograms (charts that list the alleles present at different locations of a length of DNA). The data that Mills generated was transferred to another lab and analyzed by an expert, Hope Parker. Mills testified and compared the information in a report she wrote with the information that Parker used. Mills also testified that she identified a male profile in the DNA sample, which helped to explain why the electropherogram analysis was sent to Parker for a mixture analysis. The court held that Mills's testimony was properly admitted and that the trial judge did not abuse discretion in precluding cross-examination of Mills as to alleged deficient mixture analyses at the Department of Forensic Sciences' Laboratory. The court reasoned that any problems were irrelevant to Mills's credibility, because the benchwork in this case predated the problems with mixture analysis in the lab.

**DNA Mixed Source Sample --- FST Outmoded Method Sufficiently Reliable: *United States v. Jones,*** 965 F.3d 149 (2nd Cir. 2020): The court upheld the admission of a DNA identification from a multi-source sample, where the process used --- known as FST --- had been abandoned by the only lab that had ever used it (the New York City Medical examiner). This was referred to by the court as OCME using "its internally-developed, then-usual methodology for this type of mixed DNA sample, called the Forensic Statistical Tool ("FST")."

The court explained that in 2017, OCME stopped using FST for new cases. At that time, the Combined DNA Index System ("CODIS")--the FBI's national database, to which OCME

contributes its data--raised the minimum number of loci that must be amplified during the preliminary stage of analysis. FST, which had conformed to CODIS's prior standards, became incompatible because it did not comply with the higher standard. Rather than altering the FST codes to comply with these new standards, and be forced to go through another rigorous validation process, OCME opted to switch to a DNA testing program that was commercially available.

The court found that the trial court did not abuse its wide discretion in admitting the FST-based expert testimony. Here is the court's analysis:

> We see no error, much less any manifest error, in the decision of the district court in the present case. * * * [T]he five-day *Daubert* hearing exhaustively dissected FST's development, methodology, and implementation. The court permissibly found that the only two *Daubert* factors that were meaningfully in dispute were the known rate of error in FST analysis, and the question of general acceptance of FST in the scientific community. It permissibly found that both factors favored denial of Jones's motion to exclude the Glove DNA evidence.
>
> While the hearing testimony indicated that FST does not have what experts would describe as a "known error rate," the court had leeway to find it appropriate to substitute consideration of the rate at which FST would produce false positive results. And in considering the false-positive rate, there was no abuse of discretion in the court's decision to focus on FST's overall rate of false positives instead of, as urged by Jones, limiting its focus to one single early element in the process--the estimation of quant, where there is a 30-percent rate of error. Notably, all DNA analysis involves quantitation, and the *Daubert* hearing testimony indicated that the quantitation method OCME uses is considered the "gold standard." Further, to the extent that FST integrates quantitation more directly into its analysis than other programs do (i.e., in estimating drop-out), the false-positive rate takes this into account. Thus, despite the rate of error in determining quant, the evidence showed that FST's overall false-positive rate is 0.03 percent, a mere three-hundredths of one percent; and that for "very strong support" likelihood ratios (i.e., those more than 1,000)--including that for the Glove DNA here, which was 1,340--the false-positive rate is a mere 0.0009 percent. We see no abuse of discretion in the district court's conclusion that this evidence indicated reliability sufficient to support admission of the Glove DNA evidence.
>
> [T]he district court clearly explained its finding that FST is sufficiently accepted--both in its admission in scores of New York State cases and in "the fact that the FST has been approved for use in casework by members of the relevant scientific community and subjected to peer review" to warrant its admission here.

**DNA mixed source sample --- procedure subsequently determined unreliable was properly admitted: *United States v. Barton,*** 909 F.3d 1323 (11th Cir. 2018): The defendant was convicted of felon-firearm possession, in part on the basis of testimony by a DNA expert who extracted a sample from a gun. The defendant did not challenge the process of DNA identification itself, but argued that the identification was from a sample that was a mixture from a number of

individuals, and that the expert used a flawed process in extracting the DNA that she tested. The court held that the trial court "rightly reached its decision based on an evaluation of the foundations of Zuleger's testimony and the failure of the defense to rebut it with anything but the testimony of a competing expert, who employed the same general methodology." The court concluded that "[t]he issues raised by Johnson's competing testimony went to the weight owed Zuleger's expert opinion, and were properly left to the jury."

The defendant pointed up that between the time of his conviction and the appeal, a scientific body published new guidelines concluding that the prosecution expert's methods of extraction from the mixed source were not reliable. (The prosecution expert was relying on guidelines that were primarily designed to cover single-source samples and two-person mixtures, while the sample in the case was a mixture of DNA from at least three persons.). According to the court, "the updated SWGDAM guidelines support Barton's claim that analysis of a low-quantity three-person mixture should be based on interpretation guidelines drawn from validation studies performed on low-quantity three-person mixtures. Validation studies go to the heart of reliability." The court found that the new guidelines are "potentially important evidence cutting against reliability." But because they were not presented to the trial court, the court held that they could not be considered on appeal. The remedy, if any, would lie in a motion for a new trial under Fed.R.Crim.P. 33.

**DNA single source samples --- typographical error:** *United States v. Silva,* 889 F.3d 704 (10th Cir. 2018): In a felon-firearm possession case, the government called a DNA expert who testified on the basis of "single source samples" (i.e., no problem of extraction of one source from multiple sources), that she could not exclude the defendant's profile as the donor of the samples collected from a truck and a house. The defendant argued that the testimony should have been excluded because the numbers of the samples on her digital record did not match up with the numbers on the tubes. The expert recognized the error but said it was a typo, and that the error "had nothing to do with what's labelled on the actual tube." The court found no error in admitting the expert's testimony because the errors "were typographical only and did not affect her analysis and its result." The court then stated that "errors in the implementation of otherwise-reliable DNA methodology typically go to the weight that the trier of fact should accord to the evidence and not to its admissibility."

> **Comment:** It is surely true that the typographical error should not render the testimony inadmissible, because the actual test was reliably conducted. Therefore the court did not need to state as a general proposition --- twice --- that errors in application are questions of weight and not admissibility. This wasn't even an error in application. Or if it was, the trial judge could easily have found, by a preponderance of the evidence, that the test was reliably conducted even given the typo.

**DNA—PCR methodology:** ***United States v. Eastman***, 645 Fed. Appx. 476 (6th Cir. 2016): The defendant argued that polymerase chain reaction (PCR)—the process used to identify Eastman as the likely major DNA profile found on three dust masks—has no known error rate or accepted procedure for determining an error rate, and therefore should be rejected. But the court

found no abuse of discretion in admitting the DNA identification. The court relied almost exclusively on precedent.

> The defendant's argument confuses the error-rate factor with an admissibility requirement. More than ten years ago, we noted that "[t]he use of nuclear DNA analysis as a forensic tool has been found to be scientifically reliable by the scientific community for more than a decade." *United States v. Beverly*, 369 F.3d 516, 528 (6th Cir. 2004). Eastman presents no groundbreaking evidence that leads us to question that decision. At least one of our sister circuits even permits trial courts to take judicial notice of PCR's reliability. See *United States v. Beasley*, 102 F.3d 1440, 1448 (8th Cir. 1996). Of course, a defendant may challenge sound scientific methodology by showing that its reliability is undermined by procedural error—failure to follow protocol, mishandling of samples, and so on. But Eastman did not do so here.

**DNA identification: *United States v. Preston,*** 706 F.3d 1106 (9th Cir. 2013): In a sexual assault prosecution, the defendant argued that the expert's testimony regarding DNA identification should have been excluded. The court analyzed and rejected this argument in the following passage:

> The district court properly applied Rule 702 to determine whether to admit the testimony of the DNA analyst. The trial judge fulfilled his "gatekeeper" role pursuant to *Daubert* and allowed the expert's testimony based on the foundation laid by the prosecutor that established the relevance and reliability of the testimony and the scientific method by which the DNA was analyzed; the DNA was subjected to a common procedure for analysis. * * * Preston argues that the "analyst went below her lab's quality threshold." However, the expert explicitly stated that while the test conducted may have fallen below the lab's "reporting threshold," the analysts are "allowed to go below that level to try and eliminate or exclude someone." This is exactly what the expert did. * * *

**Drug identification --- Testimony about an "infinitesimal" error rate: *United States v. Mire,*** 725 F.3d 665 (7th Cir. 2013): The court found no error in the admission of testimony by a chemist that the defendant was carrying the controlled substances cathinone and cathine. The court found the forensic testing process to be reliable. The expert relied on published literature and peer-reviewed studies to support the reliability of the methodology. The expert stated that the rate of error was "infinitesimal" --- and while that ought to raise some concern, the court found that conclusion to be a factor *supporting* reliability.

**Drug identification: *United States v. Carlson,*** 810 F.3d 544 (8th Cir. 2016): The court affirmed convictions for selling misbranded synthetic drugs, finding no abuse of discretion in the admission of testimony from a DEA chemist regarding the substantial similarity in chemical structure between scheduled controlled substances and the products sold by the defendants. The entirety of the court's analysis is as follows:

The district court did not abuse its discretion by permitting Dr. Boos to testify. He testified that his conclusion was based on relevant evidence he had observed, his specialized knowledge in the field, his review of the scientific literature, and discussions with other scientists at the DEA. Although the defendants contend that Dr. Boos's testimony did not flow naturally from disinterested research, that his methodology was not subject to peer review or publication, and that his theory had no known rate of error, these objections go to the weight of Dr. Boos's testimony, not to its admissibility.

**Comment:** Charges of suspect motivation, lack of peer review, and no known rate of error clearly do not go to weight. The *Daubert* Court itself says that these matters affect admissibility.

**Drug identification: *United States v. Gutierrez*,** 2020 U.S. App. LEXIS 12679 (11th Cir.): The defendant was convicted of conspiracy to distribute methamphetamine and argued, on appeal, that the government failed to prove the reliability of the methodology used by the government's two forensic experts, who testified as to the nature, weight, and purity of the substances found. The court found no abuse of discretion, even though the experts provided no rate of error and could not identify any studies that supported their methods. The court relied heavily on the general acceptance factor. Its analysis was as follows:

The district court did not abuse its discretion in admitting the testimony of the government's experts. Gutierrez does not question the experts' experience or background, but he argues that their testimony was unreliable because they did not know the rate of error regarding the techniques they used and were unable to identify any experts or studies that supported or discredited the methods they used. But as we have explained, expert testimony does not necessarily need to meet all or most of the *Daubert* factors to be admissible.

And here, * * * the "general acceptance" *Daubert* factor was met. Shire testified that the various techniques he and Conde used in the DEA labs to identify substances—including gas chromatography, mass spectrometry, and infrared spectroscopy—were "commonly used in the industry for identifying compounds." The district court was permitted to credit this testimony that the experts' testing methods were generally accepted and to conclude that the methods were, therefore, sufficiently reliable to be considered by the jury. The reliability of the expert testimony was further supported by Shire's testimony that DEA chemists employed "multiple testing using a variety of techniques," as well as testing multiple samples of the substance, which provided multiple results that could be compared with "authenticated reference materials from an outside source" and which permitted identification with confidence. Given the flexible nature of the gatekeeping inquiry, Gutierrez has not shown that the court abused its discretion in admitting the expert testimony as to the nature, purity, and weight of the substances.

**EDTA testing offered by the defendant, rejected: *Cooper v. Brown*,** 510 F.3d 870 (9th Cir. 2007): In a habeas challenge to a conviction for multiple murders, the defendant argued that

a forensic test for the preservative agent ethylene-diamine tetra-acetic acid (EDTA) on a bloody T-shirt would show that blood had been taken from a vial and planted on the shirt. The court found no abuse of discretion in the trial judge's conclusion that the EDTA testing lacked sufficient indicia of reliability to be admissible, because it had not been subjected to peer review, "there has been no discussion of forensic EDTA testing in scientific literature since a 1997 article that headlines the need for a better analytical method," and it is not possible to determine the error rate of EDTA testing because of the widespread presence of EDTA in the environment.

**Fabric-impression analysis found unreliable in part by trial court: *United States v. Williams,*** 576 F.3d 385 (7th Cir. 2009): The defendants challenged the trial court's admission of an expert's conclusion that an impression on a glass door at the robbery scene was left by a non-woven fabric and could have been made by a glove. The expert also sought to testify that the impression was consistent with the pair of gloves containing Williams's DNA, but the district court excluded that testimony because it considered the underlying science, fabric impression analysis, unreliable under *Daubert*. The defendants argued that the admitted testimony relied on the same science as the excluded testimony--fabric impression analysis--and therefore also should have been excluded. The court of appeals did not rule on the argument, finding any error to be harmless.

**Fingerprint identification: Overstatement --- zero rate of error --- *United States v. Straker,*** 800 F.3d 570 (D.C.Cir. 2015): The court rejected the defendant's argument that fingerprint identification, using the ACE-V method, was unreliable. The expert testified that there are two different types of error—the error rate in the methodology and human error. She further testified that there is a "zero rate of error in the methodology." She did not articulate the rate of human error, though she acknowledged the potential for such error. The defendant argued that the failure to articulate the rate of human error in the ACE–V methodology rendered her testimony based on that methodology inadmissible. But the court disagreed, arguing that "the factors listed in *Daubert* do not constitute a definitive checklist or test" and that "[n]o specific inquiry is demanded of the trial court." The court stated that the reliability of the ACE-V methodology was "properly taken for granted" because courts routinely find fingerprint identification based on the ACE–V method to be sufficiently reliable under *Daubert.*

**Fingerprint Identification: Overstatement – infinitesimal error rate --- *United States v. Casanova***, 886 F.3d 55 (1st Cir. 2018): The court held that it was not plain error to allow a latent print examiner to testify to an identification. The expert, Truta, a senior criminalist in the Latent Print Unit of the Boston Police Department, testified about the history of fingerprint examinations in criminal investigations, the "ACE-V" method (analysis, comparison, evaluation, and verification) used to compare fingerprints and perform identifications, and the results of analyses he performed on prints collected from the scene of the shooting. Truta identified one particular palm impression, located on a straw wrapper found in the back seat of the car in which the victim was shot, as belonging to Casanova. Witnesses had testified that Casanova was in that back seat. On cross-examination, Truta testified, "[a]s far as I know, in the United States the[re] are not more than maybe 50 erroneous identification[s], which comparing with identification[s] that are made daily, thousands of identification[s], the error rate will be very small." Truta had previously

testified that it would be inappropriate to claim that the rate of false-positive identifications is zero. Truta emphasized that his testimony was based on what he had read in the literature, and acknowledged that at the time of his testimony, there was "no known database of latent prints" that would permit a statistical analysis of false-positive rates for fingerprint identifications.

The defendant argued that Truta "claimed falsely that the error rate in fingerprint comparisons was effectively zero." But the court stated that "Truta never testified that the error rate for fingerprint examinations was 'effectively zero.' * * * Rather, Truta testified that in light of the number of recorded errors he knew of from his own review of the literature, and the number of fingerprint identifications made daily, he expected the error rate to be 'very small.' He did not calculate or assert any particular error rate and he specifically cautioned that whatever the rate may be, it would not be zero. On redirect he acknowledged that there was no statistical method generally accepted in the field for determining actual statistical probabilities of erroneous identifications. This is the classic stuff of cross-examination and redirect."

The defendant relied on the PCAST report, and the court had this to say about that:

> Casanova grounds his entire challenge on a single post-trial report that provided recommendations to the executive branch regarding the use of fingerprint analysis as forensic evidence in the courtroom. See President's Council of Advisors on Sci. and Tech., Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods (2016). The report, issued after Casanova's trial had already ended, is not properly before this court, and in any event it does not endorse a particular false-positive rate or range of such rates.
>
> > **Comment:** Saying "I have read some stuff and it is, uh, about 50 mistakes in all the fingerprints ever done" is not much different from saying that the error rate is effectively zero. The court makes a big deal about the distinction but what else is a jury to take from the testimony? It's a clear case of overstatement. Note that the testimony was from a state expert, not from the FBI, and so the DOJ standards are not directly applicable.

**Fingerprint identification: Overstatement --- testimony of a match --- *United States v. Pena,*** 586 F.3d 105 (1st Cir. 2009): The trial judge expressed doubts about the reliability of an expert's fingerprint identification, because the governing protocol used no specific minimum number of points for an identification. The defendant argued that the ACE-V method was unreliable because it involved merely a visual comparison of the two prints, the trooper conducting the initial analysis knew that the inked print was taken from a suspect, and the trooper made no diagrams, charts, or notes as part of his evaluation. But the judge relied on precedent, describing the case law as "overwhelmingly in favor of admitting fingerprint experts under virtually any circumstance." The trial judge essentially imposed the burden on the defendant to present data to overcome the uniform precedent, and held that the defendant did not satisfy that burden by producing a (Fordham) law review article questioning latent fingerprint identification as being

impermissibly subjective. The court of appeals found no abuse of discretion, given the precedent allowing the use of fingerprint identification.

**Fingerprint identification: Testimony of a match --- limitation of cross-examination:** ***United States v. Muhanad Mahmoud Al-Farekh,*** 956 F.3d 99 (2nd Cir. 2020): A fingerprint expert concluded that 18 latent prints recovered from the adhesive packing tape in an undetonated bomb "matched" the defendant's fingerprints. The defendant sought to cross-examine the expert by raising the famous error in fingerprint identification that occurred in the investigation of the bombing of a train in Madrid (in which a fingerprint expert incorrectly identified a latent print as a "match" for Brandon Mayfield, a lawyer in Portland). The trial judge precluded the cross-examination under Rule 403, concluding that the Mayfield misidentification was not very probative to this expert's conclusion, and would create a risk of jury confusion. The court found no error. It found that "the misidentification of Mayfield is only marginally relevant" because "the fingerprint examiners in the Mayfield incident were not involved in the instant case." It concluded that "a defendant may attack the subjectivity of fingerprint examinations as a category of evidence, but is not entitled without more to rely on a fingerprint examiner's mistakes in a wholly unrelated case to undermine the testimony of a different examiner." ***Accord, United States v. Bonds,*** 922 F.3d 343 (7th Cir. 2019) (upholding trial court's exclusion of the Mayfield incident when offered to impeach a different examiner); ***United States v. Rivas,*** 831 F.3d 931 (7th Cir. 2016) (same).

**Fingerprint identification: Overstatement --- testimony of a match ---*United States v. John,*** 597 F.3d 263 (5th Cir. 2010): The court found no abuse of discretion in allowing a fingerprint expert to testify to a "match." It recognized that the methodology is subjective, because "there is no universally accepted number of matching points that is required for proper identification." But it relied on precedent holding that the method was "testable, generally accepted, and sufficiently reliable and that its known error rate is essentially zero." The defendant pointed out that the expert's opinion had not been subjected to blind verification, but the court responded that no case law holds that blind verification is required.

> **Note: The DOJ says this entry is misrepresentative because, while the court used the term "match" the witness never did. Rather the witness "identified" the print as coming from the defendant, in accordance with DOJ standards. But this only shows that courts (like pretty much everyone else) do not get the DOJ's fine distinction between a match and an identification. And if courts don't understand it, how are juries supposed to?**

**Fingerprint testimony: Overstatement --- testimony that the methodology was error-free: *United States v. Watkins***, 450 Fed. Appx. 511 (6th Cir. 2011): The defendant relied on the 2009 NAS report to argue that latent fingerprint identification (the ACE-V method) is unreliable and should have been excluded. The examiner had testified that the method was 100% accurate. But the court found no error. It stated that the error rate "is only one of several factors that a court should take into account when determining the scientific validity of a methodology. These factors include testing, peer review, publication, error rates, the existence and maintenance of standards

controlling the technique's operation, and general acceptance in the relevant scientific community." At the *Daubert* hearing in this case, the fingerprint examiner testified about custody-control standards, generally accepted standards for latent fingerprint identification, peer review journals on fingerprint identification, and the system of proficiency testing within her lab. The court "decline[d] to hold that her allegedly mistaken error-rate testimony negates the scientific validity of the ACE-V method given all the other factors that the district court was required to consider."

> **Comment:** The court seems to say that because the methodology is sufficiently reliable, it is a question of weight when the expert says it is error-free. This makes no sense. Surely a methodology can be reliable by a preponderance of the evidence and yet have a rate of error. Why can't the court allow the testimony about the procedure, but preclude the expert from testifying that it is error-free? It would seem that highlighting the problem of overstatement --- as an admissibility requirement --- might get courts to focus more on it and not leave it to the jury to sort out.

**Fingerprint identification: Limitations on cross-examination: *United States v. Bonds,*** 922 F.3d 343 (7th Cir. 2019): The defendant argued that his right to confront an FBI fingerprint expert was impaired when the trial judge prohibited him from cross-examining the expert about an error that the FBI lab had made in the Brandon Mayfield (Madrid bombing) case. The court found no error in prohibiting this cross-examination. The court stated that the defendant had "ample opportunity to supply the jury with evidence about the reliability of the ACE-V method" --- specifically the analysis provided in the NAS and the PCAST reports. The court specifically noted that the summary on fingerprint identification provided in the PCAST report "provides the defense bar with paths to cross-examine witnesses who used the ACE-V approach. Have they avoided confirmation bias? Have they avoided contextual bias? Has their proficiency been confirmed by testing?" The court noted that Bonds was not arguing that he was precluded from using the NAS and PCAST reports on cross. His only complaint was that he was not allowed to raise the Mayfield error.

**Fingerprint identification: *United States v. Herrera***, 704 F.3d 480 (7th Cir. 2013): upholding the use of latent fingerprint matching, the court noted that the expert received "extensive training" and that "errors in fingerprint matching by expert examiners appear to be very rare." It conceded that latent fingerprint matching is "judgmental rather than scientifically rigorous because it depends on how readable the latent fingerprint is and also on how distorted a version of the person's patent fingerprint it is." But it compared fingerprint-matching favorably to another form of subjective matching --- eyewitness identification. It stated that "[o]f the first 194 prisoners in the United States exonerated by DNA evidence, none had been convicted on the basis of erroneous fingerprint matches, whereas 75 percent had been convicted on the basis of mistaken eyewitness identification."

> **Comment:** The comparison of fingerprint-matching and eyewitness identification is a false one, as Judge Edwards has pointed out. They are not comparable because a fingerprint-matcher touts his experience and training, and testifies to a match.

**Fingerprint identification: *United States v. Calderon-Segura,*** 512 F.3d 1104 (9th Cir. 2008): This is an unusual case in which the defendant challenged fingerprint identification testimony which found a match when comparing two inked thumb-print exemplars. The court noted that the defendant's challenge related to questions about *latent* fingerprints, whereas the reliability and admissibility of comparison of two inked fingerprints is "well-established." The court emphasized that the defendant made no showing that the exemplars "lacked clarity, were fragmented, or contained any other defects or artifactual interference that might call into question the accuracy or reliability of their identification."

**Fingerprint identification --- Bench trial: *United States v. Flores***, 901 F.3d 1150 (9th Cir. 2018): The court affirmed the defendant's conviction for attempting to reenter the United States after being deported. It held that the trial judge did not abuse discretion in admitting the testimony of a government fingerprint expert. The defendant presented evidence that the expert failed to consult with other professionals, had taken no certification test in forty years, had no verification of his work done in this case, and had no regular continuing education in the field. But the court found this not troubling at all. It first noted that this was a bench trial, and that the trial court's gatekeeping function is less stringent when it also acts as the trier of fact. It further noted that the witness had over 25 years' experience in fingerprint comparison, had worked as a FBI fingerprint technician, and had been qualified as an expert in federal and state court more than thirty times. It finally declared that "fingerprinting is far from junk science—it can be tested and peer reviewed and is generally accepted by the relevant scientific community." In making that assessment it relied on precedent, specifically *United States v. Calderon-Segura*, 512 F.3d 1104, 1109 (9th Cir. 2008) ("[F]ingerprint identification methods have been tested in the adversarial system for roughly a hundred years.").

**Fingerprint identification --- Abdicating the gatekeeper function: *United States v. Ruvalcaba-Garcia***, 923 F.3d 1183 (9th Cir. 2019): In an illegal reentry case, a government expert was called to testify that the fingerprint he took from the defendant matched the fingerprint on an order of removal. The expert's methodology was ACE, but not –V: meaning that he did not have his conclusion of a match validated in any way. The expert was not a member of the International Association for Identification ("IAI") or the Scientific Working Group on Friction Ridge Analysis, Study, and Technology ("SWGFAST"). The trial judge essentially ruled that the expert's qualifications and methodology were questions for the jury. The court found error, because qualifications and reliability of methodology are clearly admissibility questions for the court under Rule 702 and *Daubert.* The court concluded as follows:

> Here, the district court abused its discretion by failing to make any findings regarding the reliability of Beers's expert testimony and instead delegating that issue to the jury. Indeed, the district court made this error three times during Ruvalcaba's * * * trial. After the government conducted an initial voir dire of Beers and "move[d] to have [him] qualified as an expert fingerprint technician," the court responded, "That's a determination for the jury." After Ruvalcaba cross-examined Beers and the government again "move[d] to qualify him as an expert," the court responded, "Again, that's an issue for the jury." And when Ruvalcaba "object[ed] to the qualifying [of Beers] as an expert," the court overruled

the objection and told the jury that it was up to them "to decide whether the witness by virtue of his experience and training is qualified to give opinions." * * * The district court's failure to make an explicit reliability finding before admitting Beers's expert testimony in this case constituted an abuse of discretion.

**Fingerprint identification --- Overstatement, testimony of a match: *United States v. Baines,*** 573 F.3d 979 (10th Cir. 2009): The court found that the trial court did not abuse discretion in admitting expert testimony that a latent fingerprint *matched* the fingerprint of the defendant that was taken when he was arrested. The defendant argued that fingerprint analysis is unreliable under *Daubert*, because comparison of a latent print to a known print is essentially a subjective evaluation, with no rate of error established, and the only verification is done by a second investigator who is usually closely associated with the first investigator. The court recognized that there are "multiple questions regarding whether fingerprint analysis can be considered truly scientific in an intellectual, abstract sense" but declared that "nothing in the controlling legal authority we are bound to apply demands such an extremely high degree of intellectual purity." The court stated that "fingerprint analysis is best described as an area of technical rather than scientific knowledge." Turning to the *Daubert/Kumho* factors, the court recognized that fingerprint analysis was subjective, and that there was really no peer review of the process. As to rate of error, the court concluded that whatever the flaws in the studies conducted on false positives, "the known error rate remains impressively low." As to the factor of general acceptance, the defendant argued that fingerprint analysis had not been accepted in any unbiased scientific or technical community, and that its acceptance by law enforcement and fingerprint analysts should be considered irrelevant. But the court disagreed, noting that the Court in *Kumho* "referred with apparent approval to a lower court's inquiry into general acceptance into the relevant expert community" and also referred to testing "by other experts in the industry." The court concluded that while acceptance by a community of unbiased experts "would carry greater weight, we believe that acceptance by other experts in the field should also be considered. And when we consider that factor with respect to fingerprint analysis, what we observe is overwhelming acceptance."

**Fingerprint identification: *United States v. Watkins,*** 880 F.3d 1221 (11th Cir. 2018): In an illegal reentry prosecution, the government called an expert to testify to a fingerprint identification. The court of appeals found that the trial court "likely erred" in admitting the testimony but found any error to be harmless. The court did not discuss the particulars. It simply concluded that the fingerprint analyst's testimony was "probably not reliable" because the analyst "did not specifically testify about her scientific methods and her testimony may not have been based on sufficient facts or data."

**Fingerprint identification: Overstatement, testimony of a match: *United States v. Scott,*** 403 Fed. Appx. 392 (11th Cir. 2010): The defendant challenged the expert's use of the ACE-V method. The court simply relied on precedent to reject the challenge. In *United States v. Abreu*, 406 F.3d 1304, 1307 (11th Cir. 2005), the court had concluded that the error rate of latent fingerprint examination was infinitesimal, and that latent fingerprint examiners follow a uniform methodology. The *Abreu* court also gave significant weight to the fact that latent fingerprint

methodology was generally accepted --- by the field of latent fingerprint examiners (which is not a large surprise). The *Scott* court concluded as follows:

> Although there is no scientifically determined error rate, the examiner's conclusions must be verified by a second examiner, which reduces, even if it does not eliminate, the potential for incorrect matches. The ACE-V method has been in use for over 20 years, and is generally accepted within the community of fingerprint experts. Based on this information, the district court did not commit an abuse of discretion by concluding that fingerprint examination is a reliable technique.
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> **Reporter's Note: The term "match" is used by the court. It is unknown what the witness testified to. But the fact that a court thinks it is a "match" is cause for concern.**

**Footwear-impression testimony allowed --- Overstatement, zero error rate: *United States v. Mahone,*** 453 F.3d 68 (1st Cir. 2006): The court found no abuse of discretion when a government witness was permitted to testify as an expert on footwear-impression identification, even though she was not qualified through the International Association for Identification --- and despite the fact that the expert testified that the methodology had a zero error rate. The expert relied on the ACE-V method (analysis, comparison, evaluation, and verification) for assessing footwear impressions. The defendant argued that the ACE-V method "utterly lacks objective identification standards" because: 1) there is no set number of clues which dictate a match between an impression and a particular shoe; 2) there is no objective standard for determining whether a discrepancy between an impression and a shoe is major or minor; and 3) the government provided "absolutely no scientific testing of the premises underlying ACE-V." The court essentially relied on precedent to find no abuse of discretion:

> From the outset, it is difficult to discern any abuse of discretion in the district court's decision, because other federal courts have favorably analyzed the ACE-V method under *Daubert* for footwear and fingerprint impressions. See *United States v. Allen*, 207 F.Supp.2d 856 (N.D.Ind.2002) (footwear impressions), aff'd, 390 F.3d 944 (7th Cir.2004); *United States v. Mitchell*, 365 F.3d 215, 246 (3d Cir.2004) (favorably analyzing ACE-V method under *Daubert* in latent fingerprint identification case); *Commonwealth v. Patterson,* 445 Mass. 626, 840 N.E.2d 12, 32-33 (2005) (holding ACE-V method reliable under *Daubert* for single latent fingerprint impressions).

**Footwear-impression analysis --- Overstatement--- testimony of a match--- *United States v. Turner***, 287 Fed. Appx. 426 (6th Cir. 2008): the defendant appealed the district court's denial of his motion to exclude the boot-print analysis of the government's expert. The court found no error. The court noted that both the government and defense expert testified that photographic analysis was recognized as a valid method of shoe-print analysis within the scientific community. The government expert testified that the government lab methods were tested by an independent agency once during the year, and that he had never failed a proficiency test. Also, the government presented evidence indicating that a book entitled *Footwear Impression Evidence* by William J.

Bodziak stated that "[p]ositive identifications may be made with as few as one random identifying characteristic." The court rejected arguments that an electrostatic method should have been used, and that the four points of comparison used by the government expert were insufficient to conclude that the boot and the print on the glass matched. It stated that "the government and defense experts disagreed as to whether the photographic or the electrostatic method would be better to use on the boot print at issue--not whether the photographic method was a valid method, tested and accepted by the larger scientific community. In addition, the record reveals that the experts also disagreed about the number of points of comparison necessary for a positive match between the boot and the print. These disputes go to the weight of the evidence rather than its admissibility."

> **Comment:** Shouldn't a question of the necessary number of points of comparison be decided by the judge? That is the critical aspect of the methodology itself; if not that, it is at least a critical question about the application of the methodology. The court, in throwing up its hands and leaving questions about the methodology to the jury, appears to be using the Rule 104(b) standard, in violation of Rule 702.

**Footwear-impression testimony: *United States v. Smith***, 697 F.3d 625 (7th Cir. 2012): The defendant argued that the trial court erred in admitting footwear-impression testimony by an FBI examiner. The expert testified that the left Nike shoe worn by the defendant at the time of the robbery made the partial impression on the piece of paper recovered from the tellers' counter at the bank and that the impressions left on the bank carpet were "consistent with" the shoes worn by defendant Smith at the time of his arrest. The court found no error. It relied on prior precedent predating the scientific reports that challenge the reliability of footprint identification methodology. See *United States v. Allen*, 390 F.3d 944, 949–50 (7th Cir. 2004). The court stated that "In *Allen*, we affirmed the admission of footprint analysis testimony where the expert testified that 'accurate comparisons require a trained eye; the techniques for shoe-print identification are generally accepted in the forensic community; and the methodologies are subject to peer review.'" In this case the FBI Examiner testified that the four-step approach he used is employed by forensic laboratories throughout the United States, in Canada, and in thirty other countries. He also explained that there have been peer reviews of the methodology published in several books and articles. And he explained in detail how he applied this methodology to the footprint impressions recovered at the bank. This was enough to establish that the testimony met the criteria of Rule 702.

> **Comment: Assuming the footprint methodology is reliable, the fact that subjective judgment is required means that there is a rate of error. Therefore, while it seems correct to allow the expert to testify that a footprint is "consistent with" the defendant's shoe, it is surely an overstatement to say that the defendant's shoe is the one that made a partial impression on a piece of paper.**

**Gun residue testing upheld: *United States v. Stafford*,** 721 F.3d 380 (6th Cir. 2013): In a felon-firearm prosecution, the defendant challenged gunshot-residue evidence. He argued that the testing is imprecise and that there is no consensus in the discipline as to how many particles must be identified in order to find a positive for residue. But the court found that the expert's test had revealed five particles, and that this was more than the minimum required by the most stringent

standard used by experts in the field. The defendant also argued that he could have been exposed to gunshot residue without ever having fired a gun. The court conceded that this was so, but concluded that this affected the probative value of the test result, not the reliability of the conclusion that five particles of gunshot residue were found on the defendant's hands.

**Hair identification – overstatement – violation of constitutional rights by government presentation of overstated, "false" expert testimony: *United States v. Ausby,*** 916 F.3d 1089 (D.C.Cir. 2019): At the defendant's trial on rape and murder in 1972, the government's forensic expert testified that hairs found at the crime scene were "microscopically identical" to the defendant's hair, and that hair is "unique to a particular individual." The defendant was convicted and sentenced to life in prison. In 2012, the FBI concluded that the expert in Ausby's case "misled the jury by implying that he could positively identify the hairs taken from the crime scene as belonging to Ausby." The government conceded error, but in this proceeding argued that the error was not material to the conviction. The court, in light of the government's concession, found that the government had violated *Napue v. Illinois,* 360 U.S. 264 (1959) by presenting false testimony. The court concluded that the false testimony was material, and held that Ausby should be granted relief under §2255, and that the trial court erred in refusing to vacate Ausby's conviction. ***See also United States v. Butler,*** 955 F.3d 1052 (D.C. Cir. 2020) (conviction vacated where hair identification expert testified that the defendant's hair sample was "the same" as the hair found at the crime scene; the government itself conceded that hair comparison testimony "exceeded the limits of science").

**Handwriting: *United States v. Mallory***, 902 F.3d 584 (6th Cir. 2018): Defendants were convicted on charges arising from a scheme to steal Fewlas's sizeable estate by forging a signature on his will. On appeal, the defendants objected to the trial court's admission of testimony by government handwriting expert Olson, who testified that the signature on the forged will was "probably" not Fewlas's, but instead a "simulation" performed by someone else. The court held that the district court did not abuse its discretion in admitting Olson's handwriting analysis. Citing *Daubert*, *Kumho Tire*, and Sixth Circuit precedent, the court found that the district court faithfully applied these legal standards in deeming Olson's handwriting analysis to be reliable, and affirmed the general reliability of expert handwriting analysis.

The court relied most heavily on *United States v. Jones,* the handwriting case that was cited in the Committee Note to the 2000 amendment to Rule 702 --- the citation that some people have argued opened the gate to admission of unreliable forensic evidence. The court's analysis of *Jones, Daubert,* and *Kumho* is as follows:

> The reliability of expert handwriting analysis has come before our court before. In *United States v. Jones*, our court upheld the admissibility of such testimony. 107 F.3d 1147, 1161 (6th Cir. 1997). In so holding, *Jones* explained that handwriting analysis is not a science *per se.* Handwriting analysts "do not concentrate on proposing and refining theoretical explanations about the world," as scientists do. Instead, handwriting analysts "use their knowledge and experience to answer the extremely practical question of whether a signature is genuine or forged." Handwriting analysts see things in handwriting that

> laypeople do not—both because of analysts' training in the minutiae of loops, swoops, and dotted 'i's, and because of the volume of handwriting they inspect—and therefore assist the trier of fact by bringing their training and experience to bear. Thus, while handwriting analysis may not boast the "empirical' support underpinning scientific disciplines, it is nevertheless "technical" or "specialized" knowledge that, subject to thorough gatekeeping, is a proper area of expertise.
>
> Our court decided *Jones* without the benefit of *Kumho Tire*. In *Kumho Tire*, the Supreme Court clarified that the *Daubert* factors may also be useful in scrutinizing non-scientific expertise. * ** [T]he *Kumho* Court referenced handwriting analysis as an area where strict *Daubert*-type analysis might be less appropriate, indicating that "the relevant reliability concerns may focus upon personal knowledge or experience." Since *Jones* predated *Kumho Tire*, it did not apply the *Daubert* factors in evaluating the handwriting analysis at issue. Still, *Jones*'s focus on handwriting analysts' experience-based expertise is consistent with *Kumho Tire*, even though *Daubert*-type inquiries may also be appropriate in evaluating such testimony.

The court then proceeded to consider the trial court's review of the handwriting expert's opinion in this case.

> Here, the district court faithfully applied *Daubert, Jones*, and *Kumho Tire* in deeming Olson's handwriting analysis admissible. The court conducted thorough *voir dire* to ascertain Olson's experience and methodology. Olson testified to his thirty-one years' experience as an ink chemist and forensic document examiner at the IRS National Forensic Laboratory, during which he has performed countless handwriting analyses and testified in court on multiple occasions. He explained that his laboratory is accredited by an international organization that polices general standards practiced throughout the discipline. In addition, Olson walked through the principles and basic approach he used in performing his analysis. To perform the analysis, Olson studied approximately ninety-one known examples of Fewlas's signature. From those samples, he discerned various unique characteristics, many of which he then found lacking in the signature on the forged will. As Olson explained, this approach embodies two precepts—no two people write exactly alike, and no one person writes exactly the same every time—which he represented as having been tested in various studies and experiments. *See United States v. Prime*, 431 F.3d 1147, 1153 (9th Cir. 2005) (affirming admission of handwriting expert citing one of the same studies). Those studies and experiments, according to Olson, further establish that his mode of analysis is highly accurate. Moreover, Olson testified that his laboratory requires document examiners to review each other's work, and that in this case, another document examiner not only reviewed his work but independently verified his opinion. *See Prime*, 431 F.3d at 1153 (highlighting similar review and verification); *accord United States v. Crisp*, 324 F.3d 261, 271 (4th Cir. 2003). Based on this testimony, the district court did not abuse its discretion in deeming Olson's testimony reliable.

The defendants argued that the trial court erred in referring to handwriting as a "science." But the court had this to say about that:

> Handwriting analysis, of course, is not a science—*Jones* makes that much clear. The district court's loose language in describing handwriting analysis as a science, however, was more of an afterthought to otherwise thorough gatekeeping. The court's *voir dire* demonstrates that, rather than viewing handwriting analysis as a science, it sought to ascertain whether Olson's experience-based expertise was reliable. * * *

**Reporter's comment:** The court's analysis indicates that the reference to *Jones* in the Committee Note is not the gateway to disaster. That is because *Kumho* itself paves the way for admission of handwriting testimony as a technical rather than scientific skill. The Committee Note essentially tracks *Kumho* to that effect. One can argue that the real problem of handwriting evidence is the distinct possibility of *overstatement* --- for example, testifying that it is scientific, or has a zero rate of error. In this case, no such testimony was given. The expert only testified that a forgery was "probable."

**Handwriting Identification --- error to admit in the absence of verification: *Crew Tile Distribution, Inc. v. Porcelanosa L.A., Inc.***, 2019 U.S. App. LEXIS 4988 (10th Cir.): In an appeal of a judgment in a contract dispute, the appellant argued that the trial court erred in admitting the testimony of a handwriting expert, Carlson, because she did not complete the verification step of the ACE-V methodology before submitting her expert report. The court agreed and found error. It explained as follows:

> [T]he district court assessed the reliability of Carlson's testimony without the aid of a *Daubert* hearing. Moreover, [the appellee] did not offer any evidence to support its contention that Carlson's ACE methodology satisfied Rule 702. As a result, the district court based its finding on one Fourth Circuit case and two district court cases in which expert testimony was admitted despite a failure to complete the verification step of the ACE-V methodology. But none of these cases explain why the ACE methodology is reliable, and certainly none discuss the lack of verification with respect to Carlson's analysis in this case.
>
> It may be that verification adds so little to the reliability of an expert's opinion that there is no real difference between the ACE and ACE-V methodologies. But it might also be true that verification adds just enough to the reliability of the ACE-V methodology to push handwriting analysis over the line from worthless pseudoscience to valuable expert testimony. [The appellee's] attempt to resolve this uncertainty was lacking. Accordingly, the district court did not have sufficient evidence to perform its gatekeeping function and its decision to admit Carlson's testimony was error.

**Handwriting Identification (and fingerprinting): *United States v. Dale,*** 618 Fed. Appx. 494 (11th Cir. 2015): The court found no error in admitting latent fingerprinting and handwriting identification. It relied solely on precedent. It did not consider any of the recent challenges to these methodologies:

> We have held that fingerprint analysis utilizes scientifically reliable methodology, and Dale cites to no binding authority holding that the methodology applied in this case was scientifically unreliable. See *United States v. Abreu*, 406 F.3d 1304, 1307 (11th Cir. 2005) (per curiam) (fingerprint evidence is reliable scientific evidence, satisfying the Daubert criteria for admissibility).
>
> Dale's assertion that handwriting analysis is not reliable scientific evidence is without merit and has been squarely foreclosed by this court's precedent. See *United States v. Paul,* 175 F.3d 906, 909–10 & n.2 (11th Cir. 1999) (finding that the argument that handwriting analysis does not qualify as reliable scientific evidence is meritless).

**Post-Mortem Root Banding of Hair: *Restivo v. Hesseman,*** 846 F.3d 547 (2nd Cir. 2017): In an unusual case, Restivo was convicted of murder, exonerated by DNA, and sued police officers for malicious prosecution. The victim's hair was found in Restivo's van and Restivo contended that an officer took hair from the victim at an autopsy and then planted it in the van. Experts testified that the hair in the van exhibited post-mortem root banding (PMBR) which will not be found unless the hair was on a dead body for a number of hours. The parties conceded that if the victim was ever in the van, she was still alive. Thus, Restivo sought through expert testimony to prove the existence of PMBR on the hairs found in the van in support of his theory that they were planted after the autopsy. The trial court found that certain aspects of PMRB had not been established to "a reasonable degree of scientific certainty" [which is a standard that scientists don't use and that the National Commission on Forensic Science has rejected]. But the trial court nonetheless admitted the testimony as non-scientific testimony that was reliable under *Kumho Tire.* The trial court found that the experts were using the same degree of intellectual rigor in reaching their opinion as they would in their real life as experts. The trial court also found that the rate of error was low, and that the experts' opinions were consistent with the academic literature. The court of appeals found no abuse of discretion.

**Toolmark examination --- no error to exclude: *United States v. Smallwood,*** 456 Fed. Appx. 563 (6th Cir. 2012): On interlocutory appeal, the government challenged the trial court's order excluding the proposed testimony of its toolmark examiner. The trial court reasoned that she did not have the skill and experience with knife marks to reliably make the required subjective determination. The government argued that although the Association of Firearms and Toolmark Examiners ("AFTE") theory lacks an objective standard, competent firearms toolmark examiners still operate under standards controlling their profession, and the fact that the expert had less experience with knife toolmarks than with firearms toolmarks was not a valid reason to preclude her testimony. But the court found no error in excluding the expert --- relying in part on the NAS report.

The court noted that the AFTE guidelines provide that a qualified examiner may determine that there is a match between a tool and a tool mark when there is "sufficient agreement" in the pattern of two sets of marks --- meaning that "it exceeds the best agreement demonstrated between toolmarks known to have been produced by different tools and is consistent with agreement

demonstrated by toolmarks known to have been produced by the same tool." The court noted that because toolmark determinations "involve subjective qualitative judgments" the accuracy of an examiner's assessment "is highly dependent on skill and training." The court concluded that the expert's opinion that there was sufficient agreement between her test marks and the puncture marks found in the tires of a vehicle was "unreliable under the AFTE's own standard because she has virtually no basis for concluding that the alleged match exceeds the best agreement demonstrated between tool marks known to have been produced by different tools."

**Toolmarks:** ***United States v. Wells***, 879 F.3d 900 (9th Cir. 2018): The court affirmed convictions for murder and use of a firearm in relation to a crime of violence resulting in death, finding no abuse of discretion in allowing a government forensic tire expert to testify that a nail in a tire found in the defendant's truck had been manually inserted into the tire, undermining the foundation of the defendant's alibi that he had run over a nail while driving to work on the morning of the murders. The defendant argued that the tire expert's testing caused destruction of the evidence, but the court found that the testing neither destroyed nor substantially altered the tire or the nail. The court stated as follows:

> In an effort to identify an alleged perpetrator for formal accusation, the Government took reasonable actions in evaluating [the defendant's] stated alibi, followed industry standards, and documented all steps in [the government's tire expert's] report. [The defendant's tire expert] then had full access to all photographs, testing, methodology, and reports from the Government's nail and tire experts, in addition to the nail and tire themselves.
>
> [The defendant's tire expert] could have, and indeed *did*, launch extensive challenges to [the government's tire expert's] tests and conclusions. As *Daubert* confirmed, "[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." Furthermore, as found in the district court, [the defendant] can only speculate as to whether his own expert would have reached any different conclusions as to the condition, location, or angle of the nail while still in the tire.

## *B. Federal District Court Cases on Forensics*

**Ballistics and bullet trajectory: Unqualified expert with insufficient foundation: *Krause v. County of Mohave,*** 2020 WL 2316091 (D.Ariz.): Krause was shot and killed after he refused to drop his gun during an interaction with a police officer. The defendants challenged the admissibility of the plaintiff's expert Lauck, a law enforcement officer, who concluded that Krause was perpendicular to the [officer] when shot and […] thus, even if Krause's firearms was raised to the ninety-degree position, it was probably not pointing directly at the [officer]." The court found Lauck to lack expertise in the area of ballistics and bullet trajectories, and that his opinion lacked sufficient foundation:

> Lauck's opinions are entirely based on his general firearms and law enforcement experience. The Court does not discount that experience. However, that experience simply does not bear on his expertise to assess ballistic evidence or judge bullet trajectories. Lauck's decades of experience as a law enforcement officer, competitive shooter, and gunsmith cannot replace qualifications in ballistic forensics and do not qualify him to opine on the highly technical area of bullet path reconstruction or ballistics. Lauck made no measurements or calculations to support his conclusions. His investigation is entirely devoid of scientific analysis for which he is unqualified to conduct. Other courts have excluded expert testimony in similar circumstances. See *Rojas Mamani v. Sanchez Berzain*, 2018 WL 2980371, at *2 (S.D. Fla.); *Lee v. City of Richmond*, 2014 WL 5092715, at *6 (E.D. Va.). Finding Lauck's general firearms expertise inadequate to support his opinions regarding bullet trajectories (and conclusions derived thereof), the Court will exclude Lauck's testimony on the topic.

**Ballistics: Overstatement --- reasonable degree of ballistics certainty: *United States v. Cerna***, 2010 WL 3448528 (N.D. Cal.): The court allowed ballistics testimony that was based on a method approved by the Association of Firearms and Toolmark Examiners (AFTE). The court stated that in February 2007, it had ruled in *United States v. Diaz,* 2007 WL 485967 that the AFTE theory, as applied by the SFPD crime lab, was sufficiently reliable under *Daubert.* It concluded that "[n]o new developments since the *Diaz* ruling cast sufficient doubt on the reliability of the AFTE theory such that expert testimony must be kept from the jury simply because it is based on the AFTE theory." The court conceded that the 2009 NAS report highlighted the weaknesses and subjectivity of ballistics feature-comparison. But it concluded that these weaknesses "do not require the automatic exclusion of any expert testimony based on the AFTE theory. The weaknesses highlighted by the NAS report—subjectivity in a firearm examiner's identification of a 'match' and the absence of a precise protocol—are concerns that speak more to an individual expert's specific procedures or application of the AFTE theory, rather than the universal reliability of the theory itself." Thus, the NAS report did not "undermine the proposition that the AFTE theory is sufficiently reliable to at least be presented to a jury, subject to cross-examination."

The court reviewed Judge Rakoff's opinion in *Glynn,* which focused on the problem of overstatement and limited the expert's conclusion to "more likely than not." The court argued that the *Glynn* limitation was "not appropriate as it suggests that the expert is no more than 51% sure

that there was a match." The court concluded that the standard previously used in *Diaz*—that a bullet or casing came from a particular firearm to a "reasonable degree of certainty in the ballistics field"—would be used.

> **Reporter's Note: The DOJ memo states that this case is not problematic because "it was the court (not the witness) that ordered the witness to use the offending phrase, one that is not permitted under current Departmental policy, unless ordered by a court." But it is hard to see how it is better when it is the court rather than the witness who is responsible for the overstatement. It actually seems that it is worse when it is the court that is responsible.**

**Ballistics: *United States v. Sleugh*,** 2015 WL 3866270 (N.D. Cal. 2015): The court allowed a ballistics expert to testify. The defendant argued that photographs of the two shell casings appeared dissimilar to a layperson's eye. This did not trouble the court, because the defendant "conceded Smith is highly qualified and did not point out any flaws in Smith's methodology that would render his resulting opinion unreliable." The court emphasized that the expert had reached only limited conclusions, and accurately rendered those limitations — he stated that his comparison only pointed to the possibility that a firearm of the class depicted was used during the shooting, and conceded that many others may have been used instead.

> **Comment:** This seems to be a relatively rare case in which a ballistics expert seeks to keep the testimony within the bounds of what the methodology can support.

**Ballistics – NAS Report – Overstatement – testimony of a match: *Jackson v. Vannoy***, 2018 U.S. Dist. LEXIS 46297 (E.D. La.): In a habeas challenge to a conviction for second degree murder, the petitioner raised a claim of actual innocence, offering the NAS Report as "new reliable evidence" not presented at trial to undermine the inculpatory toolmark evidence. The firearms expert examined two nine-millimeter cartridge casings and two nine-millimeter bullets recovered from the crime scene, and concluded that the casings and bullets were each fired from the same weapon. The petitioner argued that the NAS Report called into question the ability of toolmark analysis to individuate shell casings. The court denied the petition for writ of habeas corpus, concluding that the NAS Report was not new evidence and was insufficient to show that it was more likely than not that no reasonable juror would have convicted the petitioner.

**Ballistics: Limitation on Overstatement: *United States v. Willock,*** 696 F. Supp. 2d 536 (D. Md. 2010): The defendant moved to exclude the testimony of a ballistics expert. The court denied the motion, "consistent with every reported federal decision to have addressed the admissibility of toolmark identification evidence." The court noted, however, that "in light of two recent National Research Council studies that call into question toolmark identification's status as 'science,' * * * toolmark examiners must be restricted in the degree of certainty with which they express their opinions." In response to this ruling, the government stated that "it would not seek to have [its expert] state his conclusions with any degree of certainty."

**Ballistics: Admissible testimony of exclusion of a gun: *Ricks v. Pauch*,** 2020 WL 1491750 (E.D. Mich.): Plaintiff brought this 1983 action against three Detroit police officers after having spent 25 years in prison for a wrongful conviction of murder. One of the experts for the plaintiff examined digital photographs of the bullets entered into evidence, and stated that they were mutilated and damaged to the extent that an identification with a suspect firearm would have likely not been possible. He further testified that the evidence bullets had certain characteristics such that they could not have been fired from the type of gun that the defendant had. The defendants moved to suppress the plaintiff's expert testimony on the grounds that the "field of firearms identification overall is subjective and based on the expertise of the examiner and therefore unreliable under *Dauber* and *Kumho Tire*." They further contested the reliability of the methodology because Ricks' firearm had been destroyed following his conviction. However, the court stated that "AFTE theory does not require having a suspect weapon" and the plaintiff's experts "do not opine that the evidence bullets were fired from a specific gun, but only that the evidence bullets have 5R characteristics, and that those bullets could not have been fired from a 6R gun," which was the gun attributed to Ricks in 1992. As a result, the court emphasized that "comparison of the evidence bullets with the bullets test-fired from Ricks' Rossi handgun was not relevant or necessary" and held that the experts' proposed opinions for the plaintiff met the admissibility requirements of Rule 702.

**Ballistics: *United States v. Pugh,*** 2009 WL 2928757 (S.D. Miss.): The court rejected a challenge to ballistics testimony. It relied exclusively on precedent, stating that "[m]atching spent shell casings to the weapon that fired them is a recognized method of ballistics testing. Other than the argument raised by magazine articles cited by the defense and an out-of-state federal district court ruling, [Judge Rakoff's ruling in *Glynn*] the Court has not found a case from the Fifth Circuit which shows that [the ammunition expert's] findings are unreliable. On the contrary, firearm comparison testing has widespread acceptance in this Circuit."

**Ballistics – generally accepted, testimony to a reasonable degree of certainty: *United States v. Hylton***, 2018 WL 5795799 (D. Nev. Nov. 5, 2018): In an armed bank robbery prosecution, the defendant moved to strike the Government's firearm expert's proposed testimony, or in the alternative, to conduct a *Daubert* hearing on the method that the expert used to identify the firearm at issue. The court denied the defendant's motion, finding that the Association of Firearm and Toolmark Examiners ("AFTE") ballistics methodology is generally accepted:

> The AFTE methodology is generally accepted by federal courts, and has repeatedly been found admissible under *Daubert* and Rule 702. *See United States v. Johnson*, 875 F.3d 1265 (9th Cir. 2017). *See also United States v. Johnson*, 2015 WL 5012949 (N.D.Cal. 2015); *United States v. Diaz*, 2007 WL 485967 (N.D.Cal. Feb. 12, 2007); *United States v. Arnett*, 2006 WL 2053880 (E.D.Cal. 2006). Defendant fails to identify a single case in which AFTE ballistics testimony was excluded under *Daubert. See Johnson*, 875 F.3d at 1282.

> [T]he Court finds that a *Daubert* hearing is neither required nor necessary in the instant matter. Further, to the extent Defendant wishes to criticize the AFTE methodology, or ballistics evidence generally, he may do so through the presentation of his own expert and cross-examination of FS Wilcox.

**Note: The court stated that the government "notes that some courts have required experts to testify that casings can be matched *only* to a reasonable degree of ballistics certainty, and that FS Wilcox's testimony will comply with this directive." But under the DOJ's own guidelines, a ballistics expert is not permitted to testify to a reasonable degree of certainty, unless the court requires it, and the court did not require it in this case. The DOJ has stated that many of the cases involving overstatement in this case digest preceded the guidelines and so are to be discounted. Maybe so --- but not this one. The opinion is dated November 5, 2018. And what is especially troublesome is that the court considers the "reasonable degree of certainty" testimony to be a *tempered* form of conclusion, when in fact it is a classic form of overstatement.**

**Ballistics: *United States v. Romero-Lobato***, 2019 WL 2150938 (D. Nev.): In a prosecution for robbery and related offenses, the government called a ballistics expert to testify, in the court's words, "that the Taurus handgun found in the stolen Yukon following the police chase is the *same gun* that was used to fire a round into the ceiling of Aguitas Bar and Grill." The trial court held a *Daubert* hearing in which it considered the NAS and PCAST reports as applied to ballistics analysis using the Association of Firearm and Tool Mark Examiners ("AFTE") method. In its opinion, the court first summarized the case law:

> The cases surveyed by the Court indicate that some federal courts have recently become more hesitant to automatically accept expert testimony derived from the AFTE method. While no federal court (at least to the Court's knowledge) has found the AFTE method to be unreliable under *Daubert*, several have placed limitations on the manner in which the expert is allowed to testify. The general consensus is that firearm examiners should not testify that their conclusions are infallible or not subject to any rate of error, nor should they arbitrarily give a statistical probability for the accuracy of their conclusions. Several courts have also prohibited a firearm examiner from asserting that a particular bullet or shell casing could only have been discharged from a particular gun to the exclusion of all other guns in the world. These restrictions are in accord with guidelines issued by the Department of Justice for its own federal firearm examiners which went into effect in January 2019. But it is also important to note that the courts that imposed limitations on firearm and toolmark expert testimony were the exception rather than the rule. Many courts have continued to allow unfettered testimony from firearm examiners who have utilized the AFTE method.

In a lengthy analysis, the court applied the *Daubert* factors and concluded that the ballistics expert would be permitted to testify. It summed up as follows:

> Balancing the *Daubert* factors, the Court finds that Johnson's testimony derived from the AFTE method is reliable and therefore admissible. The only factor that does not support the admission of the testimony is the lack of objective criteria governing the application of the AFTE method. But this lack of objective criteria is countered by the method's relatively low rate of error, widespread acceptance in the scientific community, testability, and frequent publication in scientific journals. The balance of the factors therefore weighs strongly in favor of the admission of Johnson's testimony. The Court also notes that the defense has not cited to a single case where a federal court has completely prohibited firearms identification testimony on the basis that it fails the *Daubert* reliability analysis. The lack of such authority indicates to the Court that defendant's request to exclude Johnson's testimony wholesale is unprecedented, and when such a request is made, a defendant must make a remarkable argument supported by remarkable evidence. Defendant has not done so here.

In its analysis, the court discussed the case law, such as *Glynn,* that has sought to put limitations not on ballistics as a whole but on the overstatement of an expert's conclusion. While the court does not specifically reject those cases, ***there is nothing in the final order that appears to impose any limitation on the expert's conclusions --- which are described by the court as testimony of a match.***

**Ballistics: Overstatement --- reasonable degree of ballistics certainty: *United States v. Otero***, 849 F. Supp. 2d 425 (D.N.J. 2012): The court denied a motion to exclude the government's expert on the subject of firearms and toolmark identification. The court allowed the expert to testify to a reasonable degree of ballistics certainty. It addressed the impact of the NAS report:

> The Government has demonstrated that Deady's proffered opinion is based on a reliable methodology. The Court recognizes, as did the National Research Council in *Strengthening Forensic Science in the United States: A Path Forward*, that the toolmark identification procedures discussed in this Opinion do indeed involve some degree of subjective analysis and reliance upon the expertise and experience of the examiner. The Court further recognizes, as did the National Research Council's report, that claims for absolute certainty as to identifications made by practitioners in this area may well be somewhat overblown. The role of this Court, however, is much more limited than determining whether or not the procedures utilized are sufficient to satisfy scientists that the expert opinions are virtually infallible. If that were the requirement, experience-based expert testimony in numerous technical areas would be barred. Such an approach would contravene well-settled precedent on the district court's role in evaluating the admissibility of expert testimony.

**Ballistics: attempt to limit overstatement of results, but allowing testimony to a reasonable degree of certainty: *United States v. Taylor*,** 663 F. Supp. 2d 1170 (D.N.M. 2009): The court allowed ballistics testimony, but limited it in several respects, relying on the NAS report. The court stated that "[b]ecause of the seriousness of the criticisms launched against the methodology underlying firearms identification, both by various commentators and by Defendant

in this case, the Court will carefully assess the reliability of this methodology, using *Daubert* as a guide." The court noted that NAS concluded that ballistics methodology was weak on the *Daubert* factor of standards and controls, because "the decision of the toolmark examiner remains a subjective decision based on unarticulated standards and no statistical foundation for estimation of error rates."

The court noted that Judge Rakoff, in *United States v. Glynn*, 578 F. Supp. 2d 567 (S.D.N.Y. 2008), resolved one of the problems of ballistics testimony "by sending the case back for retrial and ordering that the ballistics opinions offered at the retrial may be stated in terms of 'more likely than not,' but nothing more." The court adopted the reasoning in *Glynn,* concluding that the firearms identification testimony is admissible under Rule 702 and *Daubert*, but imposing limitations on that testimony.

> Because of the limitations on the reliability of firearms identification evidence discussed above, [the expert] will not be permitted to testify that his methodology allows him to reach this conclusion as a matter of scientific certainty. [The expert] also will not be allowed to testify that he can conclude that there is a match to the exclusion, either practical or absolute, of all other guns. He may only testify that, in his opinion, the bullet came from the suspect rifle to within a reasonable degree of certainty in the firearms examination field.
>
> **Note:** It is a bit sad that after all that analysis, and in a good faith attempt to prohibit the expert from overstating his conclusions, the court allows him to testify to a reasonable degree of certainty --- which is a meaningless, confusing standard that the jury may well equate with "beyond a reasonable doubt."

**Ballistics: Limiting overstatement:** ***United States v. White***, 2018 WL 4565140 (S.D.N.Y. Sept. 24, 2018): In a gang prosecution, the defendant moved to exclude the testimony of the government's proposed ballistics expert. Citing the NAS Report and other federal cases restricting ballistics experts' testimony, the court concluded that the proposed testimony was admissible, *subject to the limitation* that the expert could not testify to any specific degree of certainty that there was a match between the firearms seized from the defendant and those used in the various shooting incidents:

> The general admissibility of expert testimony regarding ballistics analysis has been repeatedly recognized by federal courts. *See, e.g., United States v. Glynn*, 578 F. Supp. 2d 567, 569 (S.D.N.Y. 2008); *Ashburn*, 88 F. Supp. 3d at 247. Moreover, the Second Circuit has recently affirmed the admission of this kind of expert ballistics testimony. *See Gil*, 680 F. App'x at 14. As such, White's motion to exclude Detective Fox's testimony in its entirety is denied.
>
> Still, certain restrictions to Detective Fox's testimony are warranted. Recent reports have challenged ballistics analysis as a science. For example, the National Research Council has noted the subjectivity of the analysis and the lack of any definitive error rate. *See, e.g.*, Nat'l Res. Council, Strengthening Forensic Science in the United States: A Path Forward 154-55 (2009); Nat'l Res. Council, Ballistic Imaging: Committee to Assess

the Feasibility, Accuracy, and Technical Capability of a National Ballistics Database 3 (2008). The Government's detailed description of Detective Fox's anticipated testimony is insufficient to persuade the Court that the concerns raised by such reports are unjustified. Specifically, the evidence fails to establish that the theory of uniqueness on which Detective Fox relies has been proven as a matter of empirical science, that there is any objective standard for declaring a "match," or that there is any reliable basis on which Detective Fox could state the degree to which he is certain of his conclusions.

For these reasons, consistent with other federal opinions, the Court finds that Detective Fox's testimony must be limited in certain respects. *See, e.g., Glynn*, F. Supp. 2d at 575 (restricting ballistics expert's opinion to statement that match was "more likely than not"); Order, *United States v. Barrett*, No. 12-cr-45, at 1 (S.D.N.Y. Mar. 11, 2013); *Ashburn*, 88 F. Supp. 3d at 249 (precluding expert from testifying that he is "certain" or "100%" sure of his matches); *United States v. Willock*, 696 F. Supp. 2d 536, 574 (D. Md. 2010) (prohibiting expert from stating that it was a "practical impossibility" that any other firearm fired the cartridges in question); *United States v. Green*, 405 F. Supp. 2d 104, 124 (D. Mass. 2005) (precluding expert from testifying that his methodology permits "the exclusion of all other guns" as source of certain shell casings). In particular, Detective Fox may not testify to any specific degree of certainty as to his conclusion that there is a ballistics match between the firearms seized from White and those used in the various shooting incidents. However, if pressed to define his degree of certainty during cross-examination, Detective Fox may state his personal belief on that issue.

**Ballistics: Limits on Overstatement: *United States v. Shipp,*** 2019 WL 6329658 (E.D.N.Y.): The court relied on the PCAST report and stated that its findings "cast considerable doubt on the reliability of the theory behind matching pieces of ballistics evidence." It concluded that the ballistics expert "will be permitted to testify only that the toolmarks on the recovered bullet fragment are consistent with having been fired from the same firearm. In other words, Detective Ring may testify that the recovered firearm cannot be excluded as the source of the recovered fragment and shell casing, but not that the recovered firearm *is,* in fact, the source of the recovered fragment and shell casing."

In reaching this conclusion preventing overstatement of the expert's results, the court made the following important points:

● A court evaluating the reliability of forensic testimony should not be precluded by precedent, given the recent studies challenging the reliability of feature-comparison testimony.

● The *Daubert* peer review factor is somewhat questionable when it comes to ballistics, because the AFTE peer review process is not rigorous --- the reviewers are all members of AFTE, and have "a vested, career-based interest in publishing studies that validate their own field and methodologies."

● The potential rate of error for matching ballistics evidence based on the AFTE theory of comparison "does not favor a finding of reliability at this time" because "the study that most closely resembles fieldwork estimated that a firearms toolmark examiner may incorrectly conclude that a revered piece of ballistics evidence matches a test fire one out of every 46 examinations."

● The AFTE theory of examination, which bases a finding of a match upon "sufficient agreement" between the compared toolmarks, is "circular and subjective" and is distinguishable from other expert testimony, such as from a psychologist, because it is not about "an ambiguous question on which experts can disagree." Rather, it is on an unambiguous question, which should be answered without subjectivity.

● On the *Daubert* question of general acceptance, the relevant scientific community cannot be limited to self-interested toolmark experts. Therefore, it is appropriate "to consider the opinions of the authors of the NRC report and the PCAST report who, while admittedly not members of the forensic ballistic community, are preeminent scientists and scholars and are undoubtedly capable of assessing the validity of a metrological method." The court consequently concluded that the AFTE theory "has not achieved general acceptance in the relevant community."

● The court recognized that the limitation on the expert's testimony--- that the firearm cannot be excluded as a source --- was more restrictive than other courts that have sought to limit overstatement. For example, Judge Rakoff in *Glynn, infra,* allowed the expert to say that it was more likely than not that the bullet came from the defendant's gun. But the court found the more restrictive limitation appropriate "given the concerns raised by the PCAST report about the lesser probative value of certain study designs and the reproducibility and accuracy of an individual examiner's application of the 'sufficient agreement' standard." The court concluded as follows:

> Placing this limitation on Detective Ring's testimony will prevent the jury from placing unwarranted faith in an identification conclusion based on the AFTE Theory, which the current research has yet to show can reliably determine, to a reasonable possibility, whether separate pieces of ballistics evidence have the same source firearm.

**Note: Despite the DOJ standards that purport to limit a forensic expert's testimony, the expert in this case was prepared to testify that the cartridge casing and bullet fragment were fired from the recovered firearm. The explanation is probably that the expert was a detective, not an expert from a lab subject to the DOJ guidelines. But that shows that the DOJ guidelines are not completely effective in regulating overstatement by forensic experts.**

**Ballistics: *United States v. Sebbern*,** 2012 WL 5989813 (E.D.N.Y.): The court denied a motion to exclude ballistics testimony. It recognized that there are legitimate questions about the validity of ballistics, and discussed the NAS report and Judge Rakoff's opinion in *Glynn*:

> The comparison of test bullets and cartridges to those of unknown origins involves "the exercise of a considerable degree of subjective judgment." *Glynn*, 578 F.Supp.2d at 573. First, some subjectivity is involved in the examination of the evidence, which is done visually using a comparison microscope. * * * In addition, the standards employed by examiners invite subjectivity. The AFTE theory of toolmark comparison permits an examiner to conclude that two bullets or two cartridges are of common origin, that is, were fired from the same gun, when the microscopic surface contours of their toolmarks are in "sufficient agreement." In part because of this reliance on the subjective judgment of the examiners, the AFTE Theory has been the subject of criticism. For example, in a 2009 report, the National Research Council of the National Academy of Sciences (the 'NRC') observed that AFTE standards acknowledged that ballistic comparisons "involve subjective qualitative judgments by examiners and that the accuracy of examiners' assessments is highly dependent on their skill and training."

In *Glynn*, Judge Rakoff found that ballistics identification had garnered sufficient empirical support as to warrant its admissibility. Accordingly, he permitted the ballistics expert to testify, but limited the degree of confidence which the expert was permitted to express with respect to his findings. Opining that the expert would "seriously mislead the jury as to the nature of the expertise involved" if he testified that he had matched a bullet or casing to a particular gun "to a reasonable degree of ballistic certainty," Judge Rakoff limited the expert to stating that it was "more likely than not" that the bullet or casing came from a particular gun. Accordingly, *Glynn* does not support the argument that the government's ballistics expert should be entirely precluded from testifying.

The court concluded that Judge Rakoff's ruling in *Glynn* "may support a request to limit the degree of confidence which the expert can express with respect to his findings." But the defendant had moved for exclusion and not limitation. Because the motion did not argue for a specific limitation, the court did not address that question. The court ultimately relied on case law to conclude that ballistics methodology is reliable.

**Ballistics: Extensive analysis, discussion of overstatement: *United States v. Johnson***, 2019 WL 1130258 (S.D.N.Y.): In a prosecution of a street gang, the government offered expert testimony from a ballistics examiner. The expert report stated that the cartridge casings produced from test fires were "discharged from the SAME firearm" as the thirteen cartridge casings recovered from the scene of the Bronx Restaurant Shooting, "based on the observed agreement of their class characteristics and sufficient agreement of their individual characteristics." The court denied the defendant's motion to exclude the expert testimony.

The court discussed the NAS and PCAST reports, and summarized the federal court treatment of those reports as applied to ballistics testimony:

> All of these courts admitted expert testimony concerning toolmark identification, rejecting arguments that the 2008-2016 scientific reports had rendered such evidence inadmissible. While acknowledging that toolmark identification evidence does not feature the full rigor of a science, and suffers from subjectivity and an absence of a precise, widely accepted methodology, these courts concluded that it is nonetheless a proper subject for

expert testimony. These courts found such evidence "sufficiently plausible, relevant, and helpful to the jury to be admitted in some form," *Willock*, 696 F. Supp, 2d at 568, and reasoned that the weaknesses in toolmark identification can be effectively explored on cross-examination. These courts also precluded toolmark identification experts from expressing their opinions in terms of absolute scientific certainty. See, e.g., *Ashburn,* 88 F. Supp. 3d at 248-50; *Monteiro,* 407 F. Supp. 2d at 369; *Cerna*, 2010 WL 3448528, at *5.

Courts have also emphasized that the demanding scientific standards on display in the three reports require a level of certainty and infallibility not properly applied in a courtroom.

The court then proceeded to an application of the *Daubert* factors. As to *testability*, the court stated as follows (with many citations omitted):

There appears to be little dispute that toolmark identification is testable as a general matter. The PCAST Report observed that "[o]ver the past 15 years, the field has undertaken a number of studies that have sought to estimate the accuracy of examiners' conclusions." While the PCAST Report dismissed "many of the[se] studies [as] not appropriate for assessing scientific validity and estimating the reliability because they employed artificial designs that differ in important ways from the problems faced in casework," PCAST acknowledged that one study was appropriately designed, and called for additional such studies to be performed.

Indeed, many courts have relied on the existing scientific literature – including the studies examined in the PCAST Report — in concluding that toolmark identification analysis satisfies the "testability" factor of *Daubert*. * * * While some courts have acknowledged the limitations of these "validation studies," even the PCAST Report – which is the report most critical of toolmark identification – conceded that these studies "indicate that examiners can, under some circumstances, associate ammunition with the gun from which it was fired."

The "testability" of Detective Fox's methods and conclusions is also supported by the annual proficiency testing he undergoes. While these proficiency tests do not validate the underlying assumption of uniqueness upon which the AFTE theory rests, they do provide a mechanism by which to test examiners' ability – employing the AFTE method – to accurately determine whether bullets and cartridge casings have been fired from a particular weapon.

Finally, * * * Detective Fox testified that he is required to photograph "positive comparisons" so that "if a qualified examiner w[ere] to reexamine [his] case[,] ... he could have an idea of what [Detective Fox] was looking at and what [he] was comparing" in reaching his conclusions. Moreover, Detective Fox testified that a second microscopist reviews his conclusions, by performing "an independent verification and technical review of [Detective Fox's] findings to see if they are correct or not." The firearms examiner conducting the review is not aware of Detective Fox's conclusions when he or she conducts

the review. These procedures demonstrate that Detective Fox's methodology can be challenged and reasonably assessed for reliability.

As to *peer review,* the court noted that most of the literature concerning the AFTE theory and methodology has been published in AFTE's peer-reviewed journal, the AFTE Journal. The defendant argued that this should be discounted as peer review because the AFTE is essentially a captive journal for ballistics experts. But the court found that other courts have found the AFTE journal to be a scholarly publication. [Though not Judge Garaufis in *Shipp, supra*].

As to *standards and controls,* the court declared as follows (with many citations omitted):

> AFTE has a well-known standard for toolmark identification, which the Government and Detective Fox have repeatedly invoked – "sufficient agreement." As discussed above, both courts and the scientific community have voiced serious concerns about the "sufficient agreement" standard, characterizing it as "tautological," "wholly subjective," "circular," "leav[ing] much to be desired," and "not scientific." The Court shares some of these concerns. Having heard Detective Fox's testimony, however, the Court is persuaded that his methodology is governed by controlling standards sufficient to render it reliable.
>
> As an initial matter, several aspects of Detective Fox's methodology discussed in connection with the "testability" *Daubert* factor constitute "standards controlling ... [toolmark identification's] operation." For example, the photographic documentation and verification requirements are industry standards adhered to by most, if not all, other crime labs in the country. Similarly, the extensive AFTE training and proficiency testing Detective Fox has received — which appear to be administered to firearms examiners nationwide – also supply such standards.
>
> Moreover, Detective Fox's testimony about his methodology demonstrates the existence of standards controlling his determination as to whether "sufficient agreement" exists with respect to a particular comparison. As discussed above, the photographic comparisons included in Detective Fox's December 5, 2018 report demonstrate how he can determine – from the individual characteristics of two casings or bullets – whether striations line up or "match" one another. The photographic comparisons at issue here reflect striations that line up exactly between the test-fired cartridge casings and those recovered from the scene of the Bronx Restaurant Shooting. The "matching" of the striations is stark, even to an untrained observer. Accordingly, the issue is not whether the ballistics evidence in this case shares specific individual characteristics. Instead, the issue is at what point Detective Fox concludes that the shared individual characteristics he has observed and photographically documented are sufficient to declare that the casings or bullets were fired from the same firearm.
>
> On cross-examination, Detective Fox resisted defense counsel's efforts to have him specify the number of matching individual characteristics that are necessary before a "sufficient agreement" conclusion can be reached. Instead, Detective Fox stated that

"[e]very single case is different," and that he employs a holistic approach incorporating his "training as a whole" and his experience "based on all the cartridge casings and ballistics that [he] ha[s] identified and compared." Detective Fox did set out certain principles that ground his conclusions, however. For example, the CMS standard – six consecutive matching striations or two groups of three matching striations – represents a "bottom standard" or a floor for declaring a match. Detective Fox will not declare that "sufficient agreement" exists unless microscopic examination reveals a toolmark impression with one area containing six consecutive matching individual characteristics, or two areas with three consecutive matching individual characteristics. Detective Fox's analysis does not end at that point, however. Instead, Detective Fox goes on to examine every impression on the ballistics evidence. "All these lines should match," as well, and if they do not, Detective Fox will not find "sufficient agreement."

These criteria provide standards for Detective Fox's findings as to "sufficient agreement." While Detective Fox's ultimate findings are subjective — a fact which he readily concedes — all technical fields which require the testimony of expert witnesses engender some degree of subjectivity requiring the expert to employ his or her individual judgment, which is based on specialized training, education, and relevant work experience. Accordingly, the presence of a subjective element in a technical expert's field does not operate as an automatic bar to admissibility.

As to *rate of error,* the court recognized that no error rate for ballistics examination has been conclusively established. It also noted that based on studies conducted, PCAST concluded that the error rate is as high as 1 in 46. But it concluded that "even accepting the PCAST Report's assertion that the error rate could be as high as 1 in 46, or close to 2.2%, such an error rate is not impermissibly high. The court concludes that the absence of a definite error rate for toolmark identification does not require that such evidence be precluded."

Finally, as to *general acceptance*, the court concluded that "[t]here is no dispute here that toolmark identification analysis is a generally accepted method in the community of forensic scientists, and firearms examiners in particular." [Again, this assessment is rejected by Judge Garaufis in *Shipp, supra.]*

After finding that tool mark comparison withstood a *Daubert* challenge, the court turned to possible limitations on the ballistics expert's testimony. The defendant asked the court to limit the expert's testimony "to a factual description of the method he applied and his observations of similarities and differences he found between sets of ballistics." But the court declined to do so. It discussed the case law concerning potential overstatement of a ballistics expert's conclusion, and noted that most of it was related to testimony to a "specific degree of scientific certainty." Citing *Glynn,* the court stated that "[o]ften these limitations are imposed because of judicial or defense counsel concern that the firearms examiner intends to offer an opinion with absolute or 100% certainty." The court concluded that in this case, it was clear that the expert did not intend to assert – and the Government did not intend to elicit – "any particular degree of certainty as to his opinions regarding the ballistics match." The court stated that "Detective Fox's repeated concession at the *Daubert* hearing that his conclusions are based on his subjective opinion stands in stark contrast to the "tendency of [other] ballistics experts ... to make assertions that their matches are certain

beyond all doubt. *Glynn,* 578 F. Supp. 2d at 574." The court also emphasized that the expert stated that he "would never" state his conclusion that ballistics evidence matches to a particular firearm "to the exclusion of all other firearms in a court proceeding, because I haven't looked at all other firearms." The court concluded that "[g]iven the testimony at the *Daubert* hearing and the Government's representations as to what it will elicit from Detective Fox, there is no need for this Court to impose limitations on Detective Fox's opinions."

**Ballistics: No identification of a specific gun: *United States v. Tucker*,** 2020 WL 93951 (E.D.N.Y.): In a robbery case, the government offered ballistics testimony from NYPD Detective Parlo who concluded that the bullet fragments from the scene came from at least three different firearms. The defendant argued that this testimony should be excluded because toolmark identification is subjective, unreliable, and unverified, especially in light of the PCAST report. But the court distinguished the subject of the PCAST report from the case at hand – the PCAST report discusses the validity of attributing bullets to a specific firearm; whereas in this case, Parlo's testimony focuses on class characteristics. The court did note that it was troubled by Parlo's claim that the second examiner conducts their own investigation and comes to a conclusion without taking notes prior to comparing their results to those of Parlo's. Ultimately, the court found that because Parlo's analysis was routine, well-documented, and subject to cross-examination, his testimony was admissible.

**Ballistics: Overstatement --- reasonable degree of ballistics certainty: *United States v. Ashburn***, 88 F. Supp. 3d 239 (E.D.N.Y. 2015): The defendant challenged ballistics testimony pursuant to the AFTE methodology. He argued for exclusion and, if not, limitation on the expert's conclusion. The court denied the motion to exclude and granted the motion to limit the conclusion. The court first addressed the findings of the NAS Report:

> In 2009, the National Academy of Sciences published a comprehensive report on the various fields of forensic science. National Research Council of the National Academies, Strengthening Forensic Science in the United States: A Path Forward (2009) [hereinafter 'NAS Report']. With respect to toolmark and firearms identification, the NAS Report found that the field suffers from certain "limitations," including the lack of sufficient studies to understand the reliability and repeatability of examiners' methods and the inability to specify how many points of similarity are necessary for a given level of confidence in the result. According to the NAS Report, "[a] fundamental problem with toolmark and firearms analysis is the lack of a precisely defined process." Still, the NAS Report concluded that "[i]ndividual patterns from manufacture or from wear might, in some cases, be distinctive enough to suggest one particular source, but additional studies should be performed to make the process of individualization more precise and repeatable."

On the *Daubert* factors, the court concluded that 1) the "AFTE methodology has been repeatedly tested"; 2) "The AFTE itself publishes within the field of toolmark and firearms identification."; 3) "Studies have shown that the error rate among trained toolmark and firearms examiners is quite low" (citing studies finding error rates between 0.9% and 1.5%); 4) "the AFTE's 'sufficient

agreement' standard is the field's established standard * * * but the fact that a standard exists does not necessarily bolster the AFTE methodology's reliability or validity, as it remains a subjective inquiry"; and 5) the AFTE theory "has been widely accepted in the forensic science community."

But the court was persuaded that given the subjectivity involved in ballistics feature-comparison, an instruction limiting the expert's testimony was appropriate. "Given the extensive record presented in other cases, the court joins in precluding this expert witness from testifying that he is 'certain' or '100%' sure of his conclusions that certain items match. * * * [T]he court will limit LaCova to stating that his conclusions were reached to a 'reasonable degree of ballistics certainty' or a 'reasonable degree of certainty in the ballistics field.'"

**Comment: The court was influenced by the NAS report to put a limit on how the expert expressed his conclusion to the jury. But the court did not mention a separate NAS report that advocates abolition of the fake standard of "a reasonable degree of certainty."**

**DOJ points out, by way of correction of this entry, that the "reasonable degree" testimony was required by the court and not chosen by the witness. That is not quite true. The court "limited" the expert to a conclusion of reasonable degree of certainty, but did not *require* that he testify to a reasonable degree of certainty. If the Department is taking the position that authorization to testify is an order to testify, there will be many cases in which the DOJ limitations will not be applicable.**

**Anyway, even if it is an order, it seems especially problematic for a court to require witnesses to testify to standards that have been so widely discredited in the scientific community and by DOJ itself. This is a good indication that the DOJ standards are not the complete answer to the problem of overstatement.**

**Ballistics: *United States v. Glynn*,** 578 F. Supp. 2d 567 (S.D.N.Y. 2008): Judge Rakoff found that the field of ballistics is not scientific because its underlying premises have not been validated empirically, and the methodology is based on subjective assessments. But he found that the methodology was sufficiently reliable to be admissible under *Kumho.* However, because of the subjectivity inherent in the field, Judge Rakoff determined that he could not permit an expert to testify that he was "certain" of a match or that there was "no rate of error." These iterations presented a risk of overstatement of the actual results. Judge Rakoff determined that the expert would be limited to testifying that the bullet "more likely than not" was fired from a particular gun. The *Glynn* opinion is discussed in many of the annotations on ballistics in this digest.

**Ballistics: *United States v. Barnes***, 2008 WL 9359653 (S.D.N.Y.): The defendant challenged ballistics testimony, relying on the assertions in the NAS Report that ballistics methodology is subjective and has not been scientifically validated. The court rejected the defendant's arguments and denied the motion for a *Daubert* hearing. It stated that "ballistics evidence has long been accepted as reliable and has consistently been admitted into evidence." The court downplayed the critique in the Report, arguing that its purpose "was to assess the

possibility of developing a national ballistics database and the feasibility of capturing by computer imaging technology the toolmarks left on discharged bullets and shell casings. The report was not aimed at assessing the procedures used in firearms identification or the degree to which firearms toolmarks are unique, and the report disclaims any motive to impact the question of ballistics evidence in courts. . . . This report, while no doubt useful for the commissioned purpose and not irrelevant to the issue of reliability and admissibility of firearms identification evidence, does not identify any new evidence undermining the core premises upon which ballistics analysis is based." The court was not asked to make a ruling on the confidence-level that the expert could testify to.

**Ballistics: Testimony to a reasonable degree of ballistics certainty is allowed even though the court cites and quotes the DOJ limitations: *United States v. Hunt,*** 2020 WL 2842844 (W.D.Okla): The court found that ballistics expert testimony was admissible, even though it was subjective. It found a sufficiently low rate of error, sufficient testing, and general acceptance. The defendants argued that the court should impose limits on potential overstatement of the ballistics expert's conclusions. On the question of overstatement, the court had this to say:

> In his penultimate argument, Defendant asks the Court to place limitations on the Government's firearm toolmark experts because the jury will be unduly swayed by the experts if not made aware of the limitations on their methodology. The Government responds that no limitation is necessary because Department of Justice guidance sufficiently limits a firearm examiner's testimony.
>
> Some federal courts have imposed limitations on firearm and toolmark expert testimony. See, e.g., *Ashburn*, 88 F. Supp. 3d at 249. However, many courts have continued to allow unfettered testimony. See, e.g., *Romero-Lobato*, 379 F. Supp. 3d at 1117.
>
> The general consensus is that firearm examiners should not testify that their conclusions are infallible or not subject to any rate of error, nor should they arbitrarily give a statistical probability for the accuracy of their conclusions. Several courts have also prohibited a firearm examiner from asserting that a particular bullet or shell casing could only have been discharged from a particular gun to the exclusion of all other guns in the world.
>
> In accordance with recent guidance from the Department of Justice, the Government's firearm experts have already agreed to refrain from expressing their findings in terms of absolute certainty, and they will not state or imply that a particular bullet or shell casing could only have been discharged from a particular firearm to the exclusion of all other firearms in the world. The Government has also made clear that it will not elicit a statement that its experts' conclusions are held to a reasonable degree of scientific certainty.
>
> The Court finds that the limitations mentioned above and prescribed by the Department of Justice are reasonable, and that the Government's experts should abide by those limitations. To that end, the Governments experts:

> [S]hall not [1] assert that two toolmarks originated from the same source to the exclusion of all other sources.... [2] assert that examinations conducted in the forensic firearms/toolmarks discipline are infallible or have a zero error rate.... [3] provide a conclusion that includes a statistic or numerical degree of probability except when based on relevant and appropriate data.... [4] cite the number of examinations conducted in the forensic firearms/toolmarks discipline performed in his or her career as a direct measure for the accuracy of a proffered conclusion..... [5] use the expressions 'reasonable degree of scientific certainty,' 'reasonable scientific certainty,' or similar assertions of reasonable certainty in either reports or testimony unless required to do so by [the Court] or applicable law.

As to the fifth limitation described above, ***the Court will permit the Government's experts to testify that their conclusions were reached to a reasonable degree of ballistic certainty, a reasonable degree of certainty in the field of firearm toolmark identification, or any other version of that standard.***

**Note: The court allows the expert to testify to a reasonable degree of certainty even though it is not permitted under the DOJ guidelines. The DOJ guidelines have an exception for when the expert is *required* to so testify. But that exception should not apply here --- the court permitted the expert to testify to a reasonable degree of certainty, but certainly did not require it. But in *Ashburn, supra,* the Department took the position that it was ordered to testify to a reasonable degree of certainty when the court "limited" the expert to that standard. That wasn't an order to so testify, though. It appears that the "ordered to testify" exception to the DOJ standards is being expansively applied by the Department.**

**I have not been able to determine whether the expert in this case actually intends to testify in violation of the DOJ guidelines. But the fact that the court permitted such testimony in violation of the guidelines surely raises some question about the efficacy of the DOJ guidelines in controlling overstatement.**

**Ballistics: Not reliable under *Daubert* and therefore *no testimony of comparison allowed*: *United States v. Adams*,** 2020 U.S. Dist. LEXIS 45125 (D. Ore.): The defendant was charged with felon gun possession. Mr. Gover, the expert for the government, proposed to testify that shell casings found at the crime scene "had been fired by" the gun found at the defendant's residence. Gover employed the AFTE methodology to make the identification. The court found that the AFTE methodology was essentially subjective, and lacked "any scientific standard that would explain to an examiner like Mr. Gover how to interpret the data he sees in any kind of objective way." As Judge Garaufis found in *Shipp, supra*, the court stated that the AFTE "sufficient agreement" standard "is a tautology that doesn't mean anything." The court asserted that "[n]ot only is the AFTE method not replicable for an outsider to the method, but it is not replicable between trained members of AFTE who are using the same means of testing." The court therefore concluded that ***no testimony*** about a comparison could be admitted --- unlike other cases *supra* in which courts allowed some testimony about comparison but limited overstatement.

The court analyzed rate of error in the AFTE methodology as follows:

> The Government initially asserted that the error rate for toolmark comparison testing is between .9 and 1.5 percent. But testing shows a range of outcomes, sometimes with an error rate as high as 2.2 percent. *United States v. Shipp*, 2019 WL 6329658 (E.D.N.Y.). If these all sound like low rates of error, whose differences could not possibly be material, it is helpful to consider them in terms of wrongful convictions, which is the correct framework for an error rate that measures only false-positives—i.e. incorrectly identified matches. A .9 percent error rate would lead to about 1 in 111 wrongful convictions. A 1.5 percent error rate would mean that 1 in 67 convictions were wrong. And 2.2 percent would mean that 1 in 46 convictions were wrong. These are dramatically different rates of error when put into context.
>
> What's more, the higher error rates tend to arise from the studies that most closely resemble the real-world conditions of toolmark testing. The lowest rates arise from the "closed-set" tests, which require the examinee to perform a matching exercise between two sets of bullets or shell casings. An examinee can "perform perfectly" if he simply matches each bullet to the standard that is closest. each match narrows the field for further matches. The next highest error rates—about 2.1 percent—arise from partly closed sets. These tests also give the examinee a closed set of matches, but it also includes two bullets or shells that do not have a match in the set. The error rate from these tests is nearly 100-fold higher than from the closed-set tests. Finally, the "black box" studies yield the highest error rates, about 2.2. percent. (citing PCAST Report at 110-11). These tests presented each examinee with an unknown shell casing or bullet and three test fires from the same known firearm, which may or may not have been the source of the unknown casing or bullet. These tests most closely resemble real-world analysis—i.e. what Mr. Gover testified that he did in this case.
>
> * * *
>
> The incentive structure for the testing process is also concerning. It appears to be the case that the only way to do poorly on a test of the AFTE method is to record a false positive. There seems to be no real negative consequence for reaching an answer of inconclusive. Since the test takers know this, and know they are being tested, it at least incentivizes a rate of false positives that is lower than real world results. This may mean the error rate is lower from testing than in real world examinations.
>
> It is hard to know exactly what to make of these results. It is possible that the error rate for toolmark testing is very low, but it is more likely that it is not. Assuming false positive test results lead to wrongful convictions, a wrongful conviction rate of 1 in 46 is far too high. The best test results would favor the government, but it is unlikely those tests reflect real-world error rates. The worst results favor Defendant. At most, then, this factor of the *Daubert* test is neutral as to both parties. In my opinion, it cuts somewhat in favor of Defendant.

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The court also determined that the AFTE methodology has not been subject to peer review. This is because the methodology was published in the AFTE Journal, "a trade publication meant

only for industry insiders, not the scientific community […] whose purpose is not to review the methodology for flaws but to review studies for their adherence to the methodology." Nor did the court find that the AFTE methodology generally accepted in the broader scientific community --- the fact that it is accepted by toolmark examiners was found essentially irrelevant, because of the inherent bias of those in the field.

The court concluded that the AFTE methodology failed "to yield reproducible results or a precisely defined process." As a result of these deficiencies, the court granted in part and denied in part the defendant's motion to exclude the government's expert testimony. It set forth its limitations in this conclusion:

> I want to be clear that my ruling, as expressed in the foregoing opinion, is limited by the testimony before me during the hearings held in this case. It is not an indictment of forensic evidence or toolmark comparison analysis writ large. It is clear that Mr. Gover and his colleagues are on to something. Even at its worst, comparison analysis has a very low rate of error and yields results that cannot be random. But it is not clear that those results are the product of a scientific inquiry. Nothing in Mr. Gover's testimony explains how or why he reached his conclusion in any quantifiable, replicable way. It is possible that the AFTE method could be expressed in scientific terms, but I have not seen it done in this case, nor elsewhere.
>
> Therefore, for the reasons discussed above, Mr. Gover's expert testimony is limited to the following observational evidence: (1) the Taurus pistol recovered in the crawlspace of Mr. Adams's home is a 40 caliber, semi-automatic pistol with a hemispheric-tipped firing pin, barrel with six lands/grooves and right twist; (2) that the casings test fired from the Taurus showed 40 caliber, hemispheric firing pin impression; (3) the casings seized from outside the shooting scene were 40 caliber, with hemispheric firing pin impressions; and (4) the bullet recovered from gold Oldsmobile at the scene of the shooting were 40/10mm caliber, with six lands/groves and a right twist.
>
> No evidence relating to Mr. Gover's methodology or conclusions relating to whether the shell casings matched the Taurus will be admitted at trial.

**Ballistics --- Overstatement --- 100% Certainty: *United States v. Casey***, 928 F. Supp. 2d 397 (D.P.R. 2013): The defendant requested that the court limit the testimony of the government's firearm expert, relying on several district court opinions restricting ballistics evidence based upon the NAS report. The court denied the motion. The expert was prepared to testify that he was 100% certain of a match. The government presented a sworn statement from the Chair of the group that prepared the NAS report, stating that its purpose "was not to pass judgment on the admissibility of ballistics evidence in legal proceedings, but, rather, to assess the feasibility of creating a ballistics data base." The court concluded that it would remain "faithful to the long-standing tradition of allowing the unfettered testimony of qualified ballistics experts."

> **Comment: If it has been established by scientists that there is no such thing as an error-free methodology, how is it permissible for an expert to say they are 100%**

**certain? There was also a long-standing tradition of "unfettered" testimony on bite-marks and probably on leeches before that. That doesn't make it reliable.**

**Ballistics: Overstatement --- Reasonable degree of ballistics certainty: *United States v. Simmons,*** 2018 U.S. Dist. LEXIS 18606 (E.D.Va.): The court held that ballistics was not a science because the process of identification was based on subjective judgment. But the court also held that ballistics identification, when independently verified, satisfied the standards of Rule 702 as reliable technical testimony. The defendant argued that the expert was contaminated by confirmation bias---because she was told that numerous cases were connected, was congratulated by the prosecution for her work in other cases, had numerous detailed conversations with prosecutors and law enforcement agents about the status of the investigation, the nature of the crimes, and the need to link the various items of evidence to each other. But the court held that the bias of a witness was classically a question for the jury.

On the question of the meaning of an identification, the government proffered two possible conclusions:

> The Government has suggested as appropriate such statements of certainty as "given her training, experience, and knowledge of the field, combined with the requirement that all identifications be verified by a second examiner, her opinion is that the likelihood that another tool could have produced an identified toolmark is so low as to be a practical, but not absolute, impossibility." Alternatively, the Government suggests that if asked, Ms. Moynihan would qualify the certainty of her conclusions with a phrase similar to "a reasonable degree of certainty in the ballistics field."

The court rejected the "almost impossible to be wrong" standard on the ground that "there is no meaningful distinction between a firearms examiner saying that 'the likelihood of another firearm having fired these cartridges is so remote as to be considered a practical impossibility' and saying that his identification is 'an absolute certainty.'" But the court found that the reasonable degree of certainty standard was just fine --- relying on precedent. The court summed up with an ode to precedent:

> Defendants concede, as they must, that no court has ever ***totally*** rejected firearms and toolmark examination testimony. [Though this is no longer true, see *Adams, supra*] * * * This Court's survey of federal courts in our sister circuits indicates that firearms and toolmark examination has and continues to be routinely accepted by courts pursuant to Fed. R. Evid. 702, *Daubert*, and its progeny, albeit with some limitations regarding statements of certainty and the requirement that certain prerequisites be satisfied. *See e.g., United States v. Casey*, 928 F. Supp. 2d 397 (D.P.R. 2013) (declining to follow sister courts who have limited expert testimony based on the 2008 and 2009 NAS reports and finding that the Committee(s) who authored such reports specifically stated that the purpose of the reports was not to weigh in on admissibility of firearm toolmark vidence) and encouraging a return to the previous tradition of unfettered admissibility of a firearm examiner's expert testimony without qualification of the expert's degree of certainty); *United States v. Taylor*, 663 F. Supp. 2d 1170 (D.N.M. 2009) (holding that expert could testify, in his

opinion, using pattern-based methodology, if such methodology was subject to peer review, that the bullet came from suspect rifle to within "reasonable degree of certainty in the firearms examination field"); *United States v. Glynn*, 578 F. Supp. 2d 567 (S.D.N.Y. 2008) (determining that although firearm toolmark examination is not a science, it is a field that is ripe for expert testimony because it is "technical" or "specialized" and the level of certainty could be expressed as "more likely than not" but nothing more); *United States v. Diaz*, 2007 U.S. Dist. LEXIS 13152, 2007 WL 485967 (N.D. Cal. 2007) (permitting the firearms examiner to testify, but could only testify that a particular bullet or cartridge case was fired from a firearm to a "reasonable degree of certainty in the ballistics field"); *United States v. Monteiro*, 407 F.Supp.2d 351 (D. Mass. 2006) (stating that the appropriate standard is "reasonable degree of ballistic certainty"). For reasons detailed herein, the Court declines Defendants' invitation to depart from this long-standing tradition favoring admissibility

> **Comment:** In dealing with the defendant's arguments about confirmation bias, the court relied on some of the many cases holding that the bias of a witness is a credibility question for the jury. But there is a difference between impeachment-bias and confirmation bias. Impeachment bias is that the witness has a motive to falsify testimony at trial. Confirmation bias is that the expert has information in advance of the testing so that she knows what the outcome of a test ought to be before doing it. That bias goes to application of the method, and should be considered an admissibility question.
>
> Finally, this is another court that thought it did a good job of protecting the defendant from overstated conclusions. But the solution was allowing the expert to testify to a reasonable degree of ballistics certainty --- and that is a standard that has been flatly rejected by scientists, as being both meaningless and misleading.
>
> Also note that this is a 2018 case and presumably the DOJ standards should have kept the expert from proffering an opinion based on a practical impossibility or a reasonable degree of certainty. And yet the expert was prepared to offer such an opinion.

**Ballistics*:* Overstatement --- testimony of a match: *United States v. Wrensford*,** 2014 WL 3715036 (D.V.I. July 28, 2014): The court allowed a ballistics expert to testify, noting that "although the comparison methodology and the sufficient agreement standard inherently involves the subjectivity of the examiner's judgment as to matching toolmarks, the AFTE theory is testable on the basis of achieving consistent and accurate results." The court relied heavily on precedent. It found that the method of comparison was peer reviewed by validation studies published in the journal of the Association of Firearm and Toolmark Examiners. The court found the method was generally accepted --- in the field of firearm and toolmark experts. It also relied on the fact that results must be confirmed by a second firearm examiner. The court also concluded, on the basis of the expert's assertion, that the rate of error was "close to zero." Finally the court rejected the

argument that the subjectivity inherent in the process was sufficient grounds for excluding an expert's opinion:

> Despite the subjectivity inherent in the AFTE standards, courts have nevertheless uniformly accepted the methodology as reliable, albeit sometimes with limitations. [Citing *Glynn]*. Although the AFTE identification theory involves subjectivity, its underlying foundation confirms that it does not involve the kind of subjective belief or unsupported speculation that runs afoul of *Daubert*. In line with the weight of the case law, the Court finds that the subjectivity inherent in firearms examination is not a bar to its admissibility.

**Ballistics --- limits on overstatement: *United States v. Davis***, 2019 WL 4306971 (W.D. Va.): In a gang prosecution, the government proposed three toolmark and firearms identification experts. The defendants challenged the admissibility of these experts' testimony and the court conducted a *Daubert* hearing. The defendants argued that toolmark identification is subjective and has been bought into doubt by the NSF and PCAST reports.

The court shared the defendants' skepticism after hearing two of the government's toolmark experts testify about the highly subjective comparative step of toolmark analysis and accounting for a supplemental 2017 PCAST report noting that experience and judgment alone can never establish reliability in the way that empirical testing can. The court held that the experts' testimony had to be limited "given the subjectivity of the field and the lack of any established methodology, error rate, or statistical foundation for firearm identification experts' conclusions[.]" In determining how to limit the testimony, the court sought guidance from Judge Grimm's opinion in *United States v. Medley*, 312 F. Supp. 3d 493 (D. Md. 2018). Judge Grimm noted the difficulty in balancing the subjective nature of the analysis with the helpfulness of the analysis to the jury. Judge Grimm's compromise was to allow the expert testimony with the limitation that the expert may not opine that a cartridge was an exact match or express any level of confidence in his opinion. Here, the court agreed with Judge Grimm and held that the experts could not testify that the marks indicate a "match" or that the cartridges have "signature toolmarks" that identify a single firearm. Further, the court precluded the experts from testifying to any degree of confidence given the lack of an empirical rate of error.

**Bite mark (mis)identification: *Starks v. City of Waukegan***, 123 F. Supp. 3d 1036 (N.D. Ill. 2015): The plaintiff was convicted of rape and assault. At his trial two bite mark experts testified that it was the defendant who bit the victim. He was eventually exonerated and brought a civil rights action against the dentists. The court granted summary judgment for the dentists. On the question of bite mark evidence, the court discussed the NAS report and other articles, and concluded that it is "doubtful that 'expert' bite mark analysis would pass muster under Federal Rule of Evidence 702 in a case tried in federal court." But the court noted that nonetheless "state courts have regularly accepted bite mark evidence—including in all three States in the Seventh Circuit." So the question was not whether bite mark evidence is now found to be unreliable, but whether it was, at the time of the criminal trial, so outrageous as to amount to a malicious use of unreliable evidence. The plaintiff argued that the dentist's opinions in this case were so far outside the norms of bite mark matching, such as they were in 1986, that their testimony violated due

process. But the court determined that while the experts overstated their conclusions and made analytical errors, nothing they did rose to the level of a due process violation.

**Blood spatter: *Camm v. Faith***, 2018 WL 587197 (S.D. Ind. Jan. 29, 2018): This was a civil action seeking damages after the plaintiff was tried and acquitted of murdering his spouse and two children. Among other things, the plaintiff challenged the reliability of high velocity impact blood spatter evidence on the plaintiff's shirt, confirming that the plaintiff was close to the victims when they were murdered. The court granted summary judgment for the defendants, noting that "while [the plaintiff] contends that the field of blood spatter analysis is fraudulent, Indiana courts have consistently found blood spatter analysis to be an acceptable science."

**Cell-Site Location --- court-imposed limitation on overstatement: *United States v. Medley,*** 312 F.Supp.3d 493 (D.Md. 2018) (Grimm, J.): The court held that historical cell site location information is sufficiently reliable to be admissible under *Daubert.* But the court recognized that there was a danger in expert testimony that would ascribe a level of precision to CSLI that is not actually supported by the methodology. Thus the court limited the expert's testimony to the opinion that the "general location" of the defendant's phone was "consistent with" the location of the crime. And the court held that this opinion could only be given after the expert has "fully explained during direct examination the inherent limitations of the accuracy of the location evidence --- namely, the phone can only be placed in the general area of the cell tower sector that it connected to near the time of the carjacking, and the it cannot be placed any more specifically within the sector."

**Cell-Site Location --- admissible because the government accepted a limitation on overstatement: *United States v. Brown*,** 2019 WL 3543253 (E.D. Mich.): The court held that the methodology of cell site location is reliable, but relied on *United States v. Hill,* 818 F.3d 289 (7th Cir. 2017), for the proposition that the court cannot "give the Government a blank check when it comes to the admission of historical cell-site analysis." Specifically, an expert could not be allowed to testify that cell site location is more precise than the actual methodology could support. It concluded as follows:

> Although the science and methods upon which historical cell-site analysis is based are understood and well-documented, they are only reliable to show that a cell phone was in a general area. The Government acknowledges this relative imprecision in its response to Brown's motion. Thus, assuming that the Government lays a proper foundation and accurately represents historical cell-site analysis's limits at trial, its expert testimony is reliable.

**Cell-Site Location --- admissible because the government accepted a limitation on overstatement: *United States v. Frazier,*** 2020 U.S. Dist. LEXIS 35417 (M.D. Tenn.): In a prosecution on charges of kidnaping and murder, the defendants moved to exclude expert testimony concerning cellphone location. The expert was an FBI Special Agent assigned to the Cellular Analysis Survey Team. He reviewed the cell phone data reports of the cellphones allegedly utilized by the defendants during the time frame when the victim was kidnapped,

murdered, and buried. The court held that because historical cell-site analysis is only reliable to show that a cellphone was located within a general area, a *Daubert* hearing is not necessary and the expert testimony is reliable *so long as* the "[g]overnment lays a proper foundation and accurately represents historical cell-site analysis's limits at trial." The defendants raised "no unique arguments to the methodology employed" and instead claimed that the expert's report "places certain cell phones in proximity to a cell tower without providing information about the cell tower's range; fails to indicate the level of precision of location, and says nothing about the range of potential error." The court concluded that the asserted flaws would go to the weight and not the admissibility of the evidence.

Even though the court denied the defendants' motion to exclude the cell-site testimony, it deferred ruling on the admissibility of a slideshow put together by the cell-site expert that purported "to show the approximate location of cellphones based upon their cellular communications with towers at or around the time in question." The court observed that the slide show contained "testimonial statements, inferences, and conclusions" and concluded that "[j]ust as the Government cannot oversell the methodology through testimony, it cannot oversell the methodology through the introduction of evidence."

**Chemical traces --- limits on overstatement: *United States v. Zajac*,** 749 F. Supp. 2d 1299 (D. Utah 2010): The defendant was charged with bombing a library, and he moved to exclude expert testimony regarding trace evidence --- the consistency between the adhesives on the bomb and those found at the defendant's residence. The court noted that the 2009 NAS Report found problems with current forensic science standards in many areas, including paint examination. "While this case pertains to adhesives rather than paints, both are polymers that require microscopic examination, instrumental techniques and methods, and scientific knowledge for proper identification. Thus, the NAS Study is instructive here and lends support to the efficacy of [the expert's] tests." The court stated that *Daubert* did not require the expert to "conduct every conceivable test to determine consistency with absolute certainty. Instead, her tests had to be reliable rather than merely subjective and speculative." The expert in this case used four different instruments to determine consistency, and while that did not go to the level of confidence specified that the defendant desired, "*Daubert* does not require a validation study on every single compound tested through these instruments." The court noted that the instruments were designed to analyze many compounds and "there is no evidence before the court that Michaud misapplied techniques or methods when she conducted her analysis." Ultimately the court concluded that the tests were sufficient for the expert to be able to opine on the visual, chemical, and elemental consistency between the adhesives on the bomb and those found at the defendant's residence. *However, the court held that the expert could not testify to a conclusion that the adhesives came from the same source, as that would be overstating the results.*

**Chromatography: *United States v. Tuzman,*** 2017 WL 6527261 (S.D.N.Y.): In a securities fraud prosecution, the defendant sought to call a forensic chemist to testify that certain entries in a notebook were made after the fact --- in 2015 rather than between 2008-12. The expert performed (1) a physical examination of the notebook entries; (2) a Thin Layer Chromatography test of the ink used to make the entries, which is designed to determine

whether the same ink was used to make the entries; and (3) a Solvent Loss Ratio Method ("SLRM") analysis using Gas Chromatography/Mass Spectrometry ("GC/MS") testing, which is designed to date the use of the ink. The government objected to the SLRM process used by the expert. The government conceded that the process could be used to date ink, but argued that the expert failed to reliably apply the method. The court agreed with the government:

> The Court concludes that Dr. Lyter's failure to use basic quality control protocols—including those required in the two papers he purportedly relies on—demonstrates that he lacks "good grounds" for his conclusions. *Amorgianos*, 303 F.3d at 267-69 (upholding trial court's determination that proposed expert testimony was unreliable because expert witness "failed to apply his own methodology reliably"). * * *
>
> Here, Dr. Lyter did not use a GC/MS machine dedicated exclusively to ink analysis, despite the clear instruction in one of the two articles on which he relies "that accurate quantitative results can only be obtained if the GC-MS system is devoted for ink analysis only." He also did not test paper blanks, even though both papers on which he relies underscore the importance of performing tests on paper blanks to rule out contamination. These departures from the methodology on which Dr. Lyter purportedly relies demonstrate that his analysis is not "reliable at every step." *Amorgianos*, 303 F.3d at 267; *Brown v. Burlington N. Santa Fe Ry. Co*., 765 F.3d 765, 773 (7th Cir. 2014) ("[A]n expert must do more than just state that he is applying a respected methodology; he must follow through with it.").
>
> Dr. Lyter has not provided any justification for these substantial deviations from the methodology he claims to have followed, other than his subjective belief that these quality control protocols are unnecessary. Precedent makes clear, however, that an expert is not free to deviate—without justification—from the requirements of a methodology he claims to have followed.

**Comment:** This is an excellent example of proper application of Rule 702(d). Reliable application is treated as a Rule 104(a) question. The court notes what should be the obvious point that unreliable application of reliable methodology leads to an unreliable conclusion.

**DNA identification, mixed samples: *United States v. Ha*yes**, 2014 WL 5470496 (N.D. Cal.): The court rejected a challenge to PCR/STR DNA identification, as applied to mixed samples. The court stated that "the use of PCR/STR technology to analyze a mixed-source forensic sample is neither a new or novel technique or methodology. Hayes has not cited any legal or scientific authority to the contrary."

> **Comment:** The PCAST report constitutes "scientific authority to the contrary" regarding the subjectivity that is part of the process of extracting DNA from a mixed source. (Though it was published after this case.)

**DNA – Mixtures, test found unreliable: *United States v. Williams***, 382 F.Supp.3d 928 (N.D. Cal. 2019): The court addressed the probabilistic genotype program Bullet, used by the Serological Research Institute (SERI) to analyze multiple source DNA mixtures that include up to four possible sources. The government expert, Hopper, analyzed the DNA under a four-person validation, despite a past analyst finding that the sample contained five possible sources. The expert proposed to testify that there is "very strong support" for the proposition that the defendant contributed DNA to the sample. The defendant moved to exclude the Bullet analysis on the ground that the program was not validated for five-source samples.

Judge Orrick provided this helpful background for the challenges to DNA identification of mixed samples:

> DNA analysis for single-source and simple mixtures—those with DNA from just one or two individuals—is objective and reproducible in part because it requires the exercise of little if any human judgment. Katherine Kwong, *The Algorithm Says You Did It: The Use of Black Box Algorithms to Analyze Complex DNA Evidence*, 31 Harv. J.L. & Tech. 275, 277 (2017)) By contrast, human judgment is required to analyze complex mixtures with three or more DNA profiles because "all of the individual DNA profiles [are] superimposed atop one another." Id. at 278. An analyst must decide between "different interpretations that might be equally or similarly valid – and those decisions may have significant impacts on the ultimate results of the analysis." Id.
>
> It is frequently impossible to tell how many individuals' DNA is present within a complex mixture; a greater number of contributors only increases the rate of error, which usually comes in the form of an underestimate. For example, a 2005 study found that analysts mischaracterized known four-person mixtures as three-person mixtures at a rate of 70%. These errors likely occur because of allele sharing:
>
> > Some alleles at some loci are relatively common and therefore likely to overlap between contributors to a mixture. Thus, the more individuals present in a mixture, the more likely it is the mixture will hide identifications of subsequent individuals, as the relative proportion of present versus absent alleles at each locus increases with each new contributor. * * * [A] five-person sample can present very similarly to the way four-person mixtures do.
>
> Advancements in amplification technology have improved analysts' ability to accurately determine the number of contributors because they amplify the alleles at more loci. For example, SERI previously relied on the Identifiler Plus kit, which amplifies the alleles at 15 loci. The newer GlobalFiler kit, which SERI validated in December 2016, amplifies the alleles present at 21 loci, and some of the additional loci are polymorphic. * * * GlobalFiler has improved the reliability of the conclusions regarding the number of contributors for known three-person mixtures. But known five-person mixtures were mischaracterized as originating from four or fewer individuals in approximately 61-75% of samples. When SERI validated GlobalFiler, it tested two-, three-, four-, and five-person mixtures. It experienced the same difficulties. In fact, it underestimated all of the known five-person mixtures tested:

> In each five-person mixture tested, the electropherograms showed no indication of more than four contributors. This was not due to a shortcoming of GlobalFiler or the testing process, but rather because, by coincidence, the contributors used to create the test mixture shared alleles. Given the genotypes of the contributors, no more than eight alleles could appear at any one locus.
>
> * * * SERI often uses DNA profiles of employees and friends during validation studies. A 2018 study found that analysts underestimated 64% of known five-person mixtures and 100% of known six-person mixtures—and characterized all of the mixtures as containing DNA from four individuals.
>
> Even with the improvement in amplification technology, other factors present challenges to accurately identifying the number of contributors. The challenge of allele sharing is "frequently exacerbated by samples that have degraded or which originally contained only a small amount of DNA." Kwong at 278. * * * [D]egradation occurs when DNA breaks off between the bases, which usually happens to larger pieces first. This process occurs naturally over time, although freezing DNA can slow it down. Amplification kits are unable to copy DNA past the point where the breakage has occurred.

The court excluded the Bullet analysis by Hopper because Hopper could not reliably conclude that only four, and not five, individuals contributed to the DNA mixture. The court noted the following issues: (1) the error rate for mistaking five-person mixtures for four-person mixtures was "troubling" (and research showed that the error rate only increased with the number of sources present in the mixture – 64% of 5-person mixtures and 100% of 6-person mixtures were underestimated); (2) SERI itself was unable to distinguish between four and five-person mixtures in a study by GlobalFiler where it failed to make a correct five-person identification even once; (3) Hopper used less than the recommended amount of DNA to test; (4) more than six years elapsed between the first test detecting a 5-person mixture and the second test by Hopper showing a 4-person mixture; and (5) "there are two loci with seven alleles—and one of those loci has a below-threshold peak that could represent an eighth allele. If that is the case, the sample can be a four-person mixture *only if* no two contributors share alleles at that locus, no contributor is a homozygote at that locus, and no additional alleles have dropped out at that locus."

The government argued that any flaws in the methodology and application to the DNA mixture could be raised on cross-examination. But the court disagreed, explaining as follows:

> The government argues that exclusion of the testimony is not appropriate; instead, Elmore can challenge Hopper's analysis and conclusions during cross-examination. But the number of contributors is a foundational part of every calculation Bullet performs. If that input is in doubt, the reliability of the entire analysis is necessarily in doubt. To corroborate Hopper's conclusion about the number of contributors, the government put forth the results he obtained after running Bullet with a five-person mixture input. But Bullet was not validated to test five-person mixtures, and I will not rely on that result for any purpose.

DNA evidence can have a powerful effect on a jury's evaluation of a criminal case. See John W. Strong, *Language and Logic in Expert Testimony: Limiting Expert Testimony by Restrictions of Function, Reliability and Form*, 71 Or. L. Rev. 349, 367 n.81 (1992) ("There is virtual unanimity among courts and commentators that evidence perceived by jurors to be 'scientific' in nature will have particularly persuasive effect.") (citing cases). If SERI could accurately identify five-person mixtures and if it had validated Bullet to analyze them, then it might have a reliable understanding of how underestimating a five-person mixture impacts the likelihood ratio. That understanding could improve the reliability of Hopper's conclusion on the number of contributors or make it appropriate to allow the government to present two likelihood ratios: one based on four contributors and a second based on five. Then the other problems identified in this Order, such as Harmor's changed testimony, the small testing sample, and the signs of degradation, would be ripe for cross-examination. But there are simply too many reasons to question the reliability of Hopper's conclusion on this foundational issue, which brings the entire analysis outside the parameters of Bullet's validation at SERI. This testimony is not reliable, and it is not admissible.

**DNA Identification --- Low Copy Number:** ***United States v. Sleugh***, 2015 WL 3866270 (N.D. Cal. 2015): The court rejected the defendant's motion to exclude an expert who would testify to a match based on Low Copy Number DNA sample. The court reasoned as follows:

The defendant argues that, as a matter of law, low copy number DNA samples produce inherently unreliable comparison results and, therefore, must be excluded from evidence or, in the alternative, warrant a *Daubert* hearing in all circumstances to determine whether the resulting findings were reliable. The defendant has not provided any binding authority—or, indeed, any legal authority—finding as a matter of law that a small sample size results in data that is inherently unreliable. At most, the defendant's authority suggests there may be a correlation between sample size and the frequency of stochastic effects—randomized errors resulting from contamination that could potentially render a comparison unreliable. See *McCluskey*, 954 F.Supp.2d at 1277 ("LCN testing carries a greater potential for error due to difficulties in analysis and interpretation caused by four stochastic effects: allele drop-in, allele drop-out, stutter, and heterozygote peak height imbalance."); see also *United States v. Morgan*, 53 F.Supp.3d 732, 743 (S.D.N.Y.2014) ("Although the presence of stochastic effects tends to correlate with DNA quantity, it is possible that a 14–pg sample may exhibit fewer stochastic effects than a 25–pg sample and therefore provide better results."). However, as the defendant's own authority explains, the critical inquiry remains whether there is evidence of unreliability (e.g., stochastic effects) in a particular case; there is no per se rule regarding sample size as called for by the defendant.

To rebut the defendant's reliability challenge on this basis, the government offered assurances that its serologist had not observed any stochastic effects. The defendant has had access to the serologist's report and hundreds of pages of underlying data for some time, and has not put forth a contrary proffer or evidence of unreliability in this specific case. Under such circumstances, and in light of the limited scope of the challenge and the

general admissibility of DNA comparison testing, the Court finds no need to hold a *Daubert* hearing on this question on the present record.

**DNA--- Low Copy Number and Combined Probability Index: *United States v. Williams***, 2017 WL 3498694 (N.D. Cal. 2017) (Orrick, J.): The court rejected the defendant's motion to exclude DNA identification from mixed samples, derived from a Low Copy Number DNA sample. The court reasoned as follows:

> Gordon urges me to apply the rationale of *United States v. McCluskey*, 954 F.Supp.2d 1224 (D.N.M. 2013), in which the court excluded DNA testing results derived from a low copy number (LCN) DNA sample. The *McCluskey* court excluded the LCN test results based on several factors, including the lab's lack of certification and validation of its LCN testing. See also *United States v. Morgan*, 53 F.Supp.3d 732, 736 n.2 (S.D.N.Y. 2014) (discussing *McCluskey's* reasoning in excluding the LCN data, and ultimately ruling LCN DNA test results admissible). * * * In deciding to exclude the LCN evidence, the court was careful to articulate its basis for exclusion—not merely the use of an LCN DNA sample, but rather, the lab's methodology in interpreting that sample. * * * [T]he critical inquiry is whether the lab utilized reliable testing methods.
>
> Gordon cannot point to any evidence that Kim failed to abide by established protocol. Instead, he challenges the assumptions underlying her interpretation of the data. Gordon has all the information he needs regarding Kim's analysis to cross-examine her at trial. It would be improper to exclude such evidence from the purview of the jury when the lab utilized reliable methods that meet the standards under *Daubert*."

But the court excluded other lab results using enhanced methods for DNA identification, where the lab used a Combined Probability Index (CPI) statistical model to enhance and interpret the samples. The court found three problems with this methodology:

> First, [the] testing generated results below the stochastic threshold, which indicates the possibility of allelic dropout. * * * [T]he mere presence of results below the stochastic threshold indicates that some degree of randomness, and therefore questionable reliability, exists. Second, [the analyst] used two enhanced detection methods to account for the small amount of DNA available for testing. He testified that the lab protocol recommended using one or the other, but he chose to do both because he was "starting with low-template copy DNA." The enhanced detection methods were individually validated, but he "[didn't] recall" whether they were validated for use at the same time. * * * Third, SERI applied the CPI statistical model on complex mixed samples in an unreliable and untestable manner. Added to the other issues, this is an insurmountable problem. * * * SERI analysts failed to adhere to their own lab protocol or take any notes documenting their decision-making process. And they cannot point to any objective criteria guiding their methodology. [The analyst] repeatedly testified that his decisions were "very subjective" and based on his training and experience. "[N]othing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the ipse dixit of the expert." *Joiner.*

The court explicitly rejected the government's arguments that the flaw, if any, was one of application and not methodology and so raised a question of weight and not admissibility:

> I fail to see the practical distinction the government seeks to draw between a methodology and the application of that methodology when it comes to my role as gatekeeper. Rule 702 explicitly directs courts to consider whether "the expert has reliably *applied* the principles and methods to the facts of the case." Fed. R. Evid. 702(d)(emphasis added). Proper application of the methods is a necessary component of ensuring the reliability of the opinion testimony. If SERI improperly employed accepted methodology then the results would lack a sound basis. That inquiry is appropriately included within the scope of a *Daubert* analysis. See *Daubert v. Merrell Dow Pharmaceuticals, Inc. ("Daubert II")*, 43 F.3d 1311, 1316 (9th Cir. 1995)("Our task, then, is to analyze not what the experts say, but what basis they have for saying it."). The basis for an expert's opinion must necessarily entail how he employed his methodology; that consideration is critical to a determination of whether the opinion "rests on a reliable foundation." See Daubert, 509 U.S. at 597.

***Comment:*** **Low copy number DNA testing was purportedly a way of finding a match from infinitesimally small samples of DNA. It was a test developed and used in only one lab in the world --- the New York City Medical Examiner's lab. It was supposedly supported by a validating test, but that test was never disclosed by the Medical Examiner. A lawsuit brought by a forensic examiner alleged that the test was never conducted and the Medical Examiner lied about it. That suit was settled for $1,000,000. The Medical Examiner, in 2017, decided to abandon the Low Copy Number procedure. But courts have consistently admitted LCN results. See https://www.nytimes.com/2019/04/23/nyregion/dna-testing-nyc-medical-examiner.html?emc=edit_ur_20190424&nl=new-york-today&nlid=63305318201904 24&te=1**

**DNA identification --- PCR/STR:** ***Floyd v. Bondi***, 2018 WL 3422072 (S.D. Fla.): In a habeas challenge to convictions for kidnapping and sexual battery, the petitioner alleged ineffective assistance of counsel for failing to subject the government's DNA evidence to meaningful adversarial testing. The court rejected this argument and denied the petition for writ of habeas corpus, concluding that PCR/STR DNA testing is generally accepted in the scientific community. It stated as follows:

> The State's expert testified that she did autosomal STR, PCR testing. She further testified that this testing technique is used worldwide, has been subject to peer review, and is generally accepted in the scientific community. She also said that it was used and accepted by laboratories everywhere and is supported by scientific literature. She sent the material to another lab for Y-STR testing, by which only the DNA on the male chromosome would be analyzed. She said that Y-STR testing is PCR testing. Y-STR testing eliminates the female DNA, is equally effective when it is only a mixture of two people, and can use a smaller amount of DNA. . . . DNA evidence is not new or novel and both are generally accepted in Florida so long as the testing procedures are properly conducted. * * * As a

result, had counsel objected to the DNA expert, it is unlikely that the trial court would have sustained the objection.

**DNA identification: *United States v. Jackson***, 2018 WL 3387461 (N.D. Ga.): In a robbery prosecution, the defendant moved to exclude DNA evidence implicating him. The DNA sample obtained from the defendant matched the DNA obtained from a black ski mask found at the scene of the robbery. The defendant argued that this evidence was not admissible because the government failed to show that the collection methods were proper or reasonably based on scientific principles. The court denied the defendant's motion, and exercised its discretion to forego a *Daubert* hearing. The court stated that the defendant's objections went to the weight of the evidence, not the "well-established reliability of the DNA testing methodology and process." The court elaborated as follows:

> Defendant has offered no reason to suspect that the mask was contaminated. * * * Defense counsel will have further opportunity to cast doubt on the evidence and testimony through cross-examination at trial. Though a court's decision of whether to conduct a *Daubert* Hearing is discretionary, the Court does not view it necessary on this issue, as the reliability of the [Georgia Bureau of Investigation's ("GBI")] DNA testing methods are "properly taken for granted." *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S 137, 152 (1999). Here, the GBI forensic biologist's specialized knowledge will help the trier of fact understand the evidence by explaining the DNA testing process; the testimony is based on the sufficient facts and data; the testimony is based on widely accepted DNA testing methods; and the lab report makes clear that the forensic biologist reliably applied the aforementioned accepted methods to specific facts here, that is the comparison of the mask and the cheek swabs. Under Rule 702, the Government's forensic biologist may present expert testimony as to the DNA evidence.
>
> **Comment:** The court talks about questions of weight but here it is pretty clearly in a Rule 104(a) sense. The court makes specific findings that the expert had sufficient facts and reliably applied the methodology. And the methodology and "process" are found so sound that no *Daubert* hearing need be held. All this looks like an application of Rule 104(a).

**DNA Identification --- probability testimony, avoiding overstatement: *McCollum v. United States*,** 2020 WL 5363302 (M.D. Ga. Sept. 8, 2020): The defendant in a bank robbery prosecution argued that his defense counsel should have moved to exclude the testimony of an FBI forensic examiner in a bank robbery trial. The expert testified that there was "moderately strong support" that McCollum was a contributor of the DNA on "item 2" from a Camaro that was used in the bank robbery that was at issue in the trial; it was 170 times more likely that this DNA came from Petitioner as opposed to a random person. The court held as follows:

> If counsel had filed a motion to challenge the DNA expert's opinion that a likelihood ratio of 170 provides moderately strong support that Petitioner contributed the DNA on item 2, a hearing on that motion would have revealed something that the DNA expert stated in his report: based on the "standards published by the Association of Forensic Science

Providers," a likelihood ratio between 100 and 990 provides "moderately strong support" for inclusion. Since there is evidence that the relevant scientific community considers a likelihood ratio of 170 to be "moderately strong support" for inclusion, the evidence would not have been excluded under Rule 702.

**DNA Identification: *United States v. Williams***, 2013 WL 4518215 (D. HI.): A forensic examiner's report found the victim's DNA on certain items in the defendant's house. He moved to exclude the testimony on the ground that source attribution methodologies are unreliable and therefore run afoul of *Daubert*. The court denied the motion, relying on precedent.

> The court agrees with those other decisions finding that the source attribution determination is based on methods of science that can be adequately explained, and that the jury should decide what weight to give this evidence based on these dueling expert opinions. See, e.g., *United States v. McCluskey*, —— F.Supp.2d ——, 2013 WL 3766686, at *44 (D. N.M. June 20, 2013) (determining that this 'battle of experts' regarding source attribution is for the jury to resolve); *United States v. Davis*, 602 F.Supp.2d 658, 683–84 (D.Md.2009) (determining that expert may opine that defendant was the source of the samples where the RMP calculation was sufficiently low to be considered unique) . . . . The court therefore rejects that *Daubert* prevents the government from providing testimony that to a reasonable degree of scientific certainty, several samples collected from Defendant's residence are from Talia.

**DNA --- STR Mix Program: *United States v. Christensen***, 2019 WL 651500 (C.D. Ill. Feb. 15, 2019): In a kidnapping prosecution, the defendant moved to exclude DNA test results and requested a *Daubert* hearing on the reliability of the methods used. With regard to the DNA tests, law enforcement used the STRmix program to compare DNA samples taken from the defendant to samples from the alleged victim. The defendant challenged the reliability of the STRmix program, arguing that its use of allele length rather than more detailed sequencing analysis makes it unreliable. The court denied the defendant's motion, finding STRmix test to be a reliable methodology:

> Defendant moved to exclude the DNA test results on the grounds that STRmix is unreliable. At the evidentiary hearing, the United States called Ms. Jerrilyn Conway, a forensic examiner for the FBI, who testified that STRmix has been validated internally by the FBI and also by numerous studies conducted by employees of the company that produced it. She noted that STRmix is used by at least 43 laboratories in the United States, including the U.S. Army. Defendant argues that the STRmix program, which utilizes a probabilistic genotyping algorithm based on allele length, is not as reliable as next-generation sequencing analyses. Ms. Conway agreed at the hearing that next-generation sequencing could be more precise. However, she testified that STRmix is nonetheless reliable, partly because it compares allele length at not just one locus (where sequencing would prevent false matches among alleles with identical lengths but different contents), but at 21 regions of the sample. She testified that the probability of two different individuals

having matching allele lengths at one locus would be approximately 1 in 50, but that the probabilities STRmix generates are in the quintillions to octillions, due to the numerous loci compared. The evidence shows that STRmix has been repeatedly tested and widely accepted by the scientific community. Although there may be more precise tests available, such tests do not affect STRmix's reliability. Accordingly, Defendant's Motion to exclude the DNA evidence based on the alleged unreliability of STRmix is denied.

**DNA Identification:** ***Anderson v. City of Chicago,*** 2020 WL 3250679 (N.D.Ill.): Anderson was convicted of murder and rape, was eventually exonerated, and then sued the City of Chicago and certain law enforcement officials. The defendants moved to exclude DNA experts who would testify that Anderson's DNA could not be found on the murder weapon, and would also provide other exculpatory DNA results. The defendants argued that because these DNA tests were done decades after the crime, the risk of contamination over that time rendered the results unreliable. The defendants also argued that the DNA had degraded; that the experts relied on Low Copy Number methodology; and that the experts had not properly considered stochastic effects. As to all these arguments, the court essentially held that they went to weight and not admissibility. Here are some excerpts from the court's opinion:

> Defendants will be permitted to thoroughly cross-examine the experts about the potential for contamination and degradation and the possible impact on the results, as well as the fact that the source of the DNA is unknown. Defendants will have ample opportunity to argue to the jurors that the DNA on the evidence in 2014 does not reflect the DNA that may have been on the evidence in 1980, and that the jurors should therefore give little weight to the DNA testing results. [citations omitted] Cross-examination, rather than exclusion, is the appropriate course.
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> * * *
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> In their argument that it was improper to interpret the low-level DNA samples here, Defendants point generally to the proposition that low-level DNA can be "challenging to interpret" and that the "forensic DNA community needs to be vigilant" in interpreting such samples. But their arguments and the bases for them do not persuade the Court that such samples can *never* be reliably interpreted or that analysts should never attempt to do so.
>
> Specifically, Defendants point to the fact that only partial DNA profiles were derived from the samples, including the sample taken from Trunko's bra which was used to develop her profile for comparison purposes. Andersen, on the other hand, points to the 2017 Interpretation Guidelines published by the Scientific Working Group on DNA Analysis Methods ("SWGDAM"), which is "a group of scientists representing federal, state, and local forensic DNA laboratories in the United States and Canada." These guidelines support the reliability of the methods used by the experts. As explained in the 2017 SWGDAM guidelines, "DNA typing results may not be obtained at all loci for a given evidentiary sample (e.g., due to DNA degradation, inhibition of amplification and/or low-template quantity); a partial profile thus results." Yet the guidelines still anticipate that laboratories will analyze such partial profiles. * * * [E]very forensic DNA laboratory

constantly encounters and then interprets, partial profiles and * * * the wholesale dismissal of a partial profile because it is a partial profile is not part of forensic practice, is not warranted on analytical grounds, and would infer that autosomal STR loci are not genetically and analytically independent (which of course they are). Cellmark's SOPs allowed for interpretation of partial profiles and allowed for exclusions to be made based off of partial profiles. All of this points to the reliability of the methodology used here.

Defendants also point repeatedly to evidence of stochastic effects present in the testing results here, arguing that when present, such effects make interpretation and analysis unreliable. The 2017 SWGDAM guidelines define stochastic effects as "the observation of intra-locus peak imbalance and/or allele drop-out resulting from random, disproportionate amplification of alleles in low-quantity template samples." Yet, again, the 2017 SWGDAM guidelines anticipate that results may still be interpreted where stochastic effects are present. Cellmark SOPs provide that for low-level DNA, the possibility of stochastic effects must be considered, and the data must be interpreted with caution, and [the plaintiff's expert] testified that when interpreting the samples, she followed this guidance.

Defendants additionally point to the fact that at least some of the evidence samples reflected "low copy number" ("LCN") DNA, which again, they say, cannot be reliably interpreted. * * * Other district courts have concluded that interpreting LCN data is a generally accepted and reliable methodology. [citing cases]

In sum, the Court determines that it is a reliable science and generally accepted practice to interpret low-level and degraded DNA samples, as the experts did here. And, as evidenced in the reports and through testimony, the conclusions that the experts reached in their interpretations are supported by the profiles obtained from the DNA samples. In seeking to discount these conclusions, Defendants appear to forget that the Court's gatekeeping function is to determine whether the methods used by an expert in reaching a conclusion are sound, not to judge whether the conclusion is correct.

**DNA Identification: *United States v. Davis,*** 602 F. Supp. 2d 658 (D. Md. 2009): The defendant moved to exclude DNA test results and requested a *Daubert* hearing. He contended that the expert used a method called low copy number (LCN) testing, and argued that identification from an LCN sample is not a validated scientific methodology. The court made a factual finding that the expert did not use LCN testing, but rather used the generally accepted PCR/STR analysis. So no *Daubert* hearing was necessary.

**DNA --- statistical evidence: *United States v. Tucker***, 2019 WL 861215 (E.D. Mich): Following his conviction for armed bank robbery, the defendant moved to vacate his sentence, arguing that his trial counsel erred in failing to object to the DNA evidence that was offered against him. The court denied the defendant's motion, finding that the Sixth Circuit has repeatedly upheld the reliability of statistical evidence related to DNA testing:

Defendant's objection regarding the DNA evidence fails because the Sixth Circuit has consistently held that statistical evidence related to DNA testing is admissible. *See United States v. Beverly*, 369 F.3d 516, 528 (6th Cir. 2004) ("The use of nuclear DNA analysis as a forensic tool has been found to be scientifically reliable by the scientific community for more than a decade."); *United States v. Bonds*, 12 F.3d 540, 568 (6th Cir. 1993) ("Thus, because the theory, methodology, and reasoning used by the FBI lab to declare matches of DNA samples and to estimate statistical probabilities are scientifically valid and helpful to the trier of fact, we affirm the district court's conclusion that they are admissible under Rule 702."). Accordingly, counsel was not deficient for failing to raise a meritless objection to the statistical DNA evidence presented.

**DNA Analysis --- mixed sample --- expert opinion excluded where the sample identified was a minor contributor to the mix: *United States v. Gissantaner***, 2019 WL 5205464 (W.D. Mich.): In a felon-firearm prosecution, the major piece of evidence was a small amount of DNA found on the firearm during a search of defendant's house. The gun was found in a chest belonging to another convicted felon, Patton. The DNA analysis was based on STRmix probabilistic genotyping software. The report from this analysis concluded that the defendant was a 7% minor contributor of the DNA and that it was at least 49 million times more likely that the DNA was that of the defendant and two unrelated, unknown individuals than that the DNA was from three unrelated, unknown contributors. The defendant challenged the use of the software under the circumstances of this case, in which his alleged DNA was a minor contributor to the mixed sample. He argued that many of the factors entered into the STRmix program are matters of judgment and thus are variable and affect the rate of error. One of these inputs is the number of contributors to a DNA mixture, which is determined by the analyst, but, empirically, is increasingly difficult to determine as the number of contributors increases.

The court noted there are no standards in the U.S. for the development and use of probabilistic genotyping software in forensic DNA analysis. There are guidelines, but those are not standards against which laboratories can be audited. The court relied on the PCAST report stating that while single-source DNA analysis is an objective method with precisely defined protocol complex mixtures with three or more contributors rely primarily on the interpretation of the DNA profile rather than on the laboratory processing --- and therefore are subject to error. The PCAST report specifically stated that STRmix methods "appear to be reliable for three-person mixtures in which the minor contributor constitutes at least 20 percent of the intact DNA in the mixture and in which the DNA amount exceeds the minimum level required for the method."

The court concluded that the government had not established adequate testing and validation of the STRmix under the conditions of DNA evidence in this case. Specifically, the court found that there were too many open and unanswered questions in the field about the testing and validation of STRmix in circumstances with low quantity, low level complex mixtures where the suspect's DNA could only at most constitute 7% of the sample. It noted that many published recommendations advise "extreme caution" using probabilistic genotype software on low-template DNA samples. The court observed that while STRmix has been the subject of many peer-reviewed articles, nothing in those articles supported its application in cases involving complex mixtures of low-quantity, low level DNA. The court also noted that no rate of error has been established for the application of STRmix in cases like the instant one.

The court ultimately held that the STRmix DNA report in this case did not meet *Daubert* reliability standards for admissibility. The court emphasized that it was not criticizing the use of STRmix or probabilistic genotyping evidence in cases where the contributor's percentage of the mix is higher.

**DNA identification: *United States v. Williams***, 2010 WL 188233 (E.D. Mich.): The defendants moved to exclude the government expert's proposed blood identification DNA testimony. The defendants argued that the expert employed a valid procedure to reach an unfounded conclusion. The court held that the testimony was admissible, because it is "well-settled that the principles and methodology underlying DNA testing are scientifically valid" and "DNA expert testimony has been widely approved by the courts as a valid procedure for making identification of blood samples." The court held that the defendants' attack on the expert's conclusion did not raise a *Daubert* question, because *Daubert* held that the gatekeeper's focus must be on the methodology and not the conclusion. In this case, "[e]ven if matching two out of thirteen loci does not provide conclusive evidence that the bloodstain at the house was that of the victim, it would seem to provide at least some evidence. The procedures from which this conclusion was drawn are scientifically sound; if Defendants want to challenge Hutchison's conclusion, they are free to do so by cross-examining Hutchison or offering their own expert."

> ***Comment:*** It is true that the *Daubert* Court stated that the focus of the gatekeeper should be on methodology and not conclusion. But then in *Joiner,* the Court recognized that the gatekeeper must look at the conclusion as well --- and exclude if there is an "analytical gap" between methodology and conclusion. And Rule 702 (after 2000) *definitely* requires the court to scrutinize the expert's conclusion --- in order to determine that a reliable methodology was *reliably applied.*
>
> The court seems to treat the question of application (two out of thirteen loci) as a question of weight under Rule 104(b). How is the jury supposed to understand that?

**DNA extraction --- STRmix:** ***United States v. Lewis*****,** 2020 U.S. Dist. LEXIS 36480 (D. Minn.): In a firearm prosecution, a forensic laboratory "analyzed three DNA swabs from the gun using a probabilistic genotyping software program called STRmix." The lab determined that the DNA on the gun was a mixture from four persons and that "the DNA mixture in each of the three swabs is greater than one billion times more likely if it originated from [the defendant] and three unknown unrelated individuals than if it originated from four unknown unrelated individuals." In addition, the STRmix results excluded as contributors to the DNA mixture the landlord and the police officers involved in the scuffling. The court granted in part and denied in part the defendant's motion to suppress the DNA evidence.

As to the validity of STRmix for extraction and identification, the defendant, relying on the PCAST report, argued that the range of reliability for STRmix does not extend to DNA mixtures of more than three contributors in which the minor contributor constitutes less than 20%. (The DNA mixtures in the case involved four contributors with the minor contributor constituting 6%). But the court noted that in response to the PCAST Report, a study was conducted and

published by a STRmix co-developer that "show[s] persuasively that STRmix is capable of producing accurate results with extremely low error rates: STRmix not only works, it seems to work extremely well, at least when used in the manner it was used in these studies."

The defendant argued that STRmix is unreliable because it does not have a known error rate, but the court concluded that the "error rate for false inclusion is known and is acceptably small." The court admitted that the rate of error could not be numerically quantified, but stated that "*Daubert* does not require that an error rate be numerically identified for scientific evidence to be found sufficiently reliable. Rather, the known or potential error rate is one of several non-exclusive factors that courts consider when assessing the scientific validity of a theory or technique."

While admitting the identification evidence, the court disallowed the "[DNA] evidence as to the exclusion of the relevant police officers and the landlord" for failing to meet the *Daubert* threshold of admissibility. The court concluded that while STRmix had been validated for extracting from DNA mixtures for *inclusion,* it has not been validated for extracting from DNA mixtures for *exclusion*.

**DNA Extraction --- STRmix Admitted --- *United States v. Washington,*** 2020 WL 3265142 (D. Neb. June 16, 2020): Law enforcement collected swabs for DNA testing from various objects to investigate a bank robbery. STRmix, a probabilistic genotyping software program, was used to test the swabs and ultimately linked the defendant's DNA to the DNA collected from the handlebars, the bike seat, the helmet, and the handle of a bag based on a likelihood ratio. The defendant argued that "STRmix relies on subjective information and results can vary to an impermissible degree depending on the lab and the analyst involved." Specifically, the defendant relied on the PCAST report, which concluded that the STRmix method "appear[s] to be reliable for three-person mixtures in which the minor contributor constitutes at least 20 percent of the intact DNA in the mixture." But the court based its decision on a study conducted and published by a STRmix co-developer at the New Zealand's Institute of Environmental Science and Research, which established that "when the [DNA] mixtures were compared with the DNA profiles of thousands of known contributors from non-contributors, STRmix was able to distinguish the contributors from non-contributors with a high level of accuracy [… and] extremely low error rates." The court observed that "[t]hese studies, including the PCAST itself, suggest that questions about STRmix's reliability arise only when samples contain several different contributors and only a low-level contribution from the minor contributor. Recent studies demonstrate that STRmix has become increasingly reliable, even with DNA samples with more than three contributors." Furthermore, the court emphasized that "STRmix is used in several federal laboratories, in more than forty states, and in at least thirteen other countries." The court stated that only one federal court ruled that STRmix failed to satisfy Rule 702, and it was a case in which "the DNA mixture at issue was composed of three contributors, with only a seven-percent contribution associated with the defendant." Because here the likelihood ratios linking the defendant to various items connected to the crime scene were "well above the 20% threshold at which the PCAST Report raised concern […] any questions regarding STRmix's reliability in this case go to the weight that should be given to STRmix statistics, not their admissibility."

**DNA Identification, including Low Copy Number testing: *United States v. McCluskey*,** 954 F. Supp. 2d 1224 (D.N.M. 2013): The defendant moved to exclude DNA test results, challenging the reliability of PCR/STR and LCN (low copy number) testing. The motion was denied in part and granted in part. The court found that the PCR/STR method of DNA typing is reliable under Rule 702, but the government had not carried its burden of demonstrating the reliability of LCN testing.

As to PCR/STR Methodology, the court noted that this was the only forensic method found to be scientific in the NAS report. The court stated that "it is clear that the PCR/STR method can be and has been extensively tested, it has been subjected to peer review and publication, there is a low error rate according to NRC (2009), and there are controls and standards in place." And it was also generally accepted.

As to low copy number (LCN) Testing --- which is a way of testing DNA that has become degraded or is only a small sample --- the court observed that "PCR/STR analysis of low-level DNA has been tested, and has been found to exhibit stochastic effects rendering the DNA profiles unreliable." Moreover peer review and publications "have raised serious questions about the reliability of testing low amounts of DNA and accounting for stochastic effects." And the reliability of LCN testing is not generally accepted in the relevant scientific community.

**DNA --- Mixed sample: *United States v. Tucker***, 2020 WL 93951 (E.D.N.Y.): In an armed robbery case, the government offered a DNA identification from a mixed sample. The court noted that although there are gaps in understanding the full reliability of probabilistic genotyping, such as STRmix, issues generally arise only where the analysis involves multiple contributors and only a low-level contribution from the minor contributor. This case involved two DNA samples that were each two-person mixtures and in one sample, the "Male Donor," alleged to be the defendant, was a 97 percent contributor. The PCAST report that criticizes STRmix did not challenge the reliability of STRmix in this context. The court found that STRmix is used in over forty states and has been peer-reviewed in over 90 articles. Further, its use is generally accepted in the relevant community and courts have "overwhelmingly admitted expert testimony based on STRmix results."

**DNA Identification ---- LCN testing: *United States v. Morgan*,** 53 F. Supp. 3d 732 (S.D.N.Y. 2014): The defendant was charged with felon-firearm possession. He moved to exclude any evidence of low copy number ("LCN") DNA test results of samples taken from the gun at issue. The court denied the motion, concluding that the methods of LCN DNA testing that the New York City Office of the Chief Medical Examiner ("OCME") employed are sufficiently reliable to satisfy *Daubert*. The court stated that "[a]though the Court in *United States v. McCluskey* ruled LCN testing evidence from a New Mexico lab to be inadmissible, its finding rested, at least partially, on that lab's lack of certification and validation of its LCN testing." [In fact that was only a very small part of the *McCluskey* court's reasoning.] The court held that the government "has clearly established that [the] validation studies are scientifically valid and bear a sufficient

analytical relationship to their protocols. Thus, Morgan's objections go to the weight to be accorded to the evidence, not to its admissibility. * * * Although OCME could have conducted more validation studies with degraded or crime-stain mixture samples, under *Daubert*, scientific techniques need not be tested so extensively as to create an absolute certainty in their reliability. Thus, additional validation studies using crime-stain or degraded mixture samples might have bolstered the strength of OCME's conclusions, but are not prerequisites to a finding of reliability sufficient to satisfy the *Daubert* test."

> **Comment:** It should be noted that there are allegations that the LCN process was never properly validated by the Office of the Chief Medical Examiner. The process was been abandoned by OCME. See *DNA Under the Scope, and a Forensic Tool Under a Cloud, New York Times,* 2/27/16.

**DNA --- Low Copy Number: *United States v. Wilbern***, 2019 WL 5204829 (W.D.N.Y.): The government sought to introduce forensic DNA evidence from swabs taken from an umbrella left by the perpetrators at the scene of the crime. Of the four swabs taken, only two, Swabs 8.2 and 8.4, contained DNA profiles able to be developed. The swabs were sent to OCME, which used Low Copy Number ("LCN") testing. Upon testing, OCME determined that Swab 8.2 was a DNA mixture from at least two people, but that Swab 8.4 was a single-source sample from one person. OCME then determined that the source of Swab 8.4 was consistent with the major contributing source of Swab 8.2. OCME determined that Swab 8.2's major contributor was the defendant, with a probability of finding the same DNA profile at 1 in 6.8 trillion people. OCME determine that Swab 8.4's source was consistent with the defendant's profile, with the probability of finding the same match at 1 in 138 million people. Swab 8.4 was lower quantity than 8.2.

Relying mostly on *Morgan, supra,* the court held that results obtained from LCN DNA testing "do not amount to 'junk science,' to which the courtroom should remain closed. Rather, in this case, vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of testing what the Court finds to be admissible evidence."

**DNA Identification --- Admissibility of "Bluestar" method of identifying latent blood stains for DNA testing: *United States v. Frazier***, 2020 U.S. Dist. LEXIS 35417 (M.D. Tenn. Mar. 2, 2020): In a murder and kidnaping prosecution involving DNA evidence, the defendants sought to exclude the testimony of Esperança, a French forensic specialist in the morpho analysis of blood tracing and the use of Bluestar Forensic --- a reagent, according to the expert, that "can be used to identify latent bloodstains without altering the DNA, in order to allow subsequent DNA typing." The government sought to admit this testimony to provide context for the DNA and blood testing they carried out to confirm the presence of the victim's blood. Although Esperança has been qualified as an expert by the French Supreme Court and the International Criminal Court in the areas of forensic science and criminology, the court stated that it did not know "what it takes to qualify as an expert in other countries." In addition, the court cast doubt on whether this testimony would be helpful to the jury as the methodology does not "conclusively identify blood,

but [aids] investigators by identifying areas to swab or collect for further testing to determine if blood is present." However, the court mentioned that the need for this testimony may become clear "if, for example, Defendants assert that the DNA or blood testing was somehow compromised by the use of Bluestar," assuming that the expert is deemed qualified to testify on the matter." For all these reasons, the court deferred ruling on the defendants' motion *in limine* as to Esperança's testimony.

**DNA Identification: *United States v. Wrensford,*** 2014 WL 1224657 (D.V.I. 2014): The court held that the PCR/STR method of DNA analysis is scientifically valid, and thus meets the standards of reliability established by *Daubert* and Rule 702.

**Drug Identification --- Government had not established the reliability of the methodology: *United States v. Brown*,** 2019 WL 3543253 (E.D. Mich.): The defendant challenged the testimony of a forensic expert on whether cocaine was found in a substance. The government argued that drug identification was basic and well established. It noted that the defendant provided no showing that the process of drug identification was unreliable. But the court stated that "it is the proponent of the testimony that must establish its admissibility by a preponderance of proof." It concluded as follows:

> The Government, as the proponent of Earles's testimony, has not offered any explanation on how Earles performed her test or about the reliability of her methods, other than to note that forensic scientists are frequently qualified as experts. Thus, the Government still needs to establish the reliability of Earles's methods.
>
> ***Comment:*** **The court is not at all saying that the methodology for drug identification is suspect. But it is absolutely right that if that methodology is challenged, the government must show its reliability by a preponderance of the evidence. That's the importance of the Rule 104(a) standard.**

**Drug identification: *United States v. Reynoso***, 2019 WL 2868951 (D.N.M.): Testimony from lab analysts that substances obtained from the defendant contained methamphetamine was found to be admissible consistent with *Daubert.* The court stated:

> In regard to the forensic scientist and chemists, as the Government points out, "there are no novel scientific principles at play." Each of the proposed expert witnesses is employed in the field of forensic analysis and all are fully qualified to detect and analyze controlled substances. Thus, the Court rules that the proffered expert testimony of Mr. Chavez, Ms. Ponce, and Ms. Dewitt regarding the specific substances they personally analyzed have a reliable basis and will be admitted.

**Fingerprints:** ***United States v. Cerna***, 2010 WL 3448528 (N.D. Cal.): The court held that the ACE–V method of latent fingerprint identification, "if properly applied, is sufficiently reliable under *Daubert*." The court recognized that the NAS report "points out weaknesses in the ACE–V method" but stated that "these weaknesses do not automatically render the ACE–V theory unreliable under *Daubert*. Instead, the weaknesses highlighted by the NAS report—the lack of specificity of the ACE–V framework and its vulnerability to bias—speak more to an individual expert's application of the ACE–V method, rather than the universal reliability of the method."

**Fingerprints: Overstatement --- testimony of a match --- *United States v. Love,*** 2011 WL 2173644 (S.D. Cal.): The court denied a motion to exclude an expert's conclusion that the defendant's fingerprints "matched" fifteen latent prints. It recognized that "the NAS Report called for additional testing to determine the reliability of latent fingerprint analysis generally and of the ACE–V methodology in particular" and that the Report "questions the validity of the ACE–V method." But the court concluded that "*Daubert, Kumho,* and Rule 702 do not require absolute certainty." Instead, "they ask whether a methodology is testable and has been tested." The court concluded that "latent fingerprint analysis can be tested and has been subject to at least a modest amount of testing—some of which, like the study published in May 2011, was apparently undertaken in direct response to the NAS's concerns." The court also noted that "the ACE–V methodology results in very few false positives" and that "despite the subjectivity of examiners' conclusions, the FBI laboratory imposes numerous standards designed to ensure that those conclusions are sound." Concluding on the NAS report, the court stated that "[i]nstead of a full-fledged attack on friction ridge analysis, the report is essentially a call for better documentation, more standards, and more research."

> **Note: As DOJ points out, it was the court and not the witness who referred to the testimony as a match. As pointed out earlier, the fact that the court thinks that the testimony is matching testimony is a problem of its own.**

**Fingerprints ---PCAST Report:** ***United States v. Casaus*****,** 2017 WL 6729619 (D. Colo.): The defendant moved to exclude latent fingerprint identification evidence, challenging the reliability of the ACE-V method. The court denied the motion. (The opinion does not mention the level of certainty that the expert proposed to testify to.) The defendant relied heavily on the PCAST report, but the court relied on precedent:

> To support his contentions that the ACE-V method is per se unreliable, Defendant Casaus relies heavily on a 2016 report created by President Obama's Council of Advisors on Science and Technology, wherein the Council criticized latent fingerprint examinations. This Court, however, is bound by established Tenth Circuit precedent concluding otherwise—that fingerprint comparison is a reliable method of identifying persons and one that courts have consistently upheld against a *Daubert* challenge. * * * Although the Court understands that further research and intellectual scrutiny into the reliability of fingerprint evidence would be all to the good, the Court agrees with the conclusion of the Tenth Circuit

that to postpone present in-court utilization of this "bedrock forensic identifier" pending such research would be to make the best the enemy of the good.

**Fingerprints: Overstatement --- testimony of a match --- *United States v. Shaw***, 2016 WL 5719303 (M.D. Fla.): In a felon-firearm possession prosecution, the government offered a fingerprint expert to analyze a latent fingerprint on a firearm, using the ACE-V method. The expert concluded that it matched the defendant's known fingerprint. The court found the expert's testimony to be admissible. The court relied on precedent:

> [F]ederal courts have routinely upheld the admissibility of fingerprint evidence under *Daubert*. In this case, Maurice's analysis followed ACE-V a formal and established fingerprint methodology that has been allowed by courts for over twenty years. Her work was reviewed by another crime scene/latent print analyst who verified Maurice's conclusions. Although there does not appear to be a scientifically determined error rate for ACE-V methodology, courts have found that the ACE-V method is reliable and it is generally accepted in the fingerprint analysis community.

**Fingerprints: Overstatement --- testimony of a match --- *United States v. Campbell***, 2012 WL 2373037 (N.D. Ga.): The court denied a motion to exclude expert testimony that the defendant's fingerprint was a "match" to a latent print. The defendant cited the NAS critique on fingerprint methodology. The court relied on precedent:

> [C]ourts have rejected this precise argument [that latent fingerprint analysis is unreliable] and have concluded that while there may be a need for further research into fingerprint analysis, this need does not require courts to take the "drastic step" of excluding a "long-accepted form of expert evidence" and "bedrock forensic identifier.' *Stone,* 2012 WL 219435, at *3 (quoting *United States v. Crisp*, 324 F.3d 261, 268, 270 (4th Cir.2003)); see also *United States v. Cerna,* 2010 WL 3448528 (N.D.Cal.) (noting that the "NAS report may be used for cross-examination or may offer guidance for fact-specific challenges," and that the methodology "need not be perfect science to satisfy *Daubert* so long as it is sufficiently reliable"); *United States v. Rose*, 672 F.Supp.2d 723, 725–726 (D.Md.2009).
>
> **Note: DOJ says that the word "match" is supplied by the court, not by the witness. But the court used the term "match" after citing two government documents in support of the expert's testimony. So the term "match" actually comes from the government --- which is the problem that an overstatement amendment is intended to address.**

**Fingerprints – Overstatement --- Testimony of a Match; PCAST and NAS Reports: *United States v. Kimble***, 2018 U.S. Dist. LEXIS 138988 (S.D. Ga.): In a prosecution for bank robbery, the defendant sought to exclude expert testimony that a latent fingerprint recovered from the getaway vehicle matched the defendant's right middle fingerprint. The court denied the defendant's request for a *Daubert* hearing. The defendant cited the PCAST and NAS Reports in

challenging the reliability of fingerprint analysis, but the court relied on precedent and on an addendum to the PCAST Report, which speaks favorably about recent developments in latent fingerprinting. The court concluded that critiques of fingerprint analysis go to the weight of the evidence, not its admissibility.

> The Government's fingerprint expert used the Analysis, Comparison, Evaluation, and Verification ('ACE-V') methodology in comparing Kimble's known fingerprints to the print lifted from the getaway vehicle. Numerous federal courts have held that that method of fingerprint comparison is widely recognized as reliable in both the scientific and judicial communities. *United States v. John*, 597 F.3d 263, 274-75 (5th Cir. 2010) (because fingerprint evidence is sufficiently reliable to satisfy Rule 702, a district court may dispense with a *Daubert* hearing); *United States v. Pena*, 586 F.3d 105, 111 (1st Cir. 2009) (district court did not err in declining to hold a *Daubert* hearing before admitting fingerprint evidence); *United States v. Crisp*, 324 F.3d 261 (4th Cir. 2003) (describing latent fingerprint methodology as a 'long-accepted form of expert evidence' and 'bedrock forensic identifier' relied upon by courts for the past century); *United States v. Abreu*, 406 F.3d 1304, 1307 (11th Cir. 2005); *United States v. Scott*, 403 F. App'x 392, 398 (11th Cir. 2010).
>
> Kimble is challenging the application of fingerprint analysis science to the specific examinations conducted in this case. * * * [T]he scientific validity and reliability of the ACE-V methodology is so well established that it is not necessary for a district court to conduct a *Daubert* hearing prior to the admission of such expert evidence at trial. [citing a bunch of case law] He can expose any weaknesses in the Government expert's application of ACE-V methodology on cross examination without the court having to expend its scarce judicial resources conducting a pretrial hearing.
>
> **Note: DOJ says that the term "match" comes from the court and that it is unknown what the witness actually testified to. But again, the point is that the court thinks that the testimony is "matching" testimony and admits it with that understanding --- how is a jury supposed to do a better job of distinguishing "match" from "identification"?**

**Fingerprints --- after PCAST --- Overstatement --- testimony to a match: *United States v. Bonds*,** 2017 WL 4511061 (N.D. Ill.): The court upheld the use of latent fingerprint identification under the ACE-V method. The expert was allowed to testify to a match. The defendant argued that ACE-V is not a reproducible and consistent means of determining whether two prints have a common source and that ACE-V's false positive rate is too high to justify reliance on it in a criminal trial. He relied on the PCAST report, which raises concerns about the subjective nature of fingerprint analysis and calls for efforts to validate the methodology through black box studies. But the court relied on precedent to reject the PCAST findings. It noted that the defendant's arguments have been rejected by the Seventh Circuit in *Herrera, supra*, which noted that the "methodology requires recognizing and categorizing scores of distinctive features in the prints, and it is the distinctiveness of these features, rather than the ACE-V method itself, that enables expert fingerprint examiners to match fingerprints with a high degree of confidence." The court

stated that "[a]lthough the PCAST Report focuses on scientific validity, the Court agrees with *Herrera's* broader reading of Rule 702's reliability requirement." The court also noted that the PCAST report was not completely negative on latent fingerprint analysis, as PCAST concluded that "latent fingerprint analysis is a foundationally valid subjective methodology—albeit with a false positive rate that is substantial and is likely to be higher than expected by many jurors based on longstanding claims about the infallibility of fingerprint analysis." The court concluded that "[a]lthough the PCAST Report suggested that accurate information about limitations on the reliability of the evidence be provided, this information concerning false positive rates, in addition to the other concerns raised in the PCAST Report * * * goes to the weight of the fingerprint evidence, not its admissibility. Bonds will have adequate opportunity to explore these issues on cross-examination."

**Comment: Again, it is the court that uses the term "match" and we don't know what the witness actually testified to. But the fact that the court is not following the ambiguous distinction between "match" and "identification" is problematic.**

**Fingerprints—Overstatement --- testimony to a match: *United States v. Rose***, 672 F. Supp. 2d 723 (D. Md. 2009): In a carjacking prosecution, the defendant challenged the admissibility of fingerprint evidence identifying him as the source of two latent prints recovered from the victim's Mercedes and one latent print recovered from the murder scene. The court addressed the findings of the NAS report:

> The [2009 NAS] Report identified a need for additional published peer-reviewed studies and the setting of national standards in various forensic evidence disciplines, including fingerprint identification. While the Report quoted a paper by Haber and Haber, the defendant's proposed experts in this case, in which the Habers found no "available scientific evidence of the validity of the ACE-V method," the Report itself did not conclude that fingerprint evidence was unreliable such as to render it inadmissible under Fed. R. Evid. 702."[T]he Habers' criticism of fingerprint methodology from their perspective as human factors consultants does not outweigh the contrary conclusions from experts within the field as evidenced by caselaw and the amicus brief in this case."

**Fingerprints: *United States v. Cruz-Mercedes***, 2019 WL 2124250 (D. Mass.): The court, during a *Daubert* hearing, compared the testimony of two experts who used the ACE-V method of fingerprint analysis. The government's expert testified to the procedure he followed, where he went through all four stages of ACE-V methodology and documented his procedures according to MSP protocol. However, he failed to follow standards for documentation set by the Scientific Working Group on Friction Ridge Analysis Study and Technology ("SWGFAST"). The defendant's expert did not find that the ACE-V method was unreliable, rather she found that none of the prints used by the government's expert were suitable for comparison or clear enough for positive identification. She also found that the government expert's failure to follow SWGFAST procedures opened the door to unconscious bias and prevented third party evaluation of his analysis. The court concluded as follows:

> Based on the testimony presented during the evidentiary hearing, I could not find that Sgt. Costa's methodology was so unreliable that it should be kept from the jury. To be sure, Dr. Wilcox's testimony highlighted the importance of documentation to the scientific process, and I did not accept the Government's suggestion that documentation is irrelevant to a determination of reliability. The documentation here was not full and complete, and that affects the credibility of Sgt. Costa's conclusion, even if he properly used the ACE-V procedures.
>
> While the SWGFAST standards for documentation represent the consensus view on what is appropriate, I was not convinced that Stg. Costa's failure to follow them renders his conclusions so unreliable that his opinion must be kept from the jury entirely. While that failure certainly raised concerns about confirmation bias and opens Stg. Costa's conclusions to robust challenge on cross-examination, the question whether to accept his comparison as accurate is properly left for the jury.

**Comment: In finding the expert's testimony to be not so unreliable as to be excluded, it can be argued that the court flipped the burden of persuasion from that imposed by *Daubert* and Rule 104(a): the proponent has the burden of showing reliability by a preponderance of the evidence. The court is essentially saying that defects in reliability are regulated by cross-examination, which is contrary to the presumption of *Daubert.***

**Fingerprints: *United States v. Stone*,** 848 F. Supp. 2d 714 (E.D. Mich. 2012): The court admitted expert testimony regarding fingerprints. The defendant raised the NAS report, but the court was "unpersuaded that the NAS Report provides a sufficient basis to exclude Mr. Wintz's testimony." The court relied on case law prior to the NAS Report. It noted that "in *United States v. Crisp*, the Fourth Circuit acknowledged the need for further research into fingerprint analysis, 324 F.3d at 270, but concluded that the need for more research does not require courts to take the 'drastic step' of excluding a 'long-accepted form of expert evidence' and 'bedrock forensic identifier.'" The court stated that "[w]holesale objections to latent fingerprint identification evidence have been uniformly rejected by courts across the country."

**Fingerprints: Overstatement --- error rate of 30 out of a zillion --- *United States v. Gutierrez-Castro***, 805 F. Supp. 2d 1218 (D.N.M. 2011): The government sought to introduce an expert's testimony about the methods and practices of inked fingerprint analysis. The expert compared several examples of fingerprints obtained from the defendant and would testify that all the fingerprints belong to the defendant. The court permitted the testimony, relying heavily on the Tenth Circuit's decision in *United States v. Baines,* 573 F.3d 979 (10th Cir. 2009) (supra). The court stated that fingerprint analysis is used throughout the country and that "there have been over a hundred years of empirical validation to support fingerprint analysis, although it has not been scientifically established that fingerprints are unique to each individual." The court acknowledged that the NAS Report calls into question ACE-V methodology, and concluded that its conclusions cut against admissibility under the *Daubert* peer review factor. The court found that the low rate of error weighed in favor of admissibility. The expert testified that error rates do exist, though it is hard to determine an error rate. He stated that there have been approximately thirty documented

misidentifications in the last thirty or forty years out of millions of fingerprints. Finally, the court concluded that the *Daubert* factor of standards and controls was met because there are "standards that guide and limit the analyst in the exercise of subjective judgments."

> **Comment:** The expert's testimony that the rate of error is 30/millions is wildly off, as shown in the PCAST report.

**Fingerprints:** ***United States v. Mercado-Gracia***, 2018 WL 5924390 (D.N.M. Nov. 13, 2018): In an armed drug trafficking prosecution, the defendant sought to exclude the testimony of the government's latent fingerprint expert, Lloyd. The court held a *Daubert* hearing on the reliability of the ACE-V method and denied the defendant's request, applying the *Daubert* factors as follows:

> 1. Whether the Theory Can be Tested
>
> Research on the persistence and uniqueness of fingerprints has occurred over hundreds of years. * * * Continued studies are ongoing in the fingerprint community. Numerous courts, including this one, have held that the ACE-V method can be tested. Given the record and authority, the first *Daubert* factor weighs in support of admissibility. * * *
>
> 2. Peer Review and Publication of the ACE-V Method
>
> The record contains information on studies concerning the reliability of latent fingerprint analysis but contains less on the extent of peer review of the studies or the ACE-V method. This factor is thus neutral.
>
> 3. Known or Potential Error Rate
>
> Defendant argues that fingerprint analysis is completely subjective and bias affects fingerprint analysis results, citing publications in support. Additionally, defense counsel highlighted at the hearing that Lloyd was unaware of population statistics regarding the uniqueness of fingerprints. Lloyd acknowledged that latent print examinations involve subjectivity, and human error can occur, notably in the comparison step of the ACE-V method.
>
> Nevertheless, the training and experience of latent print analysts is important in the field of fingerprint analysis. * * * In the Ulery study, 169 latent print examiners were given 100 prints, and the analysts made correct identifications 99.8% of the time. The Ulery study found a false negative rate of 7.5%. Numerous courts to have examined this issue have found that the error rate evidence in fingerprint identification weighs in favor of admissibility. * * * The recent bias studies cited by Defendant indicate that the error rate could be higher in real world settings where bias may be introduced; however, the very low error rate in the controlled Ulery study favors admissibility.

4. Existence and Maintenance of Standards

The Customs and Border Patrol ("CBP") laboratory is certified by an outside agency, the American Society of Crime Laboratory Directors/Laboratory Accreditation Board ("ASCLD"). ASCLD promulgates its own standards that the ASCLD-certified laboratories must follow. Independent examiners from ASCLD analyze cases from the laboratory to make sure all laboratory analysts are following the same guidelines and the laboratory internal procedures and that the analysts all have the same training. ASCLD and the fingerprint analysis community use the ACE-V process for latent print comparison.

CBP latent print examiners throughout the world, including Douglas Lloyd, are certified by the International Association for Identification ("IAI"). Latent print examiners must pass a test issued by the IAI. The IAI requires re-testing every five years and training within the five years to stay continually certified. Failure to pass the IAI's proficiency test will result in a six to twelve-month suspension, mandatory retraining, and re-testing.

Although the ACE-V system is a procedural standard relying on the subjective judgment of the examiner, there are accepted standards for following the ACE-V method, training on the system, and certification processes within the fingerprint examiner community to help ensure quality. This factor therefore weighs in favor of admissibility.

5. General Acceptance of Theory

The IAI, a worldwide standard, follows the ACE-V methodology. Despite the subjectivity inherent in the ACE-V method and some studies suggesting bias can affect results, federal courts of appeals have consistently concluded that ACE-V is an acceptable and reliable methodology. [citing a number of cases]. The general-acceptance-in-the-community factor favors admissibility.

The court concluded as follows:

Although not entirely scientific in nature, fingerprint analysis requires significant training and experience using a standard methodology. As *Kumho Tire* instructs, expert testimony on matters of a technical nature or related to specialized knowledge, albeit not scientific, can be admissible under Rule 702, so long as the testimony satisfies the Court's test of reliability and relevance. Fingerprint identification testimony is sufficiently reliable to be admitted into evidence at trial and Lloyd is qualified by his education, training, and experience to testify to matters in the field of fingerprint analysis and identification. The Court will therefore deny Defendant's motion to exclude Lloyd from testifying at trial.

**Note: The government in this case provided notice that "Lloyd is expected to testify that he viewed the digital images photographed by Handley, compared them to Defendant's fingerprint images, and identified fingerprints of value 4A and 5A as the right thumb and right index finger of Defendant." So this is testimony of a match --- an overstatement, given that no testimony of a possible rate of error is contemplated. The testimony, however, is permitted under the DOJ protocol, where the word "identification" is interpreted as something other than a statement that there is a match.**

**Fingerprints – PCAST and NAS Reports --- prohibiting testimony of zero error rate but no discussion of an alternative : *United States v. Pitts***, 2018 WL 1116550 (E.D.N.Y. Feb. 26, 2018): In a prosecution for attempted bank robbery, the defendant moved to exclude expert testimony that latent fingerprints recovered from a withdrawal slip at the crime scene were a match to the defendant. The court denied the motion. With regard to latent fingerprint analysis, the court noted that the PCAST and NAS Reports raise a number of concerns:

> First, error rates are much higher than jurors anticipate. PCAST Report at 9-10 (noting that error rates can be as high as one in eighteen); Jonathan J. Koehler, *Intuitive Error Rate Estimates for the Forensic Sciences*, 57 Jurismetrics J. 153, 162 (2017) (noting that jurors estimate the error rate to be one in 5.5 million)). Second, the NAS Report concluded that the ACE-V method lacks scientific credibility, stating that: "We have reviewed available scientific evidence of the validity of the ACE-V method and found none." NAS Report at 143. Defendant also suggests that fingerprint analysts typically testify that the methodology has a zero or near zero error rate. *See* Mot. at 10 (citing *United States v. Mitchell*, 365 F.3d 215, 246 (3d Cir. 2004) ('[S]ome latent fingerprint examiners insist that there is no error rate associated with their activities.... This would be out-of-place under Rule 702.')). These analysts reason that errors are either human or methodological, and, in the absence of human error, the methodology of fingerprint analysis is 100% accurate. *See* Simon A. Cole, *More Than Zero: Accounting for Error in Latent Fingerprint Identification*, 95 J. Crim. L. & Criminology 985, 1034-49 (2005) ('More Than Zero'). Finally, Defendant contends that the critiques in the PCAST Report and NAS Report demonstrate that fingerprint analysis has not gained widespread acceptance among the relevant community.

As to these arguments the court first noted that the PCAST report eventually was more favorable to latent fingerprint analysis, given the empirical studies that have recently been done. The court stated that while the PCAST report "reinforced the need for empirical testing of fingerprint analysis and other forensic methods, noting that 'experience and judgment alone—no matter how great—can *never* establish the validity or degree of reliability of any particular method,' it also 'applaud[ed] the work of the friction-ridge discipline' for steps it had taken to confirm the validity and reliability of its methods."

Ultimately the court relied heavily on precedent:

> Fingerprint analysis has long been admitted at trial without a *Daubert* hearing. *United States v. Stevens*, 219 Fed.Appx. 108, 109 (2d Cir. 2007) * * *; *United States v. Salameh*, 152 F.3d 88, 128-129 (2d Cir. 1998) (affirming admission of fingerprint evidence); *See also United States v. Avitia-Guillen*, 680 F.3d 1253, 1260 (10th Cir. 2012) ('Fingerprint comparison is a well-established method of identifying persons, and one we have upheld against a *Daubert* challenge.').

> The Court finds the government's citation to *United States v. Bonds*, 2017 WL 4511061 (N.D. Ill.) instructive. The court in *Bonds* reviewed the same arguments presented here: that the PCAST Report renders fingerprint analysis inadmissible.

Finally, the court addressed the possibility that the expert would overstate the meaning of the results. It noted that the government had averred that its fingerprint experts would not testify that fingerprint analysis has a zero or near zero error rate.

> While the government concedes that experts at one time claimed that the error rate was zero, recent guidance instructs experts to have familiarity with error rates and the steps taken to reduce error rates, and "not [to] state that errors are inherently impossible or that a method inherently has a zero error rate." (Nat'l Institute of Standards and Tech., *Latent Print Examination and Human Factors: Improving the Practice through a Systems Approach* (2012), http://www.nist.gov/oles/upload/latent.pdf (last visited Feb. 26, 2017)). Thus, Defendant's critiques appear to be misplaced.

The court emphasized, in conclusion, that it was not holding that fingerprint analysis is *per se* admissible." It observed that the PCAST and NAS Reports "note a number of areas for improvement among the forensic sciences, and a number of courts have criticized forensic sciences as potentially lacking in the 'science' aspect." However, the defendant, by simply relying on these reports, had not made a sufficient showing "that his critiques go to the admissibility of fingerprint analysis, rather than its weight." [Which, given everything in the opinion, looks like an application of Rule 104(a).]

> **Comment:** In discussing the question of overstatement, the court was happy that the experts were not going to testify to a zero rate of error. That is good, but there is no discussion in the opinion of what kind of confidence level and error rate the experts were going to testify to. If the expert just says it is a match --- or that the defendant's fingerprint has been "identified" --- with no indication of the meaning of that conclusion, it is arguably not much better than testimony about a zero rate of error. Arguably, this is the kind of case where an amendment to Rule 702 that prohibits overstatement of results might focus the court on what the expert should be allowed to say.

**Fingerprints – Defendant's expert prohibited from testifying that experts exaggerate their results: *United States v. Pitts***, 2018 U.S. Dist. LEXIS 34552 (E.D.N.Y. Mar. 2, 2018): In a prosecution for attempted bank robbery, the government moved to exclude the testimony of the defendant's fingerprint expert, Dr. Cole. The court granted the government's motion, concluding that Dr. Cole's testimony would not assist the trier of fact, and that excluding his testimony would not deprive the defendant of the right to use the PCAST and NAS Reports to cross-examine the government's experts.

> The Court is not convinced that Dr. Cole's testimony would be helpful to the trier of fact. The only opinion Defendant seeks to introduce is that fingerprint examiners "exaggerate" their results and exclude the possibility of error. However, the government has indicated that its experts will not testify to absolutely certain identification nor that the

identification was to the exclusion of all others. Thus, Defendant seeks to admit Dr. Cole's testimony for the sole purpose of rebutting testimony the government does not seek to elicit. Accordingly, Dr. Cole's testimony will not assist the trier of fact to understand the evidence or determine a fact in issue.

The court argued further that a defense expert was not necessary, because there was literature about error rates on which the defense could rely – most importantly, the PCAST report. The court stated that the defendant "identifies no additional information or expertise that Dr. Cole's testimony provides beyond what is in these articles and does not explain why cross-examination of the government's experts using these reports would be insufficient."

**Comment:** This result shows the importance of having an admissibility requirement that specifically prohibits overstatement of results. The court was essentially treating the possibility of overstatement as a question of weight that could be dealt with on cross-examination.

As stated above, the fact that the experts were not going to testify to a zero rate of error is insufficient to guard against the risk of overstatement. The court seems to think that the problem is solved by any language other than zero rate of error.

Next, it is difficult to accept the court's assumption that cross-examination with reports will be as effective as an expert witness for the defense. And it seems unfortunate that prosecution forensic experts are admitted and defense experts are excluded in the same case.

**Fingerprints – Question of application of the method: *United States v. Lundi***, 2018 WL 3369665 (E.D.N.Y.): In a robbery prosecution, the defendant moved to exclude expert testimony that the defendant was the source of latent fingerprints recovered at the crime scene, and the government moved to preclude the defendant's fingerprint expert from testifying. The defendant, relying on the PCAST Report, did not argue that the ACE-V method itself is flawed, but instead argued that the government's expert failed to use the ACE-V method and therefore should be precluded from testifying. The court denied the defendant's motion, concluding that the government sufficiently established that the method was used, and therefore that the defendant's challenges go to the weight of the evidence, not admissibility.

The court --- the judge that issued the opinions in *Pitts, supra* --- evaluated the government's expert as follows:

Defendant argues that the government's expert testimony as to fingerprint analysis should be excluded in this case because the government has not shown that the multistep ACE-V method for analyzing fingerprints was used by its proposed expert, Detective Skelly. However, the government points to concrete indicators of how the ACE-V method actually was followed by Detective Skelly. Defendant does not argue that the method itself is flawed. Indeed, Defendant relies upon the addendum to the *Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods* (2016) report of the President's Council of Advisors on Science and Technology, which recognizes the ACE-V method as scientifically valid and reliable. * * * This Court is not persuaded that Defendant's challenges go to the admissibility of the government's fingerprint evidence,

rather than to the weight accorded to it. Moreover, as this Court noted in *Pitts*, fingerprint analysis has long been admitted at trial without a *Daubert* hearing. The Court sees no reason to preclude such evidence here.

The defendant's expert was the same witness that the court excluded in *Pitts, supra.* As in *Pitts,* the court found that the expert could not testify to overstatement, because, once again, the government witnesses were not going to testify to a zero rate of error. Unlike in *Pitts,* however, the defense expert in this case proposed to testify to the reliability of fingerprint examinations and the "best practices" to be followed when conducting such examinations. But once again the court found the PCAST and other reports to be sufficient fodder for cross-examination of the government's experts, and so concluded that the expert's testimony would not be helpful.

**Comment:** At least on the admissibility/weight question, the court seems correct. While questions of application go to admissibility, and the defendant argued that the expert did not apply the ACE-V method, the government countered with evidence that he actually did apply the method. Thus, any questions of proper application are in the nature of a swearing match, and so are matters of weight.

Again it seems problematic for the court to hold: 1) that a promise not to testify to zero rate of error completely solves the problem of overstatement; and 2) that an expert in the defendant's case is not helpful because the defendant can use reports cross-examine experts in the government's case.

**Fingerprints: PCAST report; and some limit on overstatement: *United States v. Cantoni***, 2019 WL 1259630 (E.D.N.Y.): The defendant moved to exclude expert testimony by the NYPD Latent Print Section ("LPS"). The NYPD LPS uses the ACE-V approach for fingerprint analysis. The defendant relied on the PCAST report, which expressed doubts about the reliability of fingerprint identification and proposed a five-step process for to correct for bias. The PCAST recommendations are that latent print examiners (1) have undergone proficiency testing, (2) disclose whether they have analyzed the latent print before comparing it to the known print, (3) document their comparison of the prints' features, (4) disclose the existence of other facts that could have influenced their conclusion, and (5) verify that the latent print is comparable in quality to those prints used in certain foundational studies of latent print analysis. The defendant argued that aside from the NYPD experts undergoing proficiency testing, there was no evidence to suggest that they followed the remaining guidelines.

The court assumed, without deciding, that the defendant was correct that the NYPD experts had not satisfied the PCAST protocol. But the court concluded that "the analysis makes clear that LPS followed the ACE-V procedure, a procedure that the PCAST report deemed scientifically valid and reliable. Indeed, an addendum to the PCAST report concluded that 'there was clear empirical evidence' that 'latent fingerprint analysis [...] method[ology] met the threshold requirements of scientific validity and reliability under the Federal Rules of Evidence." (citations and internal quotations omitted). The court concluded as follows:

> Although NYPD's methods may have been imperfect and may not have delivered scientifically certain results, there is no indication that they were so fundamentally unreliable as to preclude the testimony of the experts. At best, Cantoni's submission shows certain ways in which cognitive bias may have affected the NYPD examiners' analysis but does not show that it actually did so or that any cognitive bias was so significant as to produce an erroneous conclusion. Defendant's concerns are fodder for cross-examination rather than grounds to exclude the latent print evidence entirely. This is the approach that has been adopted each time courts in this district have considered similar motions.

The defendant alternatively sought relief from possible overstatement in the expert's opinions. He moved to preclude the government experts from testifying that their conclusion is certain, that latent print analysis has a zero error rate, or that their analysis could exclude all other persons who might have left the print. In response, the government acknowledged that "the language and claims that are of concern to defense counsel are disfavored in the latent print discipline," and that "absolutely certain opinions" and identifications "to the exclusion of all others" are "not approved for latent print examination testimony." The court granted the defendant's motion to exclude such claims "without opposition." [Nonetheless, the experts were presumably allowed to testify to a source identification.]

Finally, the defendant sought to call an expert, Dr. Cole, who would testify to the rate of error in fingerprint identification, and challenges to its reliability. This was the same expert that the defendants proffered in *Pitts, supra.* Like the court in *Pitts,* the court here found that an expert would not be helpful, because the issues that would be addressed by the expert could be raised on cross-examination of the government experts.

**Fingerprints: Overstatement --- testimony to a match--- *United States v. Myers***, 2012 WL 6152922 (N.D. Okla.): The court allowed an expert to testify to a fingerprint match, using the ACE-V method. The court relied heavily on *Baines, supra.* The court ticked off the *Daubert* factors:

> 1. *Testing:* "Gorges has undergone demanding training culminating in proficiency examinations, followed by further proficiency examinations at regular intervals during her career. Thus, Gorges' testing is commensurate with the training undergone by fingerprint analysts employed by the FBI and other law enforcement agencies all over the world, and is sufficient to weight the first *Daubert* factor in favor of admissibility."
>
> 2. *Peer Review and Publication:* The court cited a report of the Office of the Inspector General (OIG), which is an updated analysis of the FBI's fingerprint identification procedures. "Although the peer review contained in the report is not strictly scientific peer review of the ACE–V methodology contemplated by independent peer review of true science, it is sufficient to lend credibility to the methodology. Gorges also testified that, pursuant to TPD protocol, both positive and negative identifications are subject to verification. Again, although review by a secondary examiner is not the independent peer review of true science, it again lends credibility to the ACE–V methodology, especially where the review is sometimes blindly done."

3. *Error Rates*: "Gorges stated that a trained, competent examiner using the ACE–V method properly should not make a misidentification. Therefore, this factor also weighs slightly in favor of admissibility."

4. *Standards and Controls*: "As Gorges testified, several steps of the analysis require subjective judgments. Although subjectivity does not, in itself, preclude a finding of reliability, the reliance on subjective judgments may weigh against admissibility. However, Gorges also testified that the extensive training and testing that she undergoes makes the subjective analysis more exacting. When defendant asked whether two examiners might view the print differently or examine a print differently in the analysis step, Gorges stated that, while two examiners might notice different areas of the print, an examiner following the standard operating procedures, or the ACE–V method in the TPD, would not have a lot of leeway. Therefore, the fourth factor weighs both for and against admissibility."

5. *General Acceptance*: "Gorges testified that ACE–V is currently utilized by the FBI. She also stated that it is the most reliable standard or protocol. Because fingerprint analysis has achieved overwhelming acceptance by experts in Gorges' field, and because ACE–V is accepted as the most reliable methodology, this final factor weighs in favor of admissibility."

**Comment:** There are many challengeable assertions in the court's application of the *Daubert* factors. To take what is probably the most important: the *Daubert* Court's reference to testing goes to whether the *method* can be verified empirically. That methodology-based focus is different from whether the *expert* is trained.

**Fingerprints: Overstatement --- testimony to a match: *United States v. Aman,*** 748 F. Supp. 2d 531 (E.D. Va. 2010): In an arson prosecution, the defendant moved to exclude the expert's testimony that the latent fingerprints and palmprints from the crime scene matched the defendant's known prints. He attacked the validity of the expert's Analysis-Comparison-Evaluation-Verification ("ACE-V") method for fingerprint identification. The court rejected the motion. It provided a helpful analysis of the reliability concerns attendant to fingerprint identification methodology. But ultimately it found that these concerns, about subjectivity and the lack of validation with empirical evidence, were questions of weight and not admissibility:

> The ACE–V method is not without criticism. Although fingerprint examination has been conducted for a century, the process still involves a measure of art as well as science. . . . The NRC Report [Strengthening Forensic Science in the United States: A Path Forward (2009)] devotes significant attention to friction ridge analysis, noting the "subjective" and "interpret[ive]" nature of such examination. Additionally, the examiner does not know, *a priori*, which areas of the print will be most relevant to the given analysis, and small twists or smudges in prints can significantly alter the points of comparison. This unpredictability can make it difficult to establish a clear framework with objective criteria for fingerprint examiners. And unlike DNA analysis, which has been subjected to population studies to

demonstrate its precision, studies on friction ridge analysis to date have not yielded accurate population statistics. In other words, while some may assert that no two fingerprints are alike, the proposition is not easily susceptible to scientific validation.

Furthermore, while fingerprint experts sometimes use terms like "absolute" and "positive" to describe the confidence of their matches, the NRC has recognized that a zero-percent error rate is "not scientifically plausible."

The absence of a known error rate, the lack of population studies, and the involvement of examiner judgment all raise important questions about the rigorousness of friction ridge analysis. To be sure, further testing and study would likely enhance the precision and reviewability of fingerprint examiners' work, the issues defendant raises concerning the ACE–V method are appropriate topics for cross-examination, not grounds for exclusion. [T]he fact that ACE–V involves judgment does not render the method unreliable for *Daubert* purposes.

**Fingerprints (Palmprints): Overstatement --- testimony to a match --- *United States v. Council***, 777 F. Supp. 2d 1006 (E.D. Va. 2011): The defendant moved to exclude an expert's testimony that known palm prints collected from the defendant matched a latent palmprint on a handgun. He relied on the NAS report that critiqued fingerprint methodology as subjective and lacking a scientific basis. The court rejected the defendant's arguments, concluding the "friction ridge analysis has gained [acceptance] from numerous forensic experts and law enforcement officials across the country. See *Crisp*, 324 F.3d at 269 (holding a district court was 'within its discretion in accepting at face value the consensus of expert and judicial communities that the fingerprint identification technique is reliable')." The court stated that the NAS report has "usefully pointed out areas in which standards governing friction ridge analysis should continue to develop" but that its critique was "insufficiently penetrating to warrant the exclusion of Dwyer's testimony."

**Comment:** It is hard to believe that dispositive weight should be given to general acceptance by members of the field, and law enforcement officials. That is like voting for yourself in an election, and you get the dispositive vote.

**Fingerprints—PCAST report --- defense rebuttal expert rejected: *United States v. Hendrix***, 2020 WL 30342 (W.D. Wash.): The expert testified to a fingerprint identification, having used the ACE-V methodology. On cross-examination, she could not recall the error rates from the studies she relied on. At the *Daubert* hearing, the defendant offered testimony from Professor Cole, who is not a fingerprint examiner, to testify mainly on rates of error for fingerprint analysis based on the PCAST report. The court denied the defendant's motion to exclude the fingerprint identification, finding it to be relevant and reliable. The defendant sought at trial call Professor Cole as a rebuttal witness to testify to the following: (1) scientific probability; (2) error rates in specific fingerprinting studies; and (3) whether the government's expert's testimony was "scientifically acceptable."

First, the court found that Professor Cole's broad-sweeping conclusions about probability, that "all evidence and all science is probabilistic in nature" was outside his expertise and not relevant to this case. Next, the court concluded that Professor Cole could not offer opinions on error rate in fingerprint analysis because he is a social scientist and not a fingerprint examiner. It reasoned that Cole's testimony would serve, not as expertise, but as a conduit for hearsay contained in the PCAST report and other studies. Finally, the court found that Professor Cole could not testify as to what was "accepted within the latent print discipline" because he is not a member of that discipline. Thus, the court excluded the entirety of Professor Cole's proposed testimony.

**Footprint identification: *United States v. Pugh,*** 2009 WL 2928757 (S.D. Miss.): The court rejected a challenge to footprint analysis, relying mainly on precedent:

> Footprint analysis is not a new concept and expert testimony on footwear comparisons has been admitted in courts in the United States. [The footprint expert] established that the theory and technique of footwear comparisons have been tested; that the techniques for shoe-print identification are generally accepted in the forensic community, and that the science of footwear analysis has by now been generally accepted. The expert shoe print testimony was based on specialized knowledge and would aid the jury in making comparisons between the soles of shoes found on or with the Defendant and the imprints of soles found on surfaces at the crime scene.

**Gunshot residue: *United States v. North***, 2017 WL 5508138 (N.D. Ga.): The defendant moved to exclude expert testimony on gunshot residue. The court denied the motion. The court noted that the defendant "does not cite any authorities or other information that the GSR analysis is unreliable, non-scientific, or that it does not have broad acceptance in the forensic community." The defendant cited the NAS and PCAST reports but the court observed that nothing in any of those reports cast doubt on the largely mechanical process of determining gunshot residue. The court also relied on the fact that other courts "have admitted expert testimony regarding GSR testing similar to that which it intends to be offered at this trial in this case." The court concluded that to the extent the defendant sought to attack the credibility and accuracy of the results of the GSR analysis, "these matters can be the subject of vigorous cross examination, presentation of contrary evidence, and careful instructions on the burden of proof."

**Gunshot residue: *Sanford v. Russell***, 2019 WL 2169911 (E.D. Mich.): This was a section 1983 action alleging that the defendants prosecuted the plaintiff after coercing his confession and generating false forensic evidence. The defendants challenged the plaintiff's expert testimony that the presence of primer residue on the plaintiff's pants did not mean that he had recently fired a gun. The defendants argued that the expert's opinions about the primer gunshot residue test were fatally uninformed because he admitted that he never even performed such a test. But the court was persuaded by the expert's explanation that he never performed the test *because it was deemed unreliable and too likely to produce misleading results*. Here is the expert's explanation:

> During my twenty years at the Michigan State Police Northville Forensic Laboratory, I never performed primer residue testing. To my knowledge, the Michigan State Police has never performed this type of test because the test can generate the false and misleading impression that someone has recently fired a gun when, in fact, it establishes nothing of the kind. In fact, there is no test today, nor has there ever been, that definitively determines whether a person did or did not fire a weapon.

The court stated that "the fact that an expert witness refuses to employ a method that is regarded in his field as unreliable certainly does not justify *excluding* his testimony; in fact, it suggests that his opinions are *more* reliable rather than less."

> **Comment: *Sanford* is a topsy-turvy case because it is essentially law enforcement challenging a (former) criminal defendant's expert testimony that a gunshot residue test is unreliable. It's interesting that the court agrees with the expert that the test is unreliable, given the fact that there is a good deal of precedent (cited in the *North* case, immediately above) that finds gunshot residue tests to be reliable.**

**Handwriting: *United States v. Yass,*** 2008 WL 5377827 (D. Kan.): The defendant argued that handwriting analysis must be excluded under Rule 702 because it is not based on a reliable methodology reliably applied. The court found the evidence admissible, relying almost exclusively on precedent:

> Federal appellate courts have been unanimous in approving expert testimony in the field of handwriting analysis. Rather than to exclude handwriting analysis as "junk science," as urged by defendant, the Court finds the process of handwriting analysis sufficiently reliable to satisfy *Daubert* and the Federal Rules of Evidence and declines to depart from the clear majority of courts weighing in on the issue. Moreover, despite the uneven treatment of handwriting experts by district courts, every appellate court to have considered the issue of handwriting testimony has held that the expert's ultimate opinion was admissible.

**Handwriting: *Boomj.com v. Pursglove***, 2011 WL 2174966 (D. Nev.): The court rejected a challenge to testimony of a handwriting expert that certain handwriting was not the defendant's. It relied heavily on the fact that "[t]he Ninth Circuit and six other circuits have already addressed the admissibility of handwriting expert testimony and determined that handwriting expert testimony can satisfy the reliability threshold." It concluded that "handwriting analysis is a tested theory, it has been subject to peer review and publication, there is a known potential rate of error and there are standards controlling the technique's operation, and it enjoys general acceptance within the relevant scientific community."

> **Comment:** That conclusion appears to be an overstatement in several respects. Handwriting analysis is not even close to being scientific, so it can't really enjoy general acceptance within a relevant scientific community; the data on rate of error on handwriting is that it is that experts are not much more accurate than laypeople; and there are no

consistent standards and controls in the field. Nor is there an empirical basis for the premise that each person's handwriting is unique.

**Handwriting: Overstatement – testimony to a match --- *United States v. Brooks,*** 2010 WL 291769 (E.D.N.Y.): The court rejected a *Daubert* challenge to handwriting identification, relying exclusively on precedent:

> Even though the district court in *United States v. Oskowitz*, 294 F.Supp.2d 379, 383–384 (E.D.N.Y.2003) partially limited a handwriting expert's testimony, the Second Circuit has "never held that a handwriting expert may not offer an opinion on the ultimate question of authorship." *A.V. by Versace, Inc.,* 2006 U.S. Dist. LEXIS 62193 at *269 fn. 14. In fact, no Second Circuit district court has wholly excluded "the testimony of a handwriting expert based on a finding that forensic document examination does not pass the *Daubert* standard." Id. And, the Second Circuit itself has routinely alluded to expert handwriting analysis without expressing any discomfort as to its admissibility. *See, e.g., United States v. Tin Yat Chin*, 371 F.3d 31, 39 (2d Cir.2004) (referring to defendant's proffer of a handwriting expert); *United States v. Badmus*, 325 F.3d 133, 138 (2d Cir.2003) (discussing government's use of expert testimony to identify defendant's handwriting on series of documents).

**Handwriting --- excluded: *Almeciga v. Center for Investigative Reporting,*** 2016 WL 2621131 (S.D.N.Y.): Judge Rakoff rejected the opinion of a handwriting expert that a signature on a release was forged. His analysis is extensive. He noted that while courts were originally skeptical of allowing handwriting experts to testify, the practice became prevalent after the Lindbergh case. But he also noted that in the last few years some courts have become more skeptical, because "even if handwriting expertise were always admitted in the past (which it was not), it was not until *Daubert* that the scientific validity of such expertise was subject to any serious scrutiny." Judge Rakoff observed that in the Second Circuit, "the issue of the admissibility and reliability of handwriting analysis is an open one. See *United States v. Adeyi*, 165 Fed.Appx. 944, 945 (2d Cir.2006) ("Our circuit has not authoritatively decided whether a handwriting expert may offer his opinion as to the authorship of a handwriting sample, based on a comparison with a known sample.") As such, the Court is free to consider how well handwriting analysis fares under *Daubert* and whether Carlson's testimony is admissible, either as 'science' or otherwise."

Judge Rakoff found that the ACE-V process of handwriting identification was not even close to being a scientific methodology. He applied the *Daubert* factors:

> *Testing:* To this Court's knowledge, no studies have evaluated the reliability or relevance of the specific techniques, methods, and markers used by forensic document examiners to determine authorship * * * . For example, there are no studies that have evaluated the extent to which the angle at which one writes or the curvature of one's loops distinguish one person's handwriting from the next. Precisely what degree of variation falls within or outside an expected range of natural variation in one's handwriting—such that an

examiner could distinguish in an objective way between variations that indicate different authorship and variations that do not—appears to be completely unknown and untested. Ditto the extent to which such a range is affected by the use of different writing instruments or the intentional disguise of one's natural hand or the passage of time. Such things could be tested and studied, but they have not been; and this by itself renders the field unscientific in nature. * * * Until the forensic document examination community refines its methodology, it is virtually untestable, rendering it an unscientific endeavor.

*Peer Review and Publication:* Of course, the key question here is what constitutes a "peer," because, just as astrologers will attest to the reliability of astrology, defining "peer" in terms of those who make their living through handwriting analysis would render this *Daubert* factor a charade. While some journals exist to serve the community of those who make their living through forensic document examination, numerous courts have found that the field of handwriting comparison suffers from a lack of meaningful peer review by anyone remotely disinterested.

*Rate of Error:* There is little known about the error rates of forensic document examiners. * * * Certain studies conducted by Dr. Moshe Kam, a computer scientist commissioned by the FBI to research handwriting expertise, have suggested that forensic document examiners are moderately better at handwriting identification than laypeople. For example, in one such study, the forensic document examiners correctly identified forgeries as forgeries 96% of the time and only incorrectly identified forgeries as genuine .5% of the time, while laypeople correctly identified forgeries as forgeries 92% of the time and incorrectly identified forgeries as genuine 6.5% of the time. * * * Although such studies may seem to suggest that trained forensic document examiners in the aggregate do have an advantage over laypeople in performing particular tasks, not all of these results appear to be statistically significant and the methodology of the Kam studies has been the subject of significant criticism. * * * [I]n a 2001 study in which forensic document examiners were asked to compare (among other things) the "known" signature of an individual in his natural hand to the "questioned" signature of the same individual in a disguised hand, examiners were only able to identify the association 30% of the time. Twenty-four percent of the time they were wrong, and 46% of the time they were unable to reach a result.

*Standards and Controls:* The field of handwriting comparison appears to be entirely lacking in controlling standards, as is well illustrated by Carlson's own amorphous, subjective approach to conducting her analysis here. At her deposition, for example, when asked "what amount of difference in curvature is enough to identify different authorship," Carlson vaguely responded, "[y]ou know, that's just a part of all of the features to take into context, so I wouldn't rely on a specific stroke to determine authorship." Similarly, when asked at the *Daubert* hearing how many exemplars she requires to conduct a handwriting comparison, Carlson testified:

> You know, that's really—that has been up for debate for a long time. I know that a lot of document examiners, myself included, I would prefer—I ask for a half a dozen to a dozen. That at least gives me a decent sampling. Others request 25 or

more. I feel like if you get too many signatures you have got so much information it is overwhelming and you tend to get lost in it.

Nor is there any agreement as to how many similarities it takes to declare a match. * * * And because there are no recognized standards, it is impossible to compare the opinion reached by an examiner with a standard protocol subject to validity testing. Furthermore, there is no standardization of training enforced either by any licensing agency or by professional tradition, nor a single accepted professional certifying body of forensic document examiners. Rather, training is by apprenticeship, which in Carlson's case, took the form of a two-year, part-time internet course, involving about five to ten hours of work per week under the tutelage of a mentor she met with personally when they were "able to connect."

*General Acceptance:* [H]andwriting experts certainly find general acceptance within their own community, but this community is devoid of financially disinterested parties. * * * A more objective measure of acceptance is the National Academy of Sciences' 2009 Report, which struck a cautious note, finding that while "there may be some value in handwriting analysis," "[t]he scientific basis for handwriting comparisons needs to be strengthened." The Report also noted that "there may be a scientific basis for handwriting comparison, at least in the absence of intentional obfuscation or forgery"—a highly relevant caveat for present purposes [because the contention in this case was that the defendant was *trying* to make a signature look forged]. This is far from general acceptance.

Judge Rakoff concluded that "[f]or decades, the forensic document examiner community has essentially said to courts, 'Trust us.' And many courts have. But that does not make what the examiners do science."

Judge Rakoff then considered whether the testimony could be qualified as "technical knowledge" that would assist the jury under *Kumho.* But he found that "the subjectivity and vagueness that characterizes Carlson's analysis severely diminishes the reliability of Carlson's methodology." He concluded as follows:

Several courts that have found themselves dubious of the reliability of forensic document examination have adopted a compromise approach of admitting a handwriting expert's testimony as to similarities and differences between writings, while precluding any opinion as to authorship. See, e.g., *Rutherford*, 104 F.Supp.2d at 1192–94. That Solomonic solution might be justified in some circumstances, but it cannot be here where the Court finds the proffered expert's methodology fundamentally unreliable and critically flawed in so many respects. * * * It would be an abdication of this Court's gatekeeping role under Rule 702 to admit Carlson's testimony in light of its deficiencies and unreliability. Accordingly, Carlson's testimony must be excluded in its entirety.

**Handwriting – PCAST and NAS Reports --- Overstatement---- testimony to a match:** ***United States v. Pitts*****,** 2018 WL 1116550 (E.D.N.Y. Feb. 26, 2018): In a prosecution for attempted

bank robbery, the defendant moved to exclude expert testimony that handwriting on a withdrawal slip at the crime scene was a match to the defendant's. The court denied the motion. The defendant relied heavily on Judge Rakoff's decision in *Almeciga*, *supra,* but the court relied on other precedent and determined that *Almeciga* was factually distinguishable. The court noted that *Almeciga* involved analysis of a forgery, "which is a more difficult handwriting analysis with a higher error rate." The court also noted that the expert in *Almeciga* "performed her initial analysis without any independent knowledge of whether the 'known' handwriting samples used for comparison belonged to the plaintiff." Third, "the expert conflictingly claimed that her analysis was based on her 'experience' as a handwriting analyst, but then claimed in her expert report that her conclusions were based on her 'scientific examination' of the handwriting samples." Given these differences, the court found *Almeciga* "inapposite and unpersuasive."

The court then went to other precedent in which the ACE-V method of latent fingerprint analysis had been admitted:

> The Second Circuit Court of Appeals has not addressed directly the admissibility of handwriting analysis. * * * Courts in this district, however, routinely admit handwriting evidence. *See, e.g.*, *United States v. Tarantino*, 2011 WL 1113504, at *7-8 (E.D.N.Y. Mar. 23, 2011) ('Subject to *voir dire* of the analyst's expert qualifications, the Court will permit the analyst to describe for the jury the similarities and differences between the Defendant's exemplar and the handwritten notes.'); *United States v. Brooks*, 2010 WL 291769, at *3 (E.D.N.Y. Jan. 11, 2010) ('[H]andwriting analysis is sufficiently reliable under *Daubert* and [Rule 702].'); *United States v. Jabali*, 2003 WL 22170595, at *2 (E.D.N.Y. Sept. 12, 2003) (citation omitted) ('Blanket exclusion [of handwriting analysis] is not favored, as any questions concerning reliability should be directed to weight given to testimony, not its admissibility.').

The court noted that the defendant had not demonstrated any flaws in the government expert's analysis. Rather, the defendant's push was for wholesale exclusion, which the court found not viable given all the precedent:

> As the Second Circuit has recognized, handwriting analysis is one area in which a juror, in some, but not all cases, may be as adept as an expert at comparing handwriting samples. *See United States v. Tarricone*, 21 F.3d 474, 476 (2d Cir. 1993) ("[The] jury could, on its own, recognize that the handwriting on the throughput agreement was not Barberio's."). Therefore, there is little reason to be concerned that a jury will place undue weight on the expert's ultimate opinion without carefully scrutinizing the basis for his conclusion. Given the liberal standard under *Daubert* and Rule 702 and the numerous cases in this district and circuit admitting expert opinion testimony regarding handwriting analysis, preclusion is neither appropriate nor warranted.
>
> > **Comment:** It is notable that in its argument for admissibility, the government relied in its brief on the citation to a handwriting case in the Committee Note to the 2000 amendment to Rule 702. According to the government, the Committee Note provides that "experience is a basis for qualifying an expert" --- which it surely does so provide --- and "specifically reference[s] handwriting

experts as an example of experts qualified based on experience." The court did not rely on this citation specifically, but did note it in its opinion. It can be argued that the government made too much of a single citation, written 9 years before the NAS report and 15 years before the PCAST report.

**Handwriting: *DRFP L.L.C. v. Republica Bouvariana De Venezuela*,** 2016 WL 3996719 (S.D. Ohio 2016): In a suit on promissory notes, with an allegation of forgery, the defendants offered the testimony of a handwriting expert, testifying to a match. The court rejected the plaintiff's motion to exclude the expert.

> Skye argues that Browne's methodology is inherently subjective and empirically unreliable. Skye points to Browne's own testimony that handwriting analysis is not scientific, it is not capable of empirical testing, all persons vary their signatures from one time to the next, no data can establish the frequency with which stylistic details recur in a person's signature, and it is impossible for Browne to determine his own error rate. Each of these critiques focuses on handwriting evidence in general, rather than on Browne's credentials or his specific methodology. The Sixth Circuit, however, has squarely ruled that handwriting analysis falls into the 'technical, or other specialized knowledge' component of Federal Rule of Evidence 702. *U.S. v. Jones*, 107 F.3d 1147, 1157-59 (6th Cir. 1997).
>
> As in *Jones*, Browne's specific testimony in this case outlined the procedure that he uses when comparing a questioned signature with a known one. He then focused on enlargements of the signatures at issue in this case and described to the finder of fact, in some detail, how he reached his ultimate conclusions. His testimony enabled the factfinder to observe firsthand the parts of the various signatures on which he focused. As a result, the Court credits Browne's expert testimony as well as his conclusions that: there is definite evidence that Puigbó's signatures on the Notes are forgeries; there is a strong probability that the Fontana' signatures on the Notes are forgeries; and it is probable that Cordero's signatures on the Notes are forgeries.

**Handwriting --- handprinting, excluded: *United States v. Johnsted,*** 30 F. Supp. 3d 814 (W.D. Wis. 2013): The defendant moved to exclude the report and expert testimony of the government's handwriting analyst, who would opine that the hand printing on the communications at issue belonged to the defendant. The court granted the motion (!) ruling that "the science or art underlying handwriting analysis falls well short of a reliability threshold when applied to hand printing analysis." The court concluded that the government's showing "indicates only that current standards of analysis are the same for handwriting and hand printing, not that they should be. The absence of such evidence might be less important if a consensus existed that hand printing and handwriting can reliably be analyzed in the same way, but that is not the case." It stated that "the limited testing that exists is inconclusive as to the reliability of hand printing analysis. Thus, while the government appears to be technically correct that standards exist controlling the technique's

operations * * * that fact does not tend to establish reliability without some evidence that those standards are actually appropriate in the hand printing context." The court also noted that peer review and publication regarding hand printing was limited. The court concluded as follows:

> The proffered expert testimony here . . . does not even qualify as the 'shaky but admissible' variety. It is testimony based on two fundamental principles, one of which has not been tested or proven, and neither of which have been proven sufficiently reliable to assist a lay jury beyond its own ability to assess the similarity and differences in the hand printing in this case.

**Comment: While the court's exclusion was specific to hand *printing*, it was no fan of handwriting comparison either. The court argued that there are two fundamental premises of handwriting identification that have not been validated. The court explained as follows:**

> The government cites to a number of studies as demonstrating that handwriting is unique, including some showing that twins's writings were individualistic and others demonstrating computer software's ability to measure selected handwriting features. Defendant contends that these studies are problematic, and that even one of the government's own studies states that "the individuality of writing in handwritten notes and documents has not been established with scientific rigor." * * *
>
> Even accepting that studies have adequately tested the first principle—that all handwriting is unique—the government does not dispute the troubling lack of evidence testing or supporting the second fundamental premise of handwriting analysis. Even more troubling is an apparent lack of double blind studies demonstrating the ability of certified experts to distinguish between individual's handwriting or identify forgeries to any reliable degree of certainty. This lack of testing has serious repercussions on a practical level: because the entire premise of interpersonal individuality and intrapersonal variations of handwriting remains untested in reliable, double blind studies, the task of distinguishing a minor intrapersonal variation from a significant interpersonal difference—which is necessary for making an identification or exclusion—cannot be said to rest on scientifically valid principles. The lack of testing also calls into question the reliability of analysts's highly discretionary decisions as to whether some aspect of a questioned writing constitutes a difference or merely a variation; without any proof indicating that the distinction between the two is valid, those decisions do not appear based on a reliable methodology. With its underlying principles at best half-tested, handwriting analysis itself would appear to rest on a shaky foundation. See *Deputy v. Lehman Bros., Inc.,* 345 F.3d 494, 509 (7th Cir.2003) (noting that among courts, "there appears to be some divergence of opinion as to the soundness of handwriting analysis").

**Paint Identification: *United States v. Pugh*, 2009 WL 2928757 (S.D. Miss.):** The court rejected a challenge to an expert's forensic paint analysis. It stated: "The Standard Guide for Forensic Paint Analysis and Comparison of the American Society for Testing and Materials [ASTM], which [the paint expert] relied on in her testing, is widely accepted by engineers and other professionals in the field of materials testing. [Her] testimony is sufficiently reliable and relevant and may assist the trier of fact in understanding the evidence or determining a fact in issue, as required by Rule 702."

**Serology tests: *United States v. Christensen***, 2019 WL 651500 (C.D. Ill.): In a kidnapping prosecution, the defendant moved to exclude serology test results and requested a *Daubert* hearing on the reliability of the methods used. The defendant challenged the reliability of the Takayama hemochromogen test used to confirm the presence of blood. The court denied the defendant's motion, finding the Takayama test to be reliable:

> Defendant moves for a *Daubert* hearing on the reliability of the Takayama hemochromogen test and the methods of the law enforcement official who performed that test. The United States responds that such a hearing is unnecessary because the test has been the standard confirmatory test for blood for over 100 years, and the law enforcement official's application of this reliable method is a subject appropriate for cross-examination at trial, not a pre-trial hearing. The Court held an evidentiary hearing on this matter on February 11, 2019, effectively granting this aspect of Defendant's Motion.
>
> At that hearing, Ms. Conway testified that the Takayama hemochromogen test is the prevailing confirmatory blood test in the field. She stated that multiple studies have confirmed that the Takayama test does not react to substances other than blood, and that the FBI has control testing protocols to avoid errors. Ms. Conway further testified that standard procedure in conducting the Takayama hemochromogen test does not involve photographic or descriptive records other than documenting whether the analyst determined that it was positive or negative. According to Ms. Conway, a second examiner always checks positive results to ensure accuracy. The Court finds that the Takayama test is well-known, widely used, not prone to errors, subject to peer review, and applied reliably in this case. Thus, Defendant's Motion to exclude the test results on reliability grounds is denied.

**Shooting reconstruction: *Merritt v. Arizona***, 2019 WL 2549696 (D. Ariz.) (Campbell, J.): This action was a product of the I-10 freeway shootings in Phoenix, AZ. The plaintiff brought section 1983 claims relating to his prosecution for the shootings. The Arizona Department of Public Safety identified plaintiff's weapon, a 9mm handgun, as the source for four freeway shootings. The plaintiff contended that he pawned the gun more than four hours before the shooting of a tire occurred. He proffered experts in shooting reconstruction to testify about the timing of the shooting. The State of Arizona offered rebuttal experts Noedel and Grant to testify about the possibility that the tire in question was shot before the gun was pawned, but retained air pressure

for a time after the gun was pawned. The plaintiff moved to exclude these experts under Rule 702 and *Daubert*.

Noedel, an expert in reconstructing shooting incidents, would testify on the question whether the tire at issue could hold air pressure after being struck by a ricocheted bullet. The purpose of his opinion was to attack the plaintiff's experts' testimony that the tire must have lost pressure immediately after being shot, which would make it impossible for the shooting to be caused by the defendant's pawned gun. Noedel concluded that "there are several unknown variables that make it impossible to say, based on analysis of the tire alone, where and when [the] tire was struck, and whether it retained air after being struck. Among the possibilities, none of which can be determined with any degree of certainty, is that the tire retained air after being shot." The court found that Noedel could testify to flaws in the plaintiff's experts' opinions and the variables that make it difficult to replicate the exact damage to the tire. However, the court found no basis for Noedel to go past rebuttal and offer testimony suggesting affirmatively that the tire could have retained pressure after the shooting. Noedel only conducted one test, and in that test the tire lost air immediately. Nothing else he relied on supported his opinion that the tire could retain air after being shot with a ricocheted bullet. The court stated that "when an expert's testimony is not based on independent research or publications, he must present some "other objective, verifiable evidence that the testimony is based on 'scientifically valid principles.'" Here, the court found too great of an analytical gap between the data and the opinion.

Grant was offered as an expert in forensic tire analysis. He offered four conclusions: (1) based on the small size of the puncture, the angle of the puncture, and the loose flaps of rubber inside the puncture, the tire may only have lost minimal air at the time it was shot; (2) it is well known in the tire industry that small punctures do no always leak immediately; (3) it is impossible to determine when the tire was shot to any degree of engineering certainty because of the sporadic air loss the tire experienced while driving; and (4) plaintiff's expert (who tested the BMW tire in question after the shooting, after it had been driven, and after chemical analysis) had inaccurate results because he did not test the tire at the time it was shot. The Court found this expert's testimony to be reliable because of Grant's extensive experience with tires and shooting reconstruction. The court found that Grant's opinion on scientific principles of tires air pressure was necessary for rebuttal because the plaintiff's experts' testimony is "the kind of testimony whose reliability depends heavily on the knowledge and the experience of the expert, rather than the methodology or theory behind it."

> **Comment: This is a good example of expert opinion that avoided overstatement. If anything, it was the plaintiffs' experts who might have overstated their conclusions, and the defendant's reconstruction expert was basically explaining the overstatement.**

**Toolmarks --- Expert unqualified: *United States v. Smallwood,*** 2010 WL 4168823 (W.D. Ky.): The defendant moved to exclude the government's expert testimony that the knife found by law enforcement was the knife that slashed the tires of a vandalized vehicle. The court granted the motion, finding that the witness was unqualified --- the witness was a firearms expert, not a toolmarks expert. The court provided some helpful background:

> According to The Association of Firearm and Tool Mark Examiners ('AFTE'), a match is determined if a "specific set of [tool marks] demonstrates sufficient agreement in the pattern of two sets of marks." See National Research Council of the National Academies, Strengthening Forensic Science in the United States: A Path Forward (2009) (hereinafter "Strengthening"). AFTE standards acknowledge that these decisions involve subjective qualitative judgments and that the accuracy of examiners' assessments is "highly dependent on their skill and training." * * * Even with new technology, "the decision of the [tool mark] examiner remains a subjective decision based on unarticulated standards."
>
> By AFTE's own standard, there is no reliability in the instant case. While Gerber is most likely an expert in firearm identification, that expertise cannot be transferred to other marks. * * * Given the subjective nature of firearm and tool mark identification, the relative frequency of firearm cases compared to tool mark cases—and knife cases in particular—necessarily makes a tool mark identification less reliable than a firearm identification. This goes directly to the "skill and experience an examiner is expected to draw on." Strengthening, pg. 155.
>
> Similar to polygraphs, it is important for this Court to thoroughly examine the underlying reliability of a tool mark identification before allowing expert testimony at trial. * * * A thorough examination of the facts and science present in this case must lead to a finding of unreliability and exclusion.

**Toolmarks: Court Order Limiting Overstatement Consistently with DOJ Uniform Standards: *United States v. Haig*,** 2019 WL 3683584 (D. Nev.): Haig was charged in connection with the October 2017 Las Vegas music festival mass shooting. Boxes of ammunition were found in the shooter's room addressed from the defendant. Haig admitted that he sold the shooter ammunition, but claimed that he did not manufacture the ammunition. He claimed the ammunition from the Las Vegas crime scene would not have the toolmarks of his manufactured ammunition. The government's toolmark expert intended to testify on the process of reloading ammunition, identifying ammunition, identifying toolmarks, and his conclusions in this case. The court rejected the defendant's argument that the methodology of toolmark identification was unreliable, stating that the Ninth Circuit "has consistently affirmed the admission of toolmark identification evidence and expert testimony of that evidence. See, e.g., United States v. Cazares, 788 F.3d 956, 988 (9th Cir. 2015); see also, e.g., United States v. Felix, 727 Fed. App'x 921, 924–925 (9th Cir. 2018). Smith's anticipated testimony falls well-within the type of evidence which the Ninth Circuit has previously considered. Thus, Smith's methods are reliable and his testimony is admissible."

The court noted, however, that "scientific certainty" is an improper characterization of expert conclusions based on toolmark identification methods --- because the conclusions are based on subjective judgment and have not been validated as science. But the court also emphasized that "[t]he government concedes this point and represents that Smith will not provide such testimony as it would violate the Depart of Justice's uniform standards for testimonies and reports."

While recognizing the importance of the DOJ standards, the court stated:

> Nevertheless, the court will exercise caution and exclude Smith from testifying that he reached his conclusions with scientific certainty or other similar standards of reasonable certainty.

**Voice identification:** ***United States v. Felix***, 2019 WL 2744621 (S.D. Ohio): The defendant was indicted for armed bank robbery and sought to introduce expert testimony to rebut the voice identification procedures conducted by the government. The expert would opine that (1) the earwitness procedure used for voice identification was untested and unreliable, (2) Felix's voice did not have any anomalies that would draw attention to his voice, (3) memory research is relevant to police investigators' results, and (4) the audio from the recorded traffic stop was poor quality, the signal was enhanced for analysis, and the hearing of listeners could be a factor.

The government did not dispute the expert's qualifications, but the court conducted an independent analysis of the expert's qualifications anyway. The court noted that the expert had a Ph.D. in Psychoacoustics, was a Professor of Speech and Hearing Sciences, and published and presented extensively on speech and voice analysis. The court concluded that the expert could opine on the science of voice analysis and audiology as well as how people recognize vocal patterns, but he could not testify as to whether police practices of voice identification were appropriate or the credibility of victims' voice identifications.

To analyze reliability, the court cited to the *Daubert* factors (testability, peer-reviewed, rate of error, standards and controls, general acceptance). The government argued that the expert's opinion was based on decades-old research and that voice identification or "earwitness" research is less developed and is usually not accepted by courts. The government also cited to Rule 901's advisory notes that state "voice identification is not a subject of expert testimony." However, the court mentions that the advisory notes were from 1972 and relied on cases from 1935-1952, also decades old, as the government claimed of the expert's research. However, the defense provided an updated supplemental research list relied upon by the expert which were significantly more recent. The court found that based on the updated research *and* the expert's background, education, and experience in the relevant areas, there was a sufficiently reliable foundation to support his area of expertise, but once again, not enough to reliably support his opinions on law enforcement procedures or victim credibility.

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# TOWARD A MORE APPARENT APPROACH TO CONSIDERING THE ADMISSION OF EXPERT TESTIMONY

## INTRODUCTION

Over a quarter century ago, *Daubert v. Merrell Dow Pharmaceuticals, Inc*. reaffirmed the trial court's role as "gatekeeper" for the admission of scientific expert evidence, to screen it not only for relevance, but for reliability. [1] To discharge this gatekeeper role, a trial court must make a preliminary determination whether the expert's opinion evidence meets the admissibility standards of Federal Rule of Evidence 702, which in turn requires application of Federal Rule of Evidence 104(a)'s preponderance test. Trial judges are cautioned not to unduly assess the validity or strength of an expert's scientific conclusions, and the Supreme Court has said that "shaky but admissible evidence" [2] should be left for a jury's consideration where it can be tested by cross-examination and contrary evidence. But application of these principles can be difficult, and appellate review can be frustrated, even under a deferential abuse of discretion standard, where trial courts are not clear about what standard they are applying. Worse, some trial and appellate courts misstate and muddle the *admissibility* standard, suggesting that questions of the sufficiency of the expert's basis and the reliability of the application of the expert's method raise questions of weight that should be resolved by a jury, where they can be subject to cross-examination and competing evidence. ***2040** The state of affairs has prompted the United States Judicial Conference's Advisory Committee on the Federal Rules of Evidence to consider possible amendment to Rule 702 to reiterate the need for proper application of Rule 104(a)'s threshold to each requirement of Rule 702.

This Article highlights lingering confusion in the caselaw as to the proper standard for the trial court's discharge of its gatekeeping role for the admission of expert testimony. The Article urges correction of the faulty application of *Daubert*'s admonition as to "shaky but admissible" evidence as a substitute for proper discharge of the trial court's gatekeeper function under Rule 104(a). The Article concludes with several suggestions for trial and appellate courts to consider for better decisionmaking in discharging their duty to apply Rule 104(a)'s preponderance standard to the elements of Rule 702.

## I. THE DAUBERT STANDARD IN APPLICATION

In 1993, the Supreme Court decided *Daubert*, a personal injury case involving an antinausea drug, and revolutionized how trial courts are to consider the admission of scientific and technical expert evidence. In eschewing the *Frye* [3] "general acceptance" test as inconsistent with the "liberal thrust" of the subsequent Federal Rules of Evidence, [4] the Court simultaneously expanded and restricted the availability of expert testimony. It liberalized the availability of evidence because the *Frye* test became, under the language of Rule 702, but one of several factors for a court to consider when determining whether the proffered evidence is valid and reliable: whether the theory or technique can be (or has been) tested; whether it has been subjected to peer review and publication; its known or potential rate of error; the existence and maintenance of standards controlling its operation; and whether it has attracted "widespread acceptance within a relevant scientific community." [5] At the same time, the Court tightened the admissibility threshold by charging trial judges to act as "gatekeepers" against the admission of unreliable expert opinion. [6]

In doing so, the Court reminded trial judges that, as with other questions of preliminary admissibility, a court "[f]aced with a proffer of expert scientific testimony ... must determine at the outset ... whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue." [7] In a footnote, the Court noted that "[t]hese matters should be established by a preponderance of proof," pursuant to Rule 104(a). [8]

***2041** Rule 702 was amended in 2000. [9] In addition to requiring that the expert be qualified to testify about scientific knowledge that will assist the trier of fact, the Rule added further foundational requirements, now found in sections (b), (c), and (d), that the testimony be based on sufficient facts or data, the testimony be the product of reliable principles and methods, and the expert have reliably applied the principles and methods to the facts of the case, respectively. [10] In light of *Daubert*'s reference to Rule 104(a), the Advisory Committee expressly stated that the trial judge determine these elements by a preponderance before allowing such testimony into evidence. [11] The extensive Advisory Committee note further explained the limits of the preponderance standard in this context. For example, competing and contradictory expert testimony can meet the standard, as proponents "do not have to demonstrate to the judge by a preponderance of the evidence that the assessments of their experts are *correct*," but only that "their opinions are reliable"--a lesser standard. [12] Moreover, the standard can be met even where competing experts rely on competing versions of the facts, as it is not the trial judge's role to believe one version of the facts over another.

After *Daubert*, the Court has clarified that this gatekeeper function applies to all expert testimony, not just that based on science. [13] Over the years, courts have supplemented the various *Daubert* factors for determining reliability. They include whether the opinions are litigation driven, or naturally flow from independent scientific research; whether the expert has accounted for obvious alternative explanations; whether the expert has employed the same level of rigor as required in the relevant field; and whether the field of expertise is known to reach reliable results. [14]

Ever since *Daubert*, the Court has expressed conflicting views on the ease with which trial judges will be able to discharge their gatekeeper role. [15] For ***2042** example, in *General Electric Co. v. Joiner*, [16] the Court retrenched from its previous admonition against judging the strength of an expert's conclusions by recognizing that on occasion an expert may "unjustifiably extrapolate[ ] from an accepted premise to an unfounded conclusion" [17] such that the trial judge may find that there is "simply too great an analytical gap between the data and the opinion proffered" to rely on the expert's *ipse dixit* to make the connection. [18] Justice Breyer, after acknowledging that *Daubert* "ask[s] judges to make subtle and sophisticated determinations" about scientific methodology and its relation to the conclusions offered by an expert witness, nevertheless predicted that given the "offer of cooperative effort" from the scientific community (there, the *New England Journal of Medicine*) and the "various Rules-authorized methods for facilitating the [trial] courts' task" (such as appointing a Rule 706 [19] advisory expert), implementing *Daubert*'s gatekeeping task "will not prove inordinately difficult." [20] Justice Stevens, in contrast, noted that "*Daubert* quite clearly forbids trial judges to assess the validity or strength of an expert's scientific conclusions, which is a matter for the jury." [21] Justice Stevens saw a distinct difference between methodology and conclusions, relying on *Daubert*'s statement 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." [22]

Not only is it "not always a straightforward exercise to disaggregate method and conclusion," [23] it is also not always easy to assess when the Rule's foundational requirements--namely, sufficiency of the basis of a proposed opinion and whether the opinion resulted from reliable application of valid principles and methods--falls short of the preponderance standard for threshold admissibility. While courts no doubt acknowledge and grapple with the issue before determining admissibility, some courts have defaulted to invoking the Supreme Court's caution that Rule 702 is not meant to prohibit "shaky but admissible" evidence and have relegated the issue to the jury's consideration on the grounds it can be subject to cross-examination and contrary proof. In doing so, some of these courts have inadvertently ***2043** applied Rule 104(b)'s standard for admissibility, in contravention of *Daubert*. [24] Some courts merely find that there is sufficient evidence, *if believed*, for a reasonable juror to find that the expert has a sufficient basis for his opinion or that he reliably applied the principles and methods he claims. Other courts conclude that the application of a valid methodology should be deemed unreliable only if it skews the methodology itself. Rule

104(a) and the *Daubert* line of cases require, however, that the trial judge *actually determine* whether it is more likely than not that the expert has met these threshold requirements of Rule 702.

In this respect, therefore, some courts appear to be abdicating their charge under the Federal Rules of Evidence and *Daubert* and its progeny to make the hard call on admissibility. The end result in such cases is to relegate to the jury the very decisions Rule 702 contemplates to be beyond jury consideration. In other cases, however, it is more difficult to tell what the courts are actually doing, as they do not articulate their reasoning in a way that demonstrates how they are applying the preponderance standard to the required elements of the Rule.

## II. COURTS THAT SEEMINGLY MISSTATE AND/OR MISAPPLY THE RULE 104(a) STANDARD

Numerous cases have stated that questions as to sufficiency of basis or reliability of application raise questions of weight that are necessarily for a jury, and not questions of admissibility for the court. Some of these courts may very well have actually applied Rule 104(a)'s standard; or, they may have applied Rule 104(b)'s standard. It is simply difficult to tell, and the courts' misstatement of the legal standard confounds a clear determination.

Since *Joiner*, it has been settled that an appellate court reviews the trial judge's Rule 702 admissibility determination for an abuse of discretion--the same standard that governs most trial court evidentiary decisions. Thus, an admissibility ruling as to evidence will not be reversed unless "manifestly erroneous."[25] Inherent in this highly deferential standard is a certain "play in the joints" that permits divergent results on the same evidence, depending on the judge's explanation for the exercise of discretion. Consequently, as the *Joiner* Court observed, "[a] court of appeals applying 'abuse-of-discretion' ***2044** review to such rulings may not categorically distinguish between rulings allowing expert testimony and rulings disallowing it."[26] This is yet another reason trial and appellate courts would be best served to be as clear as possible in their reasoning and to avoid generalized misstatements that questions as to sufficiency of basis and reliable application of method go to weight and not admissibility.

What follows is a sampling of illustrative cases that have been identified to the Advisory Committee as evidence that courts are abdicating their gatekeeper role.[27] This selection is by no means intended to be complete, nor is it meant to suggest (except perhaps for the Ninth Circuit) a consistent circuit-wide problem. What it tends to show is that in many instances the extent of the problem is murky. A closer look at the facts of these cases suggests that some courts may be hewing closer to the Rule 702 standard than the decisions suggest.

### *A. First Circuit*

*Milward v. Acuity Specialty Products Group, Inc.*,[28] has been cited as a prime example of the problem. The question in that case was the admissibility of testimony by Dr. Martyn Smith, a toxicologist, as to general causation--that exposure to benzene can cause acute promyelocytic leukemia, which the plaintiff had contracted.[29] After a four-day evidentiary hearing, the district court concluded that the expert's testimony lacked sufficient demonstrated scientific reliability under Rule 702.[30] The First Circuit reversed.[31] After citing the requirements of Rule 702 and *Joiner*'s acknowledgment that "conclusions and methodology are not entirely distinct from one another," the court engaged in a lengthy analysis of Dr. Smith's "weight of the evidence" methodology for arriving at his opinion.[32] This methodology was drawn from the work of Sir Austin Bradford Hill, who concluded that an association between a disease and a feature of the environment should not be deemed causal without a proper weighing of several factors, including the strength, frequency, consistency, and specificity of the association; the temporal relationship; the dose-response curve; biological plausibility; coherence of the explanation with generally known factors of the disease; experimental data; ***2045** and analogous causal relationships.[33] The weight of the evidence approach involves the drawing of an "inference to the best explanation."[34]

The First Circuit found that the district court had abused its discretion in rejecting the sufficiency of some of the Hill criteria on which Dr. Smith relied, [35] stating that the alleged flaws "go to the weight of Dr. Smith's opinion, not its admissibility." [36] The court noted that "[t]here is an important difference between what is unreliable support and what a trier of fact may conclude is insufficient support for an expert's conclusion." [37] Finding that the district court exceeded its gatekeeper role, the court stated that "[t]he soundness of the factual underpinnings of the expert's analysis and the correctness of the expert's conclusions based on that analysis are factual matters to be determined by the trier of fact." [38] So, when the factual underpinning is "weak," it is a matter "affecting the weight and credibility of the testimony," which is for a jury's determination. [39] It was sufficient for the court of appeals that Dr. Smith opined that, in his opinion, he weighed these flaws in his weight of the evidence methodology and nevertheless concluded there was general causation.

Putting aside any criticism of the "weight of the evidence" approach, [40] the problem with the court's analysis is that it appears to require a preponderance standard for application of Rule 702(c) (reliable method) but not for Rule 702(b) (sufficiency of basis). This, even though the trial judge had found that the expert's assumptions were "plausible" but not "based on sufficient facts and data to be accepted as a reliable scientific conclusion"--a Rule 104(a) determination. [41] The court of appeals's error may have resulted in part from the fact that it cited cases decided before the 2000 amendment to Rule 702, a problem not unique to this case. [42]

### *2046 *B. Eighth Circuit*

*United States v. Gipson* [43] involved the use of DNA evidence to link a baseball cap left at the scene of a bank robbery to the defendant. Part of the government's case rested on a forensic expert's use of AmpF/STR Profiler Plus and AmpF/STR Cofiler multiplex kits to apply the Sort Tandem Repeat (STR) profiling methodology to the DNA found on the cap so she could create the relevant DNA profiles of the dominant DNA within the mixture found on the cap. [44] Before trial, the defendant moved to suppress the expert's testimony as unreliable based on the application of the kits; the defendant did not challenge the reliability of the STR DNA methodology itself. [45] The government argued that the reliability of the use of the kits went to the weight, not the admissibility, of the challenged evidence. [46] The trial court denied the motion, and the court of appeals affirmed. [47] While the appellate court cited to *Daubert*, it never cited the then-amended Rule 702. In citing to cases predating the 2000 revisions, the court stated that "this court has drawn a distinction between, on the one hand, challenges to a scientific methodology, and, on the other hand, challenges to the *application* of that scientific methodology." [48] So, "when the *application* of a scientific methodology is challenged as unreliable under *Daubert* and the methodology itself is otherwise sufficiently reliable," the court said, "outright exclusion of the evidence in question is warranted only if the methodology 'was so altered [by a deficient application] as to skew the methodology itself.'" [49] The problem is that this construction ignores Rule 702(d), which requires that the trial court find by a preponderance that the expert has reliably applied the methodology to the facts of the case, and effectively creates a rebuttable presumption in favor of admissibility. It may be that the court nevertheless found by a preponderance that the application of the kits to the methodology was reliable, but that is not clear from the opinion, and the statement of law is incorrect.

The difficulty of conducting a proper Rule 104(a) analysis under Rule 702 is illustrated by *Kuhn v. Wyeth, Inc.* [50] There, the parties disputed whether the use of the defendant's hormone replacement drug, Prempro, caused the breast cancers of two plaintiffs, both of whom used the drug for three years ***2047** or less. [51] The plaintiffs proffered Donald Austin, MD, who opined that this short-term use of the drug increased their cancer risk. [52] Wyeth challenged his opinions, and the court held a lengthy *Daubert* hearing, ultimately excluding his testimony because the expert failed to discredit a key Women's Health Initiative (WHI) study that found no risk from short-term drug use and because he failed to base his opinions on epidemiological studies that "reliably support[ed] his position." [53] The court of appeals reversed. [54] As to the WHI study, the court found, quite properly, that the trial court erroneously put the burden on the expert to exclude the study, when Rule 702 requires that the expert demonstrate he "arrived at his contrary opinion in a scientifically sound and methodological fashion." [55] Dr. Austin had provided his opinion that the WHI study did not preclude his opinion on short-term risk because it was designed to measure

heart disease, involved a study population at a much lower risk of cancer, and involved participants who had a larger gap time between menopause and beginning hormone therapy than women who began their hormone therapy on their own. [56] The study found women using hormone therapy for more than five years to have a statistically significantly increased risk of breast cancer, which Dr. Austin found supportive of his opinion on short-term risk. [57] As to this aspect of the case, the court of appeals properly applied Rule 104(a)'s preponderance standard to the methodology the expert used.

The court of appeals also reversed the district court on the sufficiency of basis as well. This aspect of the court's ruling is more suspect. The record revealed that the selection of studies Dr. Austin relied upon was made by plaintiffs' counsel, a fact that no doubt influenced the trial court. [58] And, according to the court, Dr. Austin had ignored "a wealth of studies showing no increased risk of breast cancer from short-term Prempro use," which led to an accusation he had "cherry picked" the handful of studies he relied upon. [59] Indeed, the record showed, the expert "had never really thought about the short-term use issue before Plaintiffs' counsel presented it to him shortly before the recent *Daubert* challenge." [60] Moreover, during the *Daubert* hearing, Dr. Austin conceded that two studies he had listed on his declaration as supportive of his opinion on causation were not and should not have been included. [61] Apart from the WHI study, this left the "Million Women Study," the "French Teachers Study," and an American Cancer Society ***2048** study--all observational studies--as the basis for his opinion that short-term use causes breast cancer, even though he conceded that observational studies were "not as good for demonstrating cause and effect." [62] The trial court had found too great an analytical gap between the underlying studies and Dr. Austin's opinion. [63] But the court of appeals found that Dr. Austin's studies provided "adequate foundation" [64] for his opinion, citing *Daubert*'s admonition 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." [65] Although the trial court found the American Cancer Society study (which found no risk below two years of use, but a significant increase at two and three years) [66] unreliable because it failed to account for prior use of hormone therapy, the appellate court was satisfied that the study purported to exclude women with unknown duration of use. As to the Million Women Study, an English study, the trial court considered it unreliable because it analyzed the use of Prempro for "five years or less" [67] without breaking out three years or less, involved other formulations of estrogen, and did not measure use after enrollment--a fact the judge found "irreconcilable with 'his position that when looking at short-term use, one must be quite precise.'" [68] But the court of appeals found the lack of material difference in the other formulations of estrogen and Dr. Austin's decision to add 1.2 years to those participants with less than one year of use to be adequate responses. [69] Finally, the trial court had found the French Teachers Study unreliable because it admittedly provided no analysis of Prempro at three years or less and did not separate Prempro use from other formulations. [70] Again, the court of appeals determined that the differences in formulations of estrogen failed to render the study unreliable. [71]

These conclusions by the court of appeals are hard to explain. To say that an underestimate of 1.2 years in the Million Women Study "do[es] not create so great an analytical gap between the data and the opinion as to render the opinion inadmissible" [72] when the issue in the case involves causation for use of three years or less seems to be an abdication of the gatekeeping function and an application of Rule 104(b). Moreover, the trial court ***2049** had found that, based on Dr. Austin's prior testimony, the studies failed to meet his own previously set criteria of accurate characterization of exposure to the drug, identification of the specific drug formulation, and analysis of Prempro separately. [73] For the court of appeals, this was merely a reason to "call his credibility into question." [74] The court even rejected the fairly obvious cherry picking that occurred, ostensibly at the behest of plaintiffs' counsel, with the statement that while "[t]here may be several studies supporting Wyeth's contrary position, ... it is not the province of the court to choose between the competing theories." [75] These were not theories, of course, but rather factual bases for the opinions. As the dissent suggested, it surely seemed that in the end the district court properly exercised its gatekeeping function by concluding that the proffered opinion simply lacked a sufficient, reliable basis. [76]

***C. Fourth Circuit***

*Bresler v. Wilmington Trust Co*. [77] was a breach of contract case involving life insurance held in a trust for tax purposes. Plaintiff beneficiaries contended that the defendants breached an agreement to lend money to maintain and fund certain investments related to the life insurance policies. [78] Defendants challenged the plaintiffs' accounting expert's damages calculations on the grounds they included certain cost-of-insurance values, used an "invalid interest spread," and improperly calculated the present value of the future net trust shortfall. [79] Defendants contended that the expert's calculations were "riddled with mistakes" and "wholly unreliable." [80] Acknowledging that these were challenges made under Rule 702 and *Daubert* to the factual sufficiency of the method used, the court affirmed the district court's refusal to exclude the opinion testimony. [81] According to the court, "'questions regarding the factual underpinnings of the [expert witness'] opinion affect the weight and credibility' of the witness' assessment, 'not its admissibility.'" [82] Without explanation, the court concluded that the defendants' challenge amounted to a "disagreement" with the values the expert chose for certain variables in his opinion and consequently "'affect[ed] the weight and ***2050** credibility' of [the expert's] assessment, not its admissibility." [83] As a general rule, the Fourth Circuit's statement effectively vitiated the application of Rule 104(a) to Rule 702(b). Here, too, it may be that the court was effectively saying that there *was* a showing by a preponderance that the expert's opinion had sufficient basis under Rule 702(b), but in light of the claim that the bases of the opinions were "riddled with mistakes" and "wholly unreliable," and without any analysis, one cannot know for sure. [84]

### *D. Ninth Circuit*

Ninth Circuit caselaw appears to interpret *Daubert* as liberalizing the admission of expert testimony, which may explain decisions from that circuit that set it apart from most others. [85] *City of Pomona v. SQM North America Corp*. [86] is illustrative. The City of Pomona sued the importer of natural sodium nitrate from the Atacama Desert in Chile between 1927 and the 1950s, contending that perchlorate impurities in the nitrate, which had been used in fertilizer, contaminated its groundwater. [87] Central to the city's claim was Dr. Neil Sturchio, the city's causation expert, who opined that his fourstep "stable isotope analysis" led him to conclude that the perchlorate found in the city's water had the same distinctive isotopic composition as the perchlorate from the Atacama Desert. [88] Upon the defendant's motion in limine, the trial judge held a *Daubert* hearing and excluded the expert's opinions as unreliable on several grounds. [89] The Ninth Circuit reversed, citing the proposition that "[s]haky but admissible evidence is to be attacked by cross examination, contrary evidence, and attention to the burden of proof, not exclusion." [90]

***2051** To be sure, the Ninth Circuit properly noted that a lack of general acceptance was not grounds alone to exclude an expert's methodology, especially if there is a "recognized minority of scientists in the[ ] field" who support it. [91] Likewise, that the expert did not retest his results himself was not a basis to reject his evidence, where other independent laboratories have tested the methodology. [92] But the court's blanket conclusion that challenges to the expert's deviation from the protocols merely raised questions as to the weight of the evidence and presented a question for the fact finder, not the trial court, appears facially wrong.

The Ninth Circuit properly recited the 2000 version of Rule 702 and its Advisory Committee note to the amendments, [93] but then it rested its key statements on *United States v. Chischilly*, [94] a 1994 opinion that predated *Daubert* and, more importantly, the 2000 changes to Rule 702, for the proposition that an argument as to "adherence to protocol ... typically is an issue for the jury." [95] The court specifically rejected *In re Paoli Railroad Yard PCB Litigation*, [96] which held that "any step that renders the analysis unreliable ... renders the expert's testimony inadmissible." [97] Instead, and again citing *Chischilly*, the court stated that in the Ninth Circuit expert evidence "is inadmissible where the analysis 'is the result of a faulty methodology or theory as opposed to imperfect execution of laboratory techniques whose theoretical foundation is sufficiently accepted in the scientific community to pass muster under *Daubert*.'" [98] According to the court, a "more measured approach" to an expert's adherence to methodological protocol is more "consistent with the spirit of *Daubert* and the Federal Rules of Evidence" because they place a "strong emphasis on the role of the fact finder in assessing and weighing the evidence." [99]

The Ninth Circuit appears to set its own standard for assessing admissibility of expert opinion apart from Rule 702. Notably, in rejecting *In re Paoli*, the Ninth Circuit disregarded the 2000 Advisory Committee note's favorable citation to the case for the proposition that under Rule 702(d) the methodology must be applied accurately to every step. [100] What confounds the analysis is that the Ninth Circuit ultimately may have been correct on the result, despite these apparent misstatements of the law, when one examines the court's statements as to the factual record. The court noted the district ***2052** court's lack of explanation as to why the expert's failure to adhere to protocols was significant enough to warrant exclusion, and the expert did testify that he followed the protocols. [101] In this light, if the failure to adhere to protocols was relatively minor and did not undermine the reliability of the method or its application, the result comports with current law. For questions of weight frequently arise, even under a proper Rule 104(a) analysis as to Rule 702. But such questions do not automatically render it a jury question. To suggest otherwise, as this case does, misreads Rule 702 and ignores the proper standard. The issue is whether the deviations from the proper method are enough to render the principles and methods not reliably applied--and that's a determination that Rule 702(d) requires the trial judge to make. [102]

### *E. Eleventh Circuit*

*Quiet Technology DC-8, Inc. v. Hurel-Dubois UK Ltd.* [103] demonstrates the difficulty in asking courts of general jurisdiction to delve into sophisticated scientific questions that arise in cases dependent on technical experts. In this case, Quiet, which manufactured noise-reducing "hush kits" to retrofit DC-8 jet engines, contracted with Hurel to make a compatible thrust reverser, a necessary component for stopping upon landing. Quiet contended that the thrust reversers were defective because their linkages blocked the engine air flow and thereby significantly impaired the efficiency of performance. Hurel blamed the problem on the design of Quiet's hush kit. [104] The case focused on a battle of experts, whose analyses attempted to explain the phenomenon observed.

Hurel proffered Joel Frank, an expert in aerodynamics, to testify that using a commercial computer software to measure fluid dynamics (CFD)--the airflow around and through the jet engine--only 3.08% of the loss in performance was attributable to Hurel's reverser linkages. [105] Quiet did not challenge the reliability of CFD software generally, but it did challenge Frank's application of it under Rule 702. Quiet focused on the "boundary conditions" the expert had selected, which "define where the [computer] model begins and where it ends." [106] More specifically, in uniform flow profile cases (where a constant uniform pressure was applied at the leading edge ***2053** of the ejector, to serve as a baseline), the expert placed the inlet boundary more than a meter ahead of the leading edge of the ejector; while for inflight profile cases (using pressure measurements Quiet had taken during its in-flight testing), he placed the inlet boundary condition at the "highlight of the ejector's leading edge." [107] Relatedly, Quiet challenged the expert's use of the formula for calculating the intake pressures in his uniform profile cases. Quiet contended that the expert had "put the wrong information into the ... software" or, as the court of appeals characterized it, "garbage in, garbage out." [108] The trial court held a *Daubert* hearing and denied the motion. [109] A jury returned a verdict for Hurel, and the court of appeals affirmed. [110]

Surely animating the Eleventh Circuit's analysis, under an abuse of discretion standard, was the parties' extension of expert discovery up until close to trial, and the timing of the objection forced the court to conduct its *Daubert* hearing on the sixth day of trial. Moreover, the substance of the challenge was literally rocket science: Quiet contested the application of the expert's fan pressure ratio, using "$PT_{Intake} = FPR(P_{amb})$, where $PT_{Intake}$ is the intake pressure, FPR is the fan pressure ratio, and $P_{amb}$ is the ambient pressure." [111] As the Eleventh Circuit explained:

> Thus, the intake pressure equaled the fan pressure ratio multiplied by the standard ambient pressure for the particular altitude being tested. For example, for the 35,000 feet altitude calculation, the ambient pressure--which is a known, unchanging figure--was 23,842 pascals which, when multiplied by a power setting of 1.9 FPR, yields a $PT_{Intake}$ of 45,300 pascals. To arrive at the FPR, Frank divided the total pressure at the intake (Pt2.5) by the ambient pressure. However, Quiet says that he should have derived the FPR by dividing the total intake pressure (Pt2.5) by the exit pressure (Pt2). Quiet avers that as a result of this error, the $Pt_{Intake}$ derived by Frank was "substantially less than the actual varying intake pressures at the fan exit and substantially greater than the actual

> varying pressures at the ambient air intake gap .... [B]y using the wrong formula and the fictitious uniform flow, Frank did not even come close to duplicating the actual ejector intake pressures." [112]

It is not surprising, therefore, that the Eleventh Circuit affirmed the trial judge's decision. Before doing so, the court engaged in an extensive analysis of the technical testimony, eventually concluding that the ultimate issue was whether the expert's selection of variables for the formula was correct. Citing the Supreme Court's admonition that "[n]ormally, failure to include variables will affect the analysis' probativeness, not its admissibility," the court ***2054** rejected the challenges. [113] The court emphasized that Quiet had ample opportunity to cross-examine Frank as to his application of the methodology, noting that "[t]he identification of such flaws in generally reliable scientific evidence is precisely the role of cross-examination." [114] Thus, the court held that the trial judge did not abuse his discretion in allowing the testimony, and that ultimately it was for the jury to appropriately weigh the alleged defects, which "go to the weight, not the admissibility." [115]

Given the highly complex nature of the testimony, it is difficult to be too critical of the Eleventh Circuit. That said, there are two problems with the court's opinion. First, the court appears to have abdicated its role under Rule 702(d) to ensure, by a preponderance, that the methodology (which went largely unchallenged) was *applied* reliably. Instead, the court left that issue to a jury. As one can tell from the excerpt above, even an experienced trial judge would have difficulty working through the science. Could a jury? We do not know, but that is the point of Rule 702: to ensure that the methodology is not only reliable, but that it is reliably applied in the particular instance, with the underlying assumption that the jury is not able to handle these matters. However, it is entirely possible that the court of appeals did not mean to issue a categorical statement that arguments as to an expert's application of a recognized methodology go to the weight of such testimony. Rather, its statement that the alleged flaws "are of a character that impugn the accuracy of [Frank's] results, not the general scientific validity of his methods" [116] may have been a conclusion that Frank met Rule 104(a)'s threshold and that the criticisms were sufficiently minor so as to go to weight. [117] The opinion also reflects the high level of deference accorded a trial court under the abuse of discretion standard of review.

Second, it appears that the Eleventh Circuit was incorrect as a technical matter. [118] While it stated that Quiet "does not contest the [expert's] formulation that $PT_{Intake} = FPR(P_{amb})$," [119] the court's footnote one page earlier acknowledged that Quiet had in fact argued that Frank should have "derived the FPR by dividing the total intake pressure (Pt2.5) by the exit pressure (Pt2)" such that $PT_{Intake} = FPR(P_{exit})$. [120] This fundamental contradiction went unrecognized in the court's opinion. In this light, the court's citation to the ***2055** Supreme Court's statement that "[n]ormally, failure to include variables will affect the analysis' probativeness, not its admissibility" [121] seems misplaced, as the claim was use of the *wrong* variable. In the end, the case puts to the test Justice Breyer's prediction that implementing *Daubert*'s gatekeeping task "will not prove inordinately difficult." [122]

### *F. Sixth Circuit*

*McLean v. 988011 Ontario, Ltd.* [123] was a wrongful death lawsuit involving the crash of a private airplane brought against a refurbisher and an inspector. The pilot had purchased the used Piper Cherokee the month before the crash and had the defendants paint it and replace horizontal stabilizer tips, dorsal fin fairings, and other miscellaneous items. At the time of the crash at 1:04 a.m., the pilot had only 110 flight hours of experience, was in instrument meteorological conditions even though he was only trained for visual flight rules, and had just received a traffic advisory from air traffic control. [124] Plaintiffs offered two expert witnesses who contradicted each other as to the cause of the crash, but both contended it was ultimately a result of "flutter"--a "destructive harmonic event that virtually destroys the integrity of the control" of an aircraft. [125] The trial court granted summary judgment to the defendants on the grounds that the experts contradicted each other, relied on circumstantial evidence whose factual basis was undermined on key points by the defendants, and provided an explanation no more plausible than the defendants' explanation of pilot error. [126] The Sixth Circuit reversed. [127] Acknowledging that an expert's opinion must

be supported by "'good grounds,' based on what is known," [128] the court nevertheless stated that "mere 'weaknesses in the factual basis of an expert witness' opinion ... bear on the weight of the evidence rather than on its admissibility."' [129]

The defects the defendants noted appear to be more than "mere weaknesses," however. For example, one expert, Rick Wilken, attributed the crash to a horizontal stabilizer that had been improperly balanced and separated in flight, a sloppy paint job, the lack of calibration, the use of replacement parts not from the manufacturer, and improper tensioning of the control ***2056** cables. [130] However, Wilken did not know whether the control cables had been adjusted, and defendants' paperwork did not indicate that anyone "had touched the cables," although one employee's testimony "appears to indicate that the cables were detached and reattached" as part of the stabilizer-rebalancing procedure. [131] Plaintiffs' other expert, Robert Donham, was a "flutter" expert. He blamed the crash on a loose balance weight on the top of the plane's rudder. However, he admitted he did not know specifically what the defendant did or did not do wrong in removing and reinstalling the weight, conceding, "I have no idea what happened to the unit." [132] Moreover, the National Transportation Safety Board report of the crash did not show the weight as being found upstream of the crash, as Donham's theory assumed. [133] The court of appeals found both expert theories "plausible" and "supported by what evidence is available." [134] In other words, the court appeared to accept that the dearth of available evidence hampered plaintiffs' ability to demonstrate causation with any more precision. Plausibility, however, is plainly lower than a preponderance.

It would have been far better had the Sixth Circuit described how the available evidence was a sufficient basis for the expert's opinion under Rules 702(b) and 104(a). In the absence of such explication and given the lack of factual support for the opinions of the experts, relegating the decision to a jury under the notion that obvious weaknesses go to the weight, not admissibility, of the alleged flutter theory as the cause of the crash appears to invite speculation. This is particularly so given the uncontested facts surrounding the accident and the pilot's inexperience and lack of training for instrument meteorological weather conditions.

### *G. District Courts*

Several district court opinions also address the sufficiency/weight/admissibility question. The following are representative.

*Bouchard v. American Home Products Corp.* [135] was a personal injury action involving the diet drug Redux. The plaintiff contended that ingesting the drug caused cardiac, brain, and pulmonary injury. Among the pretrial motions were motions to exclude expert testimony of experts by both parties. In one motion, the plaintiff moved to exclude the defendant's vocational expert, a licensed psychologist, who proposed to testify that the plaintiff could still perform sedentary work and lost only twenty percent of her ability to perform household services. Plaintiff contended that the expert lacked a sufficient basis for his opinion because he failed to evaluate all available information before making his decision and relied in part on the plaintiff's ***2057** self-assessment of her lifting requirements at work. [136] Though the opinion does not explain the nature of the alleged deficiencies, the court agreed with the defendant that such challenges did not warrant exclusion, noting that "weaknesses in the factual basis of an expert witness' opinion ... bear on the weight of the evidence rather than on its admissibility." [137] According to the court, the failure to "examine sufficient evidence" was a subject "fit ... for cross-examination, not a grounds for wholesale rejection of the expert opinion." [138]

Facially, the court's opinion appears to have ignored Rule 702(b)'s requirement that there be a preponderance of evidence to support the basis for the expert's opinion. However, other aspects of the court's opinion suggest otherwise. For example, the court rejected the plaintiff's contention that an expert could not rely on the plaintiff's self-assessment of work obligations without independently verifying it, finding that a plaintiff's self-assessment is prima facie evidence sufficient for an expert's reliance. Moreover, the expert had reviewed four of the five years since plaintiff had been diagnosed, which the court may have found sufficient for admissibility under Rule 702(b). These facts may explain the court's practical recognition that had the plaintiff felt the alleged flaws would have required the expert "to substantially change his opinion," the plaintiff would have cross-examined him in his deposition. [139] In addition, although not expressly recognizing the Rule 104(a) requirement, the court provided a thorough and complete recitation of the legal standards for the admission of expert opinion and, in a careful analysis granting

the plaintiff's motion to exclude another witness (the defendant's economist), found that his testimony violated the rule that it "must be accompanied by a sufficient factual foundation before it can be submitted to the jury." [140]

In many ways, *United States v. McCluskey* [141] encapsulates the conflicting approaches to considering threshold sufficiency under Rule 702 reflected in the caselaw. The defendant moved to preclude the government's expert from testifying that polymerase chain reaction/short tandem repeat (PCR/STR) DNA analysis tied the defendant to a firearm used as a murder weapon. [142] The government argued that PCR/STR DNA analysis has been widely held to be a reliable methodology and that the defendant's challenges to its application went "primarily to the weight ... not [to] its admissibility." [143] The defendant contended that neither the methodology nor application ***2058** was reliable and that "no distinction should be made between methodology and application" in the court's analytical approach. [144] According to the defendant, the government must prove that "each step in the procedure and each item used in the procedure meet the *Daubert* test for scientific reliability." [145] The court independently determined that the PCR/STR methodology was reliable and admissible under Rule 702 and *Daubert* and concluded that the defendant's challenges to the application of that methodology "go primarily to the weight of the DNA evidence, not its admissibility." [146]

What is remarkable about the case is the trial court's extensive analysis. It contains an erudite discussion of the policy and principles underlying Rule 702 and *Daubert*. In painstaking detail, the court described all the proper applicable standards, even acknowledging that the government, as proponent, bore the burden under Rule 104(a) of proving admissibility under Rule 702 by a preponderance of the evidence. [147] The court also held an evidentiary hearing, accepted hundreds of pages of briefing, and admitted about 3500 pages of exhibits. [148] The opinion reviews scores of cases nationwide (many of which are described in this Article) to determine the proper standard for analyzing the application of the PCR/STR methodology to the defendant's facts. The court eventually sided with those courts that hold that unless the challenges to the application of the methodology raise a "major flaw which undermines the entire analysis," they constitute questions of weight for the jury. [149]

For all that the *McCluskey* court did right (and it is a lot), it failed to analyze and apply Rule 702(d), which requires that the court apply the Rule 104(a) standard to the question of reliable application of the methodology to the facts of the case. In adopting the rule that challenges to application should be left to the jury "unless the alleged 'error negates the basis for the reliability of the principle itself,"' the court relied upon cases predating the 2000 amendments to the Rules, particularly those in the Third and Eighth Circuits. [150] The court also interpreted Tenth Circuit cases to hold that *In re Paoli*'s admonition that "any step that renders the analysis unreliable ... renders the expert's testimony inadmissible" [151] was merely a reference to *Joiner*'s invitation to ensure there is not "too great an analytical gap" between the ***2059** methodology and result. [152] This conclusion seems to be a strained reading of *In re Paoli*, which went on to say that "[t]his is true whether the step completely changes a reliable methodology or merely misapplies that methodology." [153] The *McCluskey* court arrived at this conclusion by repeatedly characterizing *Daubert* as *liberalizing* the admissibility standard and citing the opinion's reference to the "liberal thrust" of the Federal Rules and their "general approach of relaxing the traditional barriers to 'opinion' testimony." [154] While the Supreme Court indeed said this, such statements do not override the express terms of the 2000 version of Rule 702(d).

## III. SUGGESTIONS FOR FUTURE CASES

Based on decisions like those highlighted in this Article, the Advisory Committee on the Federal Rules of Evidence has spent the last two years debating whether Rule 702 should be amended to underscore the need to apply Rule 104(a) to ensure that the gatekeeper function contemplated by the Rules and *Daubert* and its progeny is performed. Central to the Committee's discussion is adding the preponderance requirement to the text of Rule 702. The argument in favor construes the cases as evidence that a significant number of courts are simply misapplying Rule 702 and misstating the law. [155] The argument against the amendment is that Rule 104(a) is a rule of general application and that Rule 702 should not be singled out for special treatment. Moreover, the Supreme Court has already made the point in *Daubert*, and the 2000 Advisory Committee note repeats it. Therefore, some say, the amendment would do no more than reinforce what has already been said. If courts are currently ignoring the Supreme Court and the 2000 amendments, is it likely they would follow a new amendment?

No doubt, in some cases the courts are misstating and misapplying Rule 702. Correction by the courts of appeals will go a long way to remedying the most obvious outliers. But it is unlikely that in the main courts are erring as egregiously as the proponents of a rule change suggest. [156] True, courts could be more careful in how they state that the challenges "go to weight, not admissibility." But as demonstrated above, in many cases the courts may very well be applying the proper Rule 104(a) standard; they are just not explicating it. Confounding any ultimate determination are the oftentimes complex and highly technical nature of the disputes, *Daubert*'s description of the Rule 702 inquiry as "a flexible one" [157] that accords the trial judge "considerable ***2060** leeway," [158] and the highly deferential abuse of discretion standard of review. Whether or not Rule 702 is amended, however, trial and appellate courts would be best served to adopt better practices in analyzing challenges to the admissibility of expert witnesses under Rule 702.

First, courts should cite the standard of admissibility they are employing. Specifically, citation to Rule 104(a) and its preponderance standard will educate the reader (and reviewing court) as to the threshold used and reinforce the proper admissibility framework. In virtually every other context, a judicial opinion always begins with a recitation of the proper standard of review. In the vast majority of cases under question, while Rule 702 and relevant cases are cited, there is no acknowledgment that the gatekeeper function requires application of Rule 104(a)'s preponderance test, much less for *each* of the elements of the Rule. Instead, courts tend to defer to statements from caselaw, even if it is outdated.

Second, a surprising number of cases start and end with *Daubert* and its progeny and fail to mention Rule 702. [159] Of course, Rule 702 was amended in 2000, and the elements of Rule 702, not the caselaw, are the starting point for the requirements for admissibility. [160] In this respect, labeling expert challenges "*Daubert*" motions is a misnomer. Moreover, statements as to the "liberal thrust" of Rule 702 and "flexible" standard trial judges should apply must be contextualized. Expansion of the gatekeeper inquiry beyond *Frye*'s general acceptance test is necessarily cabined by the elements of Rule 702. And the flexibility accorded trial judges relates to which *Daubert* factors, in the totality of circumstances, the court chooses to examine in applying Rule 702's required elements; the court cannot pick and choose among the Rule 702 elements. Such generalizations should not be used as a basis to evade the Rule. Rather, courts should cite the current Rule 702 and its elements for admissibility. Caselaw may be indispensable for interpreting those elements, but the foundation for the test is Rule 702.

Third, courts should read cases predating the 2000 amendments to Rule 702 with caution. Rule 702 has changed, and thus so have the admissibility requirements. *City of Pomona* illustrates this problem.

Fourth, courts should identify what evidence either meets or fails the preponderance standard for threshold admissibility, and why. In several cases, such as *Bouchard*, statements that the weaknesses of the evidence went to the weight and not admissibility may have merely reflected the court's conclusion ***2061** that there was a preponderance of evidence to support the opinion. One does not always know for sure, as it was never articulated. *Daubert*'s famous line about "shaky *but admissible* evidence" [161] should not be misused to avoid a proper analysis or, worse, relegate gatekeeper questions to a factfinder. The trial court must first find whether the opinion testimony is admissible.

Fifth, courts should require that challenges be raised timely, so that thoughtful analysis can be conducted. Trial courts are exceedingly busy, and *Daubert* motions tend to be very time consuming. [162] Many Rule 702 challenges involve highly technical questions, and the parties' disagreement often stems from the complexity. Planning should begin with the Rule 26(f) scheduling conference, allowing ample time for the court to understand and contemplate the issues. In this respect, criminal cases raise even more of a challenge. [163] For the seasoned trial judge, last-minute challenges may be resolved during trial for efficiency's sake, [164] but making appropriate findings on the record at this late stage may be more difficult.

Sixth, there will be challenges to the weight of an opinion's basis even under a proper Rule 104(a) analysis. This does not automatically render the question one for a jury, as some of the cases suggest. Rather, the trial judge, as gatekeeper, must determine whether such challenges are so significant that the factual basis for the opinion fails to reach the preponderance standard or, instead, whether the alleged defects are sufficiently minor, such that they do not undermine the remaining basis. In the latter instance, the alleged flaws do not impugn the reliability or validity of the method or results. For example, an expert

who allegedly failed to include a handful of patients in a study of over 100 patients, or an expert whose opinion is supported by a dozen studies but is contrary to a study that would not undermine her ultimate conclusion would likely pass the Rule 104(a) bar. [165] Of ***2062** course, where there is a legitimate question of fact on which the admissibility of the expert opinion turns, Rule 104(a) does not allow the trial court to make that call, and the jury must decide. [166]

In the end, just as the Supreme Court has reiterated that the nature of the task of gatekeeping is by design flexible, there will be no silver bullet to ensuring a proper application of Rule 702. But the leeway accorded trial courts in deciding *how* to determine reliability cannot serve as a substitute for the application of the proper threshold standards for determining admissibility. Hopefully, these suggestions will assist trial and appellate courts in making the best decisions possible.

## CONCLUSION

As trial judges can attest, discharging their gatekeeper role under Rule 702 can frequently be exceedingly difficult, especially when it is case dispositive. While judges are accorded wide latitude in how they go about making that determination and are reviewed for an abuse of discretion, they are nevertheless bound by Rule 104(a)'s requirement that there be a preponderance of evidence supporting each of the requirements of Rule 702(a) through (d). Decisionmaking on the admissibility of expert testimony would be better served if trial judges acknowledged the Rule 104(a) standard and articulated how the expert's opinion fared under each element of Rule 702. This would also assist the appellate courts, which, in conducting their deferential review, should avoid blanket statements suggesting that any alleged flaws affect the weight of the evidence, not its admissibility.

## Footnotes

a1 Chief United States District Judge for the Middle District of North Carolina. Member, United States Judicial Conference Advisory Committee on the Federal Rules of Evidence, and Chair of Subcommittee on Rule 702; Senior Lecturer, Duke University School of Law; Member, American Law Institute. The views expressed herein are mine only and do not represent the official views of the Advisory Committee on the Federal Rules of Evidence. I wish to thank Professor Daniel Capra, the Committee's Reporter, for use of his excellent memoranda on Rule 702, as well as materials from Timothy Lau, PhD, Senior Research Associate, of the Federal Judicial Center. The Advisory Committee memoranda are available at https://www.uscourts.gov/committees/evidence.

1 509 U.S. 579, 597 (1993).

2 *Id*. at 596.

3 Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).

4 *Daubert*, 509 U.S. at 588 (citing Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 169 (1988)).

5 *Id*. at 580, 592-95.

6 *Id*. at 597.

7 *Id*. at 592.

8 *Id*. at 592 n.10 (citing Bourjaily v. United States, 483 U.S. 171, 175-76 (1987) (applying Rule 104(a)'s preponderance test to the threshold question of the existence of a conspiracy)). Rule 104(a) provides: “The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on privilege.” FED. R. EVID. 104(a).

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

10 The full Rule provides: 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: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case. FED. R. EVID. 702.

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

12 *Id*. (emphasis added) (quoting Brown v. Se. Pa. Transp. Auth. (*In re* Paoli R.R. Yard PCB Litig.), 35 F.3d 717, 744 (3d Cir. 1994)).

13 Kumho Tire Co. v. Carmichael, 526 U.S. 137, 141 (1999).

14 *See* FED. R. EVID. 702 advisory committee's note to 2000 amendment.

15 *See* Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 598-601 (1993) (Rehnquist, C.J., concurring in part and dissenting in part, joined by Stevens, J.).

16 522 U.S. 136 (1997).

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

18 *Joiner*, 522 U.S. at 146.

19 FED. R. EVID. 706.

20 *Joiner*, 522 U.S. at 147, 150 (Breyer, J., concurring).

21 *Id*. at 154 (Stevens, J., concurring in part and dissenting in part).

22 *Id*. at 154 n.9 (quoting Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 596 (1993)). Some commentators have suggested that this mantra "simply begs the central question" of admissibility under Rule 702. KENNETH R. FOSTER & PETER W. HUBER, JUDGING SCIENCE: SCIENTIFIC KNOWLEDGE AND THE FEDERAL COURTS 16 (1997); *see also id*. at 15 ("This language is usually cited by those favoring looser standards of admissibility.").

23 Norris v. Baxter Healthcare Corp., 397 F.3d 878, 886 (10th Cir. 2005) (quoting Bitler v. A.O. Smith Corp., 391 F.3d 1114, 1121 (10th Cir. 2004)) (but noting where the conclusion simply does not follow from the data, the district court is free to conclude that the analytical gap is impermissible).

24 Rule 104(b) provides: "When the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist. The court may admit the proposed evidence on the condition that the proof be introduced later." FED. R. EVID. 104(b). In *Huddleston v. United States*, 485 U.S. 681, 690 (1988), the Court clarified that in determining whether a party has introduced sufficient evidence to meet Rule 104(b), "the trial court neither weighs credibility nor makes a finding that the [party] has proved the conditional fact by a preponderance of the evidence." Rather, "[t]he court simply examines all the evidence in the case and decides whether the jury could reasonably find the conditional fact ... by a preponderance of the evidence." *Id*.

25 *Joiner*, 522 U.S. at 142 (quoting Spring Co. v. Edgar, 99 U.S. 645, 658 (1879)). "[E]mbedded findings of fact are reviewed for clear error ...." Ungar v. Palestine Liberation Org., 599 F.3d 79, 83 (1st Cir. 2010).

26 *Joiner*, 522 U.S. at 142.

27 The Advisory Committee's investigation was prompted by an article by David E. Bernstein & Eric G. Lasker, *Defending* Daubert *: It's Time to Amend Federal Rule of Evidence 702*, 57 WM. & MARY L. REV. 1 (2015), which identified many

cases as evidencing erroneous application of Rule 702 and urged amendment of the Rule to underscore the need for the trial court to address each of the Rule's requirements.

28 639 F.3d 11 (1st Cir. 2011).

29 *Id*. at 13.

30 *Id*.

31 *Id*. at 14.

32 *Id*. at 15-16 (quoting Gen. Elec. Co. v. Joiner, 522 U.S. 136, 146 (1997)).

33 *Id*. at 17 (citing Austin Bradford Hill, *The Environment and Disease: Association or Causation?*, 58 PROC. ROYAL SOC'Y MED. 295, 295-99 (1965)).

34 *Id*. at 17 (quoting Bitler v. A.O. Smith Corp., 391 F.3d 1114, 1124 n.5 (10th Cir. 2004)).

35 For example, the district court had found that Dr. Smith's conclusions lacked general acceptance, there was insufficient evidence to support Dr. Smith's opinion that all subtypes of acute myeloid leukemia likely share a common etiology (finding the expert's broad extrapolation from acute myeloid leukemia to acute promyelocytic leukemia unsupported), existing knowledge of DNA did not support biological plausibility, insufficient evidence to support the expert's opinion on mechanism to cause chromosomal damage, the epidemiological evidence on which Dr. Smith relied was not statistically significant, and Dr. Smith had faulty calculations in his odds ratios. *See id*. at 21-23.

36 *Id*. at 22.

37 *Id*. (emphasis omitted).

38 *Id*. (quoting Smith v. Ford Motor Co., 215 F.3d 713, 718 (7th Cir. 2000)).

39 *Id*. (quoting United States v. Vargas, 471 F.3d 255, 264 (1st Cir. 2006)).

40 *See, e.g.*, Bernstein & Lasker, *supra* note 27, at 40-42 (arguing that the "weight of the evidence" methodology was rejected by *Joiner*).

41 *Milward*, 639 F.3d at 22 (quoting Milward v. Acuity Specialty Prods. Grp., Inc., 664 F. Supp. 2d 137, 146 (D. Mass. 2009)).

42 Other First Circuit caselaw demonstrates a proper application of Rule 104(a), *see, e.g.*, Pelletier v. Main St. Textiles, LP, 470 F.3d 48 (1st Cir. 2006), while other cases do not, *see, e.g.*, United States v. Shea, 211 F.3d 658, 668 (1st Cir. 2000) (noting that "any flaws in [an expert's] application of an otherwise reliable methodology went to weight and credibility and not to admissibility").

43 383 F.3d 689 (8th Cir. 2004).

44 *See id*. at 694.

45 *Id*.

46 *Id*. at 695.

47 *Id*. at 695, 670.

48 *Id*. at 696.

49 *Id*. at 697 (alteration in original) (quoting United States v. Beasley, 102 F.3d 1440, 1448 (8th Cir. 1996)).

50 686 F.3d 618 (8th Cir. 2012).

51 *Id*. at 620.

52 *Id*.

53 *Id*. at 624 (alteration in original) (quoting Kuhn v. Wyeth, Inc. (*In re* Prempro Prods. Liab. Litig.), 765 F. Supp. 2d 1113, 1126 (W.D. Ark. 2011)).

54 *Id*. at 633.

55 *Id*. at 626.

56 *Id*. at 627.

57 *See id*.

58 *See id*. at 628.

59 *Id*. at 633.

60 *Id*. (Loken, J., dissenting).

61 *Id*. at 624 (majority opinion).

62 *Id*. at 624, 627. He did contend that observational studies were "much better at estimating the size of the risk." *Id*. at 627.

63 *Id*. at 628.

64 *Id*.

65 *Id*. at 625 (quoting Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 596 (1993)) (citing amended Rule 702 as well).

66 *Id*. at 628.

67 *Id*. at 631 n.17.

68 *Id*. at 631 (quoting Kuhn v. Wyeth, Inc. (*In re* Prempro Prods. Liab. Litig.), 765 F. Supp. 2d 1113, 1123 (W.D. Ark. 2011)).

69 *See id*. at 629.

70 *Id*. at 631.

71 *Id*.

72 *Id*. at 632.

73 *Id*.

74 *Id*.

75 *Id*. at 633. Despite this statement, a review of the appellate briefs suggests that one plaintiff (Davidson) actually attempted to explain away the contrary data from the other studies cited by Wyeth. *See* Appellant's Brief at 42-45, Davidson v. Wyeth, 686 F.3d 618 (8th Cir. 2012) (No. 11-1815).

76 Kuhn v. Wyeth, Inc., 686 F.3d at 633-34 (Loken, J., dissenting).

77 855 F.3d 178 (4th Cir. 2017).

78 *Id*. at 203.

79 *Id*. at 195.

80 *Id*. at 188.

81 *Id*. at 195.

82 *Id*. (alteration in original) (quoting Structural Polymer Grp., Ltd. v. Zoltek Corp., 543 F.3d 987, 997-98 (8th Cir. 2008)).

83 *Id*. at 195-96 (quoting *Zoltek Corp.*, 543 F.3d at 997-98).

84 That this case may be an outlier is demonstrated by *Nease v. Ford Motor Co.*, 848 F.3d 219, 230-31 (4th Cir. 2017), where the court reversed the district court for concluding that criticisms of the expert's opinion testimony went to its weight and not its admissibility.

85 *See, e.g.*, *In re* Roundup Prods. Liab. Litig., 390 F. Supp. 3d 1102, 1112-13 (N.D. Cal. 2018) ("The Ninth Circuit has placed great emphasis on *Daubert*'s admonition that a district court should conduct this analysis 'with a "liberal thrust" favoring admission,"' which "has resulted in slightly more room for deference to experts in close cases than might be appropriate in some other Circuits." (quoting Messick v. Novartis Pharm. Corp., 747 F.3d 1193, 1196 (9th Cir. 2014))).

86 750 F.3d 1036 (9th Cir. 2014).

87 *Id*. at 1041.

88 *Id*. at 1042-43.

89 *Id*. at 1043.

90 *Id*. at 1044 (quoting Primiano v. Cook, 598 F.3d 558, 564 (9th Cir. 2010)). The court also cited its own standard, articulated in 2013, that "[t]he judge is 'supposed to screen the jury from unreliable nonsense opinions, but not exclude opinions merely because they are impeachable."' *Id*. (quoting Alaska Rent-A-Car, Inc. v. Avis Budget Grp., Inc., 738 F.3d 960, 969 (9th Cir. 2013)). While true, this holding ignores the wide gap between the two standards where otherwise qualified experts rely on faulty data or misapply critical procedures.

91 *Id*. at 1045 (alternation in original) (quoting Southland Sod Farms v. Stover Seed Co., 108 F.3d 1134, 1141 (9th Cir. 1997)).

92 *Id*. at 1046.

93 *Id*.

94 30 F.3d 1144 (9th Cir. 1994).

95 *City of Pomona*, 750 F.3d at 1047.

96 Brown v. Se. Pa. Transp. Auth. (*In re* Paoli R.R. Yard PCB Litig.), 35 F.3d 717 (3d Cir. 1994).

97 *City of Pomona*, 750 F.3d at 1047 (quoting *In re Paoli*, 35 F.3d at 745).

98 *Id*. at 1047-48 (quoting *Chischilly*, 30 F.3d at 1154).

99 *Id*. at 1048.

100 It is ironic that the court of appeals faulted the district court for "not apply[ing] the correct rule of law." *Id*. at 1048.

101 *Id*. Had the trial court articulated the reasons it determined the expert's failure to adhere to protocols rendered the expert's entire analysis unreliable, it is entirely possible that, under an abuse of discretion review, the decision to exclude the witness would have been affirmed.

102 *See, e.g.*, Dow Chem. Co. v. Seegott Holdings, Inc. (*In re* Urethane Antitrust Litig.), 768 F.3d 1245, 1261 (10th Cir. 2014) (finding that the district court reasonably concluded that the statistical expert's foundation was reliable because there was "no need to consider every measurable factor--just the 'major' ones").

103 326 F.3d 1333 (11th Cir. 2003).

104 *Id*. at 1336-37.

105 *Id*. at 1339.

106 *Id*. at 1338.

107 *Id*.

108 *Id*. at 1344.

109 *Id*. at 1352.

110 *Id*.

111 *Id*. at 1344 n.11.

112 *Id*.

113 *Id*. at 1346 (alteration in original) (quoting Bazemore v. Friday, 478 U.S. 385, 400 (1986) (Brennan, J., concurring in part)).

114 *Id*. at 1345.

115 *Id*.

116 *Id*.

117 For example, the court noted Hurel's contention that the criticism applied only in the calculations for the uniform profile cases, not the flight profile cases, and that even if Quiet was correct, Frank's analysis was "not completely invalid" but instead required (at most) a "re-matching" of data. *Id*. at 1344 n.12.

118 Dr. Timothy Lau is credited with this observation. Dr. Lau, a lawyer, also holds a doctorate in materials science and engineering from the Massachusetts Institute of Technology and serves as a Senior Research Associate at the Federal Judicial Center.

119 *Quiet Tech.*, 326 F.3d at 1345.

120 *Id*. at 1344 n.11.

121 *Id*. at 1346 (alteration in original) (quoting Bazemore v. Friday, 478 U.S. 385, 400 (1986) (Brennan, J., concurring in part)).

122 Gen. Elec. Co. v. Joiner, 522 U.S. 136, 150 (1997) (Breyer, J., concurring).

123 224 F.3d 797 (6th Cir. 2000).

124 *Id*. at 799.

125 *Id*. at 802. One expert blamed faulty repairs; the other cited a loose balance weight on the tail section. *Id*.

126 *Id*. at 799.

127 *Id*. at 800.

128 *Id*. at 801 (quoting Pomella v. Regency Coach Lines, Ltd., 899 F. Supp. 335, 342 (E.D. Mich. 1995)).

129 *Id*. (alteration in original) (quoting United States v. L.E. Cooke Co., 991 F.2d 336, 342 (6th Cir. 1993)).

130 *Id*. at 801-02.

131 *Id*. at 802.

132 *Id*. at 803-04.

133 *Id*. at 804.

134 *Id*. at 805.

135 No. 3:98CV7541, 2002 WL 32597992 (N.D. Ohio May 24, 2002).

136 *Id*. at *7.

137 *Id*. (citing *McLean*, 224 F.3d at 801).

138 *Id*.

139 *Id*.

140 *Id*. at *10 (quoting Elcock v. Kmart Corp., 233 F.3d 734, 754 (3d Cir. 2000)). The court ultimately rejected the testimony on a lack of "fit" with the evidence, because the expert had an "almost complete disregard for the ... facts of [the] case." *Id*.

141 954 F. Supp. 2d 1224 (D.N.M. 2013).

142 *Id*. at 1228.

143 *Id*. at 1244.

144 *Id*.

145 *Id*. Elsewhere, the court noted that the defendant argued that the methods employed must be "independently review[ed]" at "each major step" under *Daubert*. *Id*. (emphasis omitted).

146 *Id*.

147 *Id*. at 1233-36.

148 *Id*. at 1228-29.

149 *Id*. at 1248.

150 *Id*. at 1250 (quoting United States v. Martinez, 3 F.3d 1191, 1198 (8th Cir. 1993)).

151 *Id*. at 1245 (quoting Brown v. Se. Pa. Transp. Auth. (*In re* Paoli R.R. Yard PCB Litig.), 35 F.3d 717, 745 (3d Cir. 1994)). The "any step" requirement is specifically quoted in Rule 702's 2000 Advisory Committee note.

152 *Id*. (quoting Gen. Elec. Co. v. Joiner, 522 U.S. 136, 146 (1997)).

153 *In re Paoli*, 35 F.3d at 745 (emphasis omitted).

154 *McCluskey*, 954 F. Supp. 2d at 1238 (quoting Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 588 (1993)); *see also id*. at 1238, 1246, 1251, 1255.

155 *See* Bernstein & Lasker, *supra* note 27, at 19-25.

156 *See* 3 STEPHEN A. SALTZBURG, ET AL., FEDERAL RULES OF EVIDENCE MANUAL § 702.02[10], at 702-57 (12th ed. 2019) (concluding that the problem is "not ... as great" as intimated).

157 Kumho Tire Co. v. Carmichael, 526 U.S. 137, 150 (1999) (quoting *Daubert*, 509 U.S. at 594).

158 *Id*. at 152.

159 This point was made by Bernstein & Lasker, *supra* note 27, at 8.

160 *See* Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 163 (1988) ( "Because the Federal Rules of Evidence are a legislative enactment, we turn to the 'traditional tools of statutory construction' in order to construe their provisions. We begin with the language of the Rule itself." (quoting INS v. Cardonza-Fonseca, 480 U.S. 421, 446 (1987))); United States v. Parra, 402 F.3d 752, 758 (7th Cir. 2005) (acknowledging that "Rule 702 has superseded *Daubert*"); United States v. Mamah, 332 F.3d 475, 477 (7th Cir. 2003) ("We begin our analysis by looking at the actual text of Rule 702, which was amended in 2000 in response to *Daubert* and *Kumho Tire* ....").

161 *Daubert*, 509 U.S. at 596 (emphasis added).

162 *Symposium on Forensic Expert Testimony,* Daubert *, and Rule 702*, 86 FORDHAM L. REV. 1463, 1535 (2018) (U.S. District Judge Patti Saris noting necessity of reaching *Daubert* motions early in the litigation, "so that you can think about it more slowly" because it is "complicated" and "hard").

163 FED. R. CIV. P. 26(f); *see* Paul W. Grimm, *Challenges Facing Judges Regarding Expert Evidence in Criminal Cases*, 86 FORDHAM L. REV. 1601, 1611-13 (2018).

164 See, for example, *United States v. McCluskey*, 954 F. Supp. 2d 1224, 1234 (D.N.M. 2013) (citing United States v. Nichols, 169 F.3d 1255, 1264 (10th Cir. 1999)), for the proposition that, if the expert's testimony is admissible, the jury is entitled to hear the same criticisms raised during the *Daubert* challenge, and to avoid duplication it may be presented once before the jury.

165 How to deal with competing scientific studies is an area that continues to confound courts. Rule 702(b) requires that "the testimony [be] based on sufficient facts or data." FED. R. EVID. 702. The 2000 Advisory Committee note reminds that in determining reliability, a trial judge should consider "[w]hether the expert has adequately accounted for obvious alternative explanations." FED. R. EVID. 702 advisory committee's note to 2000 amendment. Here, too, the inquiry is one of degree. The Advisory Committee note provides some guidance in the context of causation: "[T]he possibility of some uneliminated causes presents a question of weight, so long as the most obvious causes have been considered and reasonably ruled out by the expert." *Id*. (citing Ambrosini v. Labarraque, 101 F.3d 129 (D.C. Cir. 1996)). Thus, where the studies relied upon provide sufficient basis for the expert's opinion, Rule 104(a) is met as long as the conflicting studies can be adequately explained or raise issues that are insufficient to undermine the Rule 104(a) preponderance requirement. In many cases, this may be what courts mean when they say that the criticisms "go to the weight, not the admissibility, of the evidence." Quiet Tech. DC-8, Inc. v. Hurel-Dubois UK Ltd., 326 F.3d 1333, 1345 (11th Cir. 2003); *see also* Margaret A. Berger, *The Admissibility of Expert Testimony*, *in* REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 11, 19 (3d ed. 2011) (discussing problems in experts' reliance on some, but not all, scientific studies in a field).

166 *See* FED. R. EVID. 702 advisory committee's note to 2000 amendment ("The emphasis in the amendment on 'sufficient facts or data' is not intended to authorize a trial court to exclude an expert's testimony on the ground that the court believes one version of the facts and not the other."). To preserve the issue, the jury could be instructed that if they find the fact as proffered, they may consider the expert's opinion.

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**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>

[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).

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January 31, 2020

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

Re: Amending Federal Rule of Evidence 702 to Clarify Courts' "Gatekeeping" Obligation

Dear Ms. Womeldorf:

As chief legal officers of organizations that are frequently engaged with the American civil justice system, we represent stakeholders—including employees, customers, suppliers, communities, and shareholders—who rely on the federal courts to be a just forum for the resolution of legal disputes on the merits.

The Advisory Committee on Evidence Rules ("Committee") is entrusted with the essential task of ensuring the Federal Rules of Evidence ("FRE") are fair, plainly understood, and uniformly applied. We applaud the Committee for the seriousness of purpose with which it is evaluating practices under Rule 702.

Our experience indicates that adherence to Rule 702's standards for the admission of opinion testimony is far from acceptable. We are concerned that, left on its current trajectory without Committee action, judicial practices under Rule 702 will continue to diverge materially from the Committee's purpose when it drafted the rule to give effect to the Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) and its progeny.

Too often, courts fail to execute or enforce the "gatekeeping" obligation. Instead, we see courts inappropriately delegate to juries the job of deciding whether an expert's opinions have the requisite scientific support. Such abrogation of the court's "gatekeeping" role deviates from the Committee's intent that Rule 702 allocate the responsibility between the judge and the jury for deciding preliminary questions under Rules 104(a) (the court must decide the preliminary question of whether a witness is qualified or the evidence admissible) and 104(b) (determining whether there are sufficient facts and data to render evidence relevant). The distinction between these tests is often unclear to both the bench and the bar. Confusion about the court's role in assessing these foundational requirements results in the admission of unreliable opinion testimony that misleads juries, undermines civil justice, and erodes our stakeholders' confidence in the courts.

Moreover, some courts refer to Rule 702's establishing a "presumption of admissibility"—a mischaracterization that inverts the proponent's burden to establish the admissibility of expert testimony. This erroneous "presumption of admissibility" appears to stem in part from the Committee's well-intended but widely misunderstood Note to the 2000 rule amendment stating that "the rejection of expert testimony is the exception rather than the rule." That statement, which was an observation

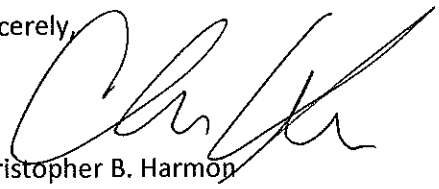
about pre-2000 practice and not intended to characterize admissibility standards, has derailed Rule 702 in many courts, causing unjust results.

We understand that the Committee balances several factors when deciding whether to amend a rule, and we don't make our suggestion lightly. We support the Committee's general caution about amendments that clarify rather than change standards; address problems of adherence to, rather than understanding of, the rule; and affect the development of legal principles in a way perhaps better left to case law. Nevertheless, the Committee has a responsibility to act when doing so would materially improve a situation of widespread disregard for or misapplication of a rule.

We urge you to move forward with an amendment to Rule 702 that would remedy the inconsistency in practice 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.

Thank you for your consideration.

Sincerely,



Christopher B. Harmon
General Counsel

March 2, 2020

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

Re: Amending Federal Rule of Evidence 702 to Clarify Courts' "Gatekeeping" Obligation

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Too often, courts do not fully execute or enforce the "gatekeeping" obligation. Instead, we see courts allowing juries a role in deciding whether an expert's opinions have the requisite scientific support without first ensuring that the testimony is the product of reliable principles and methods and is reliably applied. This practice deviates from the Committee's intent that Rule 702 allocate the responsibility between the judge and the jury for deciding preliminary questions under Rules 104(a) (the court in its "gatekeeping" role must decide the preliminary question of whether a witness is qualified or the evidence admissible) and 104(b) (the jury may determine whether there are sufficient facts and data to render evidence relevant). The distinction between these tests is often unclear to both the bench and the bar. Confusion about the court's role in assessing these foundational requirements results in the admission of unreliable opinion testimony that misleads juries, undermines civil justice, and erodes our stakeholders' confidence in the courts.

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We understand that the Committee balances several factors when deciding whether to amend a rule, and we don't make our suggestion lightly. We support the Committee's general caution about amendments that clarify rather than change standards; address problems of adherence to, rather than understanding of, the rule; and affect the development of legal principles in a way perhaps better left to case law. Nevertheless, the Committee has a responsibility to act when doing so would materially improve a situation of widespread misapplication of a rule.

We urge you to move forward with an amendment to Rule 702 that would remedy the inconsistency in practice 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.

Thank you for your consideration.

Sincerely,

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Chris Harmon
Senior Vice President and General Counsel
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Lucy Fato
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American International Group, Inc.

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March 12, 2020

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

Re: Amending Federal Rule of Evidence 702 to Clarify Courts' "Gatekeeping" Obligation

Dear Ms. Womeldorf:

Washington Legal Foundation (WLF) writes to request that you share the attached WLF Legal Studies Division publications with the members of the Advisory Committee on Evidence Rules. As these publications showcase, many federal courts have eroded the effectiveness of Federal Rule 702 and ignored the principles the U.S. Supreme Court set out for expert evidence in *Daubert*, *Joiner*, and *Kumho Tire*. This disparity deprives the civil-justice system and its stakeholders of the clarity and consistency sought by the Committee on Rules of Practice and Procedure when it promulgated Rule 702.

The first WLF WORKING PAPER, ***Weight of the Evidence: A Lower Expert Evidence Standard Metastasizes in Federal Courts*** by attorney Lawrence A. Kogan, highlights the growing acceptance of an inherently unreliable method for reaching scientific or technical conclusions on causation. The First Circuit became the first court to accept this methodology in *Milward v. Acuity Special Products Group, Inc.* The court held that testimony developed through a weighing of multiple lines of evidence and an application of the "Bradford Hill criteria" was admissible. This "weight-of-the-evidence" methodology applies non-traditional abductive reasoning and places too much discretion in the expert witness's hands to pick and choose data to evaluate.

Before *Milward*, some federal appeals courts and even the Second Edition of the Federal Judicial Center's (FJC) respected *Reference Manual on Scientific Evidence* recognized the pitfalls of finding weight-of-the-evidence a reliable methodology for developing expert testimony. But within six months of *Milward*'s release, the FJC reversed course and endorsed weight-of-the-evidence as acceptable in its manual's Third Edition. As the WORKING PAPER documents through extensive case analysis, federal courts are increasingly following *Milward*'s and the FJC's lead, admitting testimony derived from abductive reasoning.

Mr. Kogan argues that the *Reference Manual*'s Third Edition has in effect changed the way that judges conduct their review of expert evidence, usurping the role of the Committee on Rules of Practice and Procedure. As a result, some courts are exposing juries to unreliable expert evidence, an outcome that can have devastating consequences for defendants, especially those in mass-tort litigation.

The second WLF WORKING PAPER is ***Inconsistent Gatekeeping Undercuts the Continuing Promise of* Daubert**, written by Joe G. Hollingsworth and Mark A. Miller. The authors point to examples such as a California-based federal district court judge's *Daubert* decision in glyphosate products-liability litigation as support for their conclusion that gatekeeping isn't being performed consistently. Along with detailing deviations from *Daubert* in Ninth Circuit trial courts, the paper provides examples from courts in other circuits, including the Sixth and the Eleventh.

The Advisory Committee on Evidence Rules takes an understandably cautious approach to amending federal rules of evidence. As the March 2, 2020 letter from 50 corporate chief legal officers noted, the Committee acts "to clarify rather than change standards" and to "address problems of adherence to, rather than understanding of, the rule." The WORKING PAPER by Kogan makes the case that judicial decisions, following the lead of a highly respected *Reference Manual* published for (and by) the judiciary, has in effect changed the Rule 702 standard. The Hollingsworth and Miller WORKING PAPER notes instances in which courts have failed to adhere to rule.

We encourage the Advisory Committee on Evidence Rules to consider the information and analysis in these educational papers when weighing whether to formally amend Rule 702.

Thank you for your consideration.

Sincerely,

Glenn G. Lammi
Chief Counsel, Legal Studies Division

Attachments

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Critical Legal Issues: WORKING PAPER SERIES

# WEIGHT OF THE EVIDENCE:
## A LOWER EXPERT EVIDENCE STANDARD METASTASIZES IN FEDERAL COURTS

By

Lawrence A. Kogan
The Kogan Law Group, P.C.

**Washington Legal Foundation**
Critical Legal Issues WORKING PAPER Series

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## ABOUT THE AUTHOR

**Lawrence A. Kogan** is an international business, trade, and regulatory attorney and founder of the Kogan Law Group, P.C., a multidisciplinary legal services firm assisting U.S. and non-U.S.-based public and private enterprises. He also directs the Princeton, N.J.-based Institute for Trade, Standards and Sustainable Development, Inc. (ITSSD, www.itssdusa.org). Mr. Kogan has served as an Adjunct Professor of International Trade Law at the John C. Whitehead School of Diplomacy and International Relations at Seton Hall University, South Orange, New Jersey.

 

# ABSTRACT

U.S. Supreme Court precedent and federal evidentiary rules require litigants to demonstrate that the evidence their expert presents is both "reliable" and "relevant." In order for the evidence to be reliable and thus admissible, the Court stressed in its seminal 1993 *Daubert* decision that the analytical methodology the expert employs must itself be reliable. Contrary to this guidance, in 2011 a federal appeals court permitted a plaintiff's expert to utilize an inherently unreliable methodology to conclude that a specific chemical could generally cause cancer. The First Circuit held in *Milward v. Acuity Special Products Group, Inc.* that testimony developed through a weighing of multiple lines of evidence and an application of the "Bradford Hill criteria" was admissible. This "weight-of-the-evidence" methodology applies non-traditional abductive reasoning and places a great deal of discretion in the expert witness's hands to pick and choose data to evaluate. Regulators, whose role is to identify possible risks and act preventatively in the "public interest," favor weight-of-the-evidence when assessing studies for the methodology's pliability.

Prior to *Milward*, some federal appeals courts and even the Second Edition of the Federal Judicial Center's (FJC) respected *Reference Manual on Scientific Evidence* recognized the pitfalls of finding weight-of-the-evidence a reliable methodology for developing expert testimony. But within six months of *Milward*'s release, the FJC reversed course and endorsed weight-of-the-evidence as acceptable in its manual's Third Edition. As this WORKING PAPER documents through extensive case analysis, federal courts are increasingly following *Milward*'s and the FJC's lead, admitting testimony derived from abductive reasoning. This development allows judges to take precautionary action as if it were a regulator, and also rewards plaintiffs whose claims are suspect. The WORKING PAPER urges practitioners, policymakers, and the federal judiciary to contemplate where this drift away from reliable scientific and technical evidence is leading, and sets out options for a return to the rigorous judicial gatekeeping *Daubert* demands.

 

# WEIGHT OF THE EVIDENCE:
# A LOWER EXPERT EVIDENCE STANDARD METASTASIZES IN FEDERAL COURTS

In *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 589 (1993), the United States Supreme Court held that trial court judges are effectively "gatekeepers" for the admissibility of expert testimony, and that they should not admit testimony from a "qualified" expert unless they determine that it is both "reliable" *and* "relevant."

Eighteen years later, in *Milward v. Acuity Special Products Group, Inc.* 639 F.3d 11 (1st Cir. 2011), the U.S. Court of Appeals for the First Circuit held that the "weight-of-evidence," inference-to-the-best-explanation methodology is a scientifically *reliable* basis for establishing general causation in toxic tort/product liability litigation. Expert evidence that survives a court's weight-of-the-evidence review, therefore, is admissible under Federal Rule of Evidence ("FRE") 702 and the U.S. Supreme Court's decisions in *Daubert*, *General Electric Co. v. Joiner*, 522 U.S. 136 (1997), and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999). *Milward* was a negligence (toxic tort) case involving allegations that plaintiff's routine workplace exposure to benzene-containing products caused his rare type of leukemia.

Within six months of the First Circuit's March 22, 2011 *Milward* decision, the Federal Judicial Center ("FJC") released the Third Edition of its *Reference Manual on Scientific Evidence*. Established in 1967,[1] the FJC has served as "the research and education agency of the judicial branch of the U.S. government."[2] The Third Edition *Reference Manual* reverses the Second Edition's admonition that federal trial courts avoid the pitfalls of admitting expert testimony based on weight-of-the-evidence methodology. According to legal commentators, the *Milward* decision narrowed the scope of federal district courts' evidentiary gatekeeping role under FRE 702 and *Daubert*.[3]

This WORKING PAPER highlights for practitioners and policymakers the extent to which the FJC's *Reference Manual* has encouraged a growing number of federal trial court judges to lower the standard for admitting scientific and technical evidence into the judicial record based on its *reliability*. The *Reference Manual* describes this lower evidentiary standard for reliability as one that sanctions the admissibility of evidence that "contributes to the weight

[1] *See* 28 U.S.C. §§ 620–29.

[2] *See* Federal Judicial Center, https://www.fjc.gov/; 28 U.S.C. § 620(b)(3).

[3] *See* David E Bernstein and Eric G. Lasker, *Defending* Daubert*: It's Time to Amend Federal Rule of Evidence 702*, 57 WM & MARY L. REV. 1, 5 (2015), https://scholarship.law.wm.edu/wmlr/vol57/iss1/2 (discussing how, in *Daubert*, "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.' 509 U.S. at 596. The Court emphasized that Rule 702 'requires a valid scientific connection to the pertinent inquiry as a precondition to admissibility.' 509 U.S. at 592. And the Court explained that under the Federal Rules, a trial judge 'exercises more control over experts than over lay witnesses.' 509 U.S. at 595.").

 

of evidence supporting causal inferences" that an agent can cause a specific disease.[4] It is analogous to the "hazard identification process [which] often uses 'weight of evidence' approaches in which the toxicological, mechanistic, and epidemiological data are rigorously assessed to form a judgment regarding the likelihood that the agent produces a specific effect."[5] "Determinations about cause-and-effect relations by regulatory agencies often depend upon expert judgment exercised by assessing the weight of evidence."[6] The problem with this approach, however, is that it relies on the use of *subjectively* "weighted" inferences of general causation that can be based on unvalidated and unverifiable scientific/technical theories that otherwise would fail to meet the rigorous minimal reliability standards the Supreme Court imposed through *Daubert* and its progeny. This paper also tracks and analyzes instances where U.S. district and appellate courts have employed this lower reliability standard first articulated in *Milward*.

## I. NARROWING COURTS' "GATEKEEPER" ROLE BY LOWERING THE EVIDENTIARY THRESHOLD

In *Daubert*, the Supreme Court held that, in order to determine whether proffered testimony constitutes scientific knowledge that would assist the trier of fact to understand or determine a fact in issue, the trial court must preliminarily assess "whether the reasoning or methodology underlying the testimony properly can be applied to the facts in issue."[7] According to the Court, although the assessment is a flexible one, it ultimately engenders a determination of whether: 1) the scientific methodology can be or has been tested, refuted and/or falsified; 2) the theory, technique, or methodology has been subject to peer review and publication, which is relevant but not dispositive of its validity; 3) the specific scientific technique has a known or potential rate of error, and there are existing and maintained standards controlling the technique's operation; and 4) the degree of general acceptance of the methodology or reasoning within the relevant scientific community.[8]

The *Milward* court, however, cleverly went beyond the accepted methodology by which scientific and technical evidence may be determined "relevant" and "reliable" within the meaning of FRE 702 and *Daubert*. By expanding the scope of the logical reasoning process against which the *Daubert* reliability test could be applied (*i.e.*, beyond classical deductive and inductive reasoning), in *apparent* consistency with the Court's holding in *Joiner*,[9] the *Milward* court indirectly diminished the "exacting standards of reliability"[10] for, and thereby,

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[4] *See* Federal Judicial Center and National Research Council of the National Academies, *Reference Manual on Scientific Evidence—Third Edition* ("*Third Edition*") (2011), https://www.fjc.gov/sites/default/files/2015/SciMan3D01.pdf, at 637.

[5] *Id*. at 651.

[6] *Id*. at 660.

[7] *Daubert*, 509 U.S. at 593.

[8] *Id*. at 593-94.

[9] Bernstein and Lasker, *supra* note 3, at 6 (discussing how *Joiner* had held *inter alia* that the *Daubert* "reliability test may be applied to an expert's *reasoning process*, not just to his general methodology") (emphasis added).

[10] *See Weisgram v. Marley Co*., 528 U.S. 440, 455 (2000).

 

the quality of, the scientific, technical, and other expert knowledge-based testimony[11] admissible at trial in traditional tort action areas to establish general causation.

Significantly, the *Milward* court found as generally reliable the application of the Bradford Hill criteria, a method that employs "abductive" reasoning through subjective interpretations of general causation based on a weighing of multiple lines of evidence revealing semi-quantitative and qualitative "associations" that may potentially lead to the "best explanation in which the conclusion is not guaranteed by the premises."[12] According to the First Circuit, abductive reasoning is unlike both deductive and inductive reasoning, insofar as it focuses not on probabilities, but on plausibilities/*possibilities*.

> This *'weight of the evidence'* approach to making causal determinations involves a mode of logical reasoning often described as *'inference to the best explanation,'* in which the conclusion is not guaranteed by the premises [fn…] *Unlike a logical inference made by deduction* where one proposition can be logically inferred from other known propositions, *and unlike induction* where a generalized conclusion can be inferred from a range of known particulars, *inference to the best explanation—or 'abductive inferences'*—are drawn about a particular proposition or event by a process of eliminating all other *possible* conclusions to arrive at the most likely one, the one that best explains the available data.[13]

Arguably, the *Milward* court found the Bradford Hill methodology generally acceptable for purposes of determining general causation[14] because, as the court observed, "'[g]eneral causation' exists when a substance is capable of causing a disease."[15] In other words, to establish *general* causation, one must show the association is merely plausible or possible, whereas, "'[s]pecific causation' exists when exposure to an agent caused a particular plaintiff's disease."[16]

The *Milward* court's acceptance of Bradford Hill as generally reliable for establishing general causation, presumably, was based on its requirement that *all* nine of its criteria[17]

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[11] *See Kumho Tire Co.*, 526 U.S. at 147-49.

[12] *See Milward*, 639 F.3d at 17, citing *Bitler v. AO Smith Corp.*, 391 F.3d 1114, 1124 n. 5 (10th Cir. 2004).

[13] *Id*. at 17 n. 7, quoting *Bitler*, 391 F.3d at 1124, n. 5 (emphasis added).

[14] The *Milward* court ultimately reversed the district court's exclusion of expert general causation testimony based on the weight-of-evidence, inference-to-the-best-explanation methodology. *Id*. at 14.

[15] *Milward*, 639 F.3d at 13, quoting *Restatement (Third) of Torts: Liability for Physical and Emotional Harm* § 28 cmt. c(3) (2010).

[16] *Id*. at 13, quoting *Restatement (Third) of Torts: Liability for Physical and Emotional Harm* § 28 cmt. c(4) (2010).

[17] These nine criteria are: 1) "the strength or frequency of the association"; (2) "the consistency of the association in varied circumstances"; (3) "the specificity of the association"; (4) the temporal relationship between the disease and the posited cause"; (5) "the dose response curve between them"; (6) "the biological plausibility of the causal explanation given existing scientific knowledge"; (7) "the coherence of the explanation with generally known facts about the disease"; (8) "the experimental data that relates to it"; and (9) "the existence of analogous causal relationships." *Milward*, 639 F.3d at 17, citing Arthur Bradford Hill, *The Environment and Disease: Association or Causation?*, 58 PROC. ROYAL SOC'Y MED. 295-99 (1965).

 

must be considered *before* "an observed association between a disease and a feature of the environment (*e.g.*, a chemical)" can be deemed causal.[18] However, the *Milward* court then arbitrarily dispensed with the need to establish all nine criteria, citing to the testimony of a philosophy of science professor who claimed that courts need only consider six factors when utilizing a weight-of-the-evidence methodology. These six steps are: (1) "identify[ing] an association[s] between exposure and a disease"; (2) "consider[ing] a range of plausible explanations for the association[s]"; (3) "rank[ing] the rival explanations according to their plausibility"; (4) "seek[ing] additional evidence to separate the more plausible from the less plausible explanations"; (5) "consider[ing] all of the relevant available evidence"; and (6) "integr[ating] the evidence using professional judgment to come to a conclusion about the best explanation."[19]

The court in *Milward* apparently believed that "the use of scientific judgment is necessary" with weight-of-evidence-based abductive reasoning, since "[n]o algorithm exists for applying the Hill guidelines to determine whether an association truly reflects a causal relationship or is spurious."[20] And, "[b]ecause '[n]o scientific methodology exists for this process … reasonable scientists may come to different judgments about whether such an inference is appropriate,'" ultimately, for specific causation purposes.[21] Indeed, the court reasoned that, while "the role of judgment in the weight of evidence approach is more readily apparent than it is in other methodologies," it does not render this approach "any less scientific," because "an evaluation of data and scientific evidence to determine whether an inference of causation is appropriate requires judgment and interpretation."[22]

The First Circuit, therefore, rejected defendants' assertion that a pure weight-of-the-evidence approach like that which plaintiff's expert witness had employed was inherently unreliable as a matter of science and contrary to *Daubert*. Instead, the court held that "admissibility must turn on the particular facts of the case"—*i.e.*, on whether the expert, in reaching his opinion, "applied the methodology with 'the same level of intellectual rigor' that he used in his scientific practice."[23]

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[18] *Milward*, 639 F.3d at 17. *See accord*, *In re Mirena IUS Levonorgestrel-Related Products Liability Litigation* (MDL No. II), 341 F. Supp. 3d 213, 242 (S.D.N.Y. 2018) (discussing how epidemiologists "'start with an association demonstrated by epidemiology and then apply' eight or nine criteria to determine whether that association is causal."); *Fecho v. Eli Lilly and Company*, Civ. No. 1-10152-MBB (D. Mass. 2012), slip op. at 1, citing *Milward*, 639 F.3d at 17-19 (where the district court "[r]ecogniz[ed] that an observed association between a disease, in this instance, breast cancer, and in utero exposure to DES does not, without more, creation causation…").

[19] *Milward*, 639 F. 3d at 17-18.

[20] *Id*. at 18, quoting *Restatement (Third) of Torts: Liability for Physical and Emotional Harm* § 28 cmt. c(3) (2010).

[21] *Id*., quoting *Restatement (Third) of Torts: Liability for Physical and Emotional Harm* § 28 cmt. c(4) (2010).

[22] *Id*., quoting *Restatement (Third) of Torts: Liability for Physical and Emotional Harm* § 28 cmt. c(1) (2010).

[23] *Id*. at 18-19, citing *Kumho Tire*, 526 U.S. at 152.

 

## II. FJC ELEVATES REGIONAL *MILWARD* OPINION TO NATIONAL PROMINENCE

The FJC's release of its *Reference Manual on Scientific Evidence*, Third Edition, within months of *Milward*, merits examination. Absent FJC's frequent references to *Milward* in the Third Edition, the decision's influence would likely have been limited to those district courts in the First Circuit bound to apply it as binding precedent. FJC's imprimatur, however, signaled to federal judges beyond the First Circuit that they consider interpreting FRE 702 in a substantively different manner than recommended in the *Reference Manual*'s Second Edition.

The process of substantively amending a Federal Rule of Evidence ordinarily would take place under the auspices of the Judicial Conference of the United States, which is the federal courts' national policy-making body.[24] "The Conference operates through a network of committees created to address and advise on a wide variety of subjects,"[25] including its Advisory Committee on Rules of Evidence.[26] From 2007 through 2010, the meeting agendas of the Advisory Committee on Rules of Evidence indicated that the committee had begun a project to "restyle" the FRE.[27] This effort did *not*, however, reflect that the Committee had proposed or finalized any *substantive* amendment(s) to FRE Rule.[28] As the 2009 and 2010 meeting agendas stated:

> The language of 702 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to by stylistic only. *There is no intent to change any result in any ruling on evidence admissibility*.[29]

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[24] *See* United States Courts, *Governance & the Judicial Conference*, https://www.uscourts.gov/about-federal-courts/governance-judicial-conference.

[25] *Id*.

[26] *See* Federal Judicial Center, *Judicial Conference of the United States: Committees (Alphabetical)*, https://www.fjc.gov/history/administration/judicial-conference-united-states-committees-alphabetical (under "Committee on Rules of Practice and Procedure, 1958-present").

[27] *See* United States Courts, *Advisory Committee on Evidence Rules–Agenda for Committee Meeting* (11-16-07), at II, at 1, 22, https://www.uscourts.gov/sites/default/files/fr_import/EV2007-11.pdf; United States Courts, *Advisory Committee on Evidence Rules–Agenda for Committee Meeting* (Oct. 23-24, 2008), at 1, 113, https://www.uscourts.gov/sites/default/files/fr_import/EV2008-10.pdf; United States Courts, *Advisory Committee on Evidence Rules–Agenda for Committee Meeting* (Nov. 20, 2009), Committee Note at 229, https://www.uscourts.gov/sites/default/files/fr_import/EV2009-11.pdf; United States Courts, *Advisory Committee on Evidence Rules–Agenda for Committee Meeting* (Oct. 12, 2010), Committee Note at 252, https://www.uscourts.gov/sites/default/files/fr_import/EV2010-10.pdf.

[28] *See* United States Courts, *Advisory Committee on Evidence Rules–Agenda for Committee Meeting* (Nov. 20, 2009), *supra*, I at 2-3; United States Courts, *Advisory Committee on Evidence Rules–Agenda for Committee Meeting* (Oct. 12, 2010), *supra* II at 1, II at 2-3.

[29] *See* United States Courts, *Advisory Committee on Evidence Rules–Agenda for Committee Meeting* (Nov. 20, 2009), *supra*, Committee Note at 229; United States Courts, *Advisory Committee on Evidence Rules–Agenda for Committee Meeting* (Oct. 12, 2010), *supra*, Committee Note at 252 (emphasis added).

 

Indeed, the 2010 meeting agenda of the Advisory Committee on Rules revealed that, "to determine whether any proposed change [to the Federal Rules of Evidence] was one of substance rather than style," it had defined the term "substance" as "changing an evidentiary result *or method of analysis*, or changing language that is so heavily engrained in the practice as to constitute a 'sacred phrase.'"[30] The Judicial Conference ultimately approved and finalized the committee's proposed stylistic changes to FRE 702 on April 26, 2011, and such changes became effective on December 1, 2011.[31]

Very recently, members of the Advisory Committee on Evidence Rules began seeking stakeholder input on a substantive amendment to FRE 702 "to address 'overstatement' by expert witnesses, which occurs when an expert expresses a degree of confidence that cannot be supported by the expert's principles and methods."[32] The proposed amendment would assume the form of an additional Rule 702 admissibility factor: "'(e) the expert does not claim a degree of confidence that is unsupported by a reliable application of the principles and methods.'"[33]

The FJC's *Reference Manual on Scientific Evidence* is entirely separate from the formal evidentiary rulemaking process. It is a compilation of separately authored articles or manuals. The FJC published the first edition in 1994, "at a time of heightened need for judicial awareness of scientific methods and reasoning created by the Supreme Court's decision in *Daubert* […]."[34] The second edition was published in 2000, following the Supreme Court's 1997 and 1999 decisions in *Joiner* and *Kumho Tire*, and after Advisory Committee on Evidence Rules' submission to Congress of "proposed amendments to Federal Rules of Evidence, 701, 702 and 703 that [were] intended to codify case law that [was] based on *Daubert* and its progeny."[35]

The FJC released the Third Edition on September 28, 2011[36] in conjunction with the National Research Council ("NRC"). The Third Edition arguably reflects a more confident tone and attitude of the authors and of the FJC toward the reliability, and thus, the admissibility of expert testimony based on witnesses' use of subjective weight-of-the-evidence methodology to infer general causation from multiple lines of individually non-definitive evidence.

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[30] *Id*. at II at 2 (emphasis added).

[31] *See* The Committee on the Judiciary, House of Representatives, *Federal Rules of Evidence* (Dec. 1, 2014), at FRE Rule 702, https://www.uscourts.gov/sites/default/files/Rules%20of%20Evidence.

[32] *See* Alex Dahl, *Expert Evidence Standards Under Review: Committee Considers Possible Amendments to Rule FRE 702*, WLF COUNSEL'S ADVISORY, Vol. 27 No. 4 (Oct. 25, 2019), at 1, https://www.wlf.org/wp-content/uploads/2019/10/10252019CA_Dahl.pdf.

[33] *Id*.

[34] *See* Federal Judicial Center, *Reference Manual on Scientific Evidence, Second Edition* ("*Second Edition*") (2000), at v, https://nebula.wsimg.com/518f91b5b8b66fb3d91297f6e5436067?AccessKeyId=39A2DC689E4CA87C906D&disposition=0&alloworigin=1.

[35] *Id*. at vi.

[36] *Third Edition*, *supra* note 4.

 

### A. Second Edition Cautious about Admissibility of Expert Opinion Based on Inferences of Causation

The Second Edition, by contrast, stated that, "[i]n toxic tort cases in which the causal mechanism is unknown, establishing causation means providing scientific evidence from which an inference of cause and effect may be drawn."[37] It noted how "numerous unresolved issues [remained] about the relevancy and reliability of the underlying hypotheses that link the evidence to the inference of causation."[38]

The Second Edition discussed how Justice Stevens, in *Joiner*, would "have found no abuse of discretion had the district court admitted expert testimony based on a methodology used in risk assessment, *such as weight-of-evidence methodology* (on which the plaintiff's expert claimed to rely), which pools all available information from many different kinds of studies, taking the quality of the studies into account."[39] The Second Edition also discussed how some had found the "pooling of results of epidemiological studies in a meta-analysis unreliable when used in connection with observational studies," and regarding how it was even more controversial to combine studies across different fields.[40] In addition, the Second Edition stated that although a court might not object to a particular methodology's relevance in proving causation, it may disagree with how that methodology was applied in the particular case: "As the Supreme Court said in *Joiner*, 'nothing … requires a district court to admit opinion evidence which is connected to existing data only by the ipse dixit of the expert.'"[41]

Furthermore, the Second Edition concluded that although "inferences based on well-executed randomized experiments are more secure than inferences based on observational studies,"[42] the "bulk of statistical studies seen in court are observational, not experimental."[43] To this end, the Second Edition emphasized that associations inferred from observation are not causation (*i.e.*, "association is not causation"), and consequently, that "the causal inferences that can be drawn from such analyses rest on a less secure foundation than that provided by a randomized controlled experiment."[44]

The Second Edition emphasized that the "inferences that may be drawn from a study depend on the quality of the data and the design of the study."[45] And, statistical inference

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[37] *See* Margaret A. Berger, The Supreme Court's Trilogy on the Admissibility of Expert Testimony, at 32, in *Second Edition*, *supra* note 34.

[38] *Id*.

[39] *Id.* at 32-33, referencing Justice Steven's partial concurrence and dissent in *Joiner*, 522 U.S. at 150-53. The Second Edition even referenced in a footnote a 1996 article authored by Carl F. Cranor, an advocate of the weight-of-evidence methodology. (emphasis added). *See id*. at n. 123, at 33.

[40] *Id*. at 33.

[41] *Id*.

[42] *See* David H. Kaye and David A. Freedman, *Reference Guide on Statistics*, at 93, in *Second Edition*, *supra* note 34.

[43] *Id*. at 94.

[44] *Id*.

[45] *Id.* at 115.

 

derived from valid statistical models for the data collected on the basis of a probability sample or randomized experiment will be more secure than inference derived from statistical calculations based on analogy.[46] The Second Edition also warned that "[a] correlation between two variables does not imply that one event causes the second. Spurious correlation arises when two variables are closely related but bear no causal relationship because they are both caused by a third, unexamined variable."[47] Moreover, it stated that *"[c]ausality cannot be inferred by data analysis alone*; rather, one must infer that a causal relationship exists on the basis of an underlying causal theory that explains the relationship between the two variables. […] One must also look for empirical evidence that there is a causal relationship."[48]

The Second Edition further discussed how toxicological and epidemiological evidence are used. Toxicological evidence (based on *in vivo* animal exposure/testing of chemicals, or *in vitro* animal/human cell or tissue exposure/testing of chemicals) is used, for example, to refute allegations of *specific* causation (*i.e.*, caused plaintiff's alleged disease or injury) in toxic tort litigation, and to refute allegations of *general* causation (*i.e.*, exposure effects on populations) in regulatory litigation.[49] It noted that "animal toxicological evidence often provides the best scientific information about the risk of disease [to humans] from a chemical exposure."[50] According to the Second Edition, "proffered toxicological expert opinion on potentially cancer-causing chemicals almost always is based on a review of research studies that extrapolate from [*in vivo*] animal experiments involving doses significantly higher than that to which humans are exposed."[51] While "[s]uch extrapolation is accepted in the regulatory arena," it is *not* so accepted in toxic tort cases, where "experts often use additional background information [statistical bases] to offer opinions about disease causation and risk."[52] The reliability of *in vitro* testing/exposure is usually determined by reference to established laboratory protocols.[53]

Finally, the Second Edition noted how both epidemiology ("the study of the incidence and distribution of disease in human populations") and toxicology ("the study of the adverse effects of chemicals in living organisms") help to elucidate "the causal relationship between chemical exposure and disease." Yet, it admonished readers that, while "courts generally rule

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[46] *Id*. at 117.

[47] *See* Daniel L. Rubinfeld, *Reference Guide on Multiple Regression*, at 184, in *Second Edition*, *supra* note 34 ("Multiple regression analysis is a statistical tool for understanding the relationship between two or more variables. Multiple regression involves a variable to be explained – called the dependent variable – and additional explanatory variables that are thought to produce or be associated with changes in the dependent variable. […] Multiple regression is sometimes well suited to the analysis of data about competing theories to which there are several possible explanations for the relationship among a number of explanatory variables. […] Multiple regression also may be useful (1) in determining whether a particular effect is present; (2) in measuring the magnitude of a particular effect; and (3) in forecasting what a particular effect would be, for but for an intervening event."). *Id*. at 181.

[48] *Id*. at 184-85 (emphasis added)..

[49] *See* Bernard D. Goldstein and Mary Sue Henifin, *Reference Guide on Toxicology*, at 404-05, in *Second Edition*, *supra* note 34.

[50] *Id*. at 405.

[51] *Id.* at 409.

[52] *Id*.

[53] *Id*. at 410.

epidemiological expert opinion admissible […where "relevant epidemiological research data exists"…], admissibility of toxicological expert opinion has been more controversial because of uncertainties regarding extrapolation from animal and in vitro data to humans."[54] The Second Edition still noted that, "there is far more information from toxicological studies than from epidemiological studies … even for cancer causation."[55]

### B. Third Edition Promotes Admissibility of Expert Opinion Based on Inferences of Causation Using a Weight-of-the-Evidence Approach

The Third Edition emphasized that Justice Stevens, in his partial concurrence and dissent in *Joiner*, had "assumed that the plaintiff's expert was entitled to rely on epidemiological studies showing "a link between PCBs and cancer if the results of all the studies were pooled, and [consequently,] that this weight-of-the-evidence methodology was reliable." [56] The Third Edition also noted how, unlike the atomized "slicing and dicing approach" the majority in *Joiner* had taken by examining the reliability of each individual study independently, "scientific inference typically requires consideration of numerous findings, which, when considered alone, may not individually prove the contention."[57] In partial support of this proposition, it cites *Milward* ("reversing the district court's exclusion of expert testimony based on an assessment of the direct causal effect of the individual studies, finding that the *'weight of the evidence'* properly supported the expert's opinion that exposure to benzene can cause acute promyelocytic leukemia."). In other words, the Third Edition embraced the *Milward* court's admission of expert opinion to establish general causation.[58]

The Third Edition emphasized generally that "[i]n applying the scientific method, scientists do not review each scientific study individually for whether by itself it reliably supports the causal claim being advocated or opposed. Rather, […] 'summing, or synthesizing, data addressing different linkages [between kinds of data] forms a more complete causal evidence model and can provide the biological plausibility needed to establish the association' being advocated or opposed."[59]

The Third Edition cleverly departed from the Second Edition by noting that, while trial judges possess the discretion "to choose an atomistic approach" to evaluate available studies individually, "[s]ome judges have found this practice contrary to that of scientists who look at knowledge incrementally, especially considering that "there are no hard-and-fast scientific rules for synthesizing evidence."[60] The Third Edition cited two federal court decisions as support for this proposition. In the first case, *In re Ephedra*, 393 F. Supp. 2d 181, 190 (S.D.N.Y.

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[54] *Id.* at 403, 413-14.

[55] *Id*. at 414.

[56] *See* Margaret A. Berger, *The Admissibility of Expert Testimony*, at 15-16, in *Third Edition*, *supra* note 4.

[57] *Id*. at 19-20.

[58] *Id*. at 20, n. 51 (emphasis added).

[59] *Id*. citing n. 52.

[60] *Id.* at 23.

2005), a New York federal district court admitted (and thus dismissed the notion that *Daubert* had precluded) a scientific expert's testimony regarding "the scientific plausibility of a particular hypothesis of causality or even to the fact that a confluence of suggestive, though non-definitive, scientific studies make it more-probable-than-not that a particular substance (such as ephedra) contributed to a particular result (such as a seizure)."[61] The second case cited was *Milward*.[62]

The Third Edition, like the Second Edition, discusses the usefulness of toxicological studies, "which are [often] the only or best available evidence of toxicity," given the limited availability of epidemiological studies. "Epidemiological studies are difficult, time-consuming, expensive, and […] virtually impossible to perform," and "do not exist for a large array of environmental agents."[63] However, unlike the Second Edition, the Third Edition omits reference to the controversy surrounding the admissibility into evidence of toxicological opinions based on extrapolated *in vivo* and *in vitro* study data.

The Third Edition, instead, hedges about how there are "no universal rules for how to interpret or reconcile" animal toxicological and epidemiological studies where both are available.[64] In support of this proposition, the Third Edition cites the methodology of the International Agency for Research on Cancer (IARC), which synthesizes and evaluates, in the *regulatory* context, "all the relevant evidence, including animal studies as well as any human studies," publishes a monograph containing its evaluation and analysis, and explains that, "[s]olely on the basis of the strength of animal studies, IARC may classify a substance as 'probably carcinogenic to humans.'"[65] It also cites to a presentation made at a National Cancer Institute symposium "concluding that, 'There should be no hierarchy [among different types of scientific methods to determine cancer causation]. Epidemiology, animal, tissue culture and molecular pathology should be seen as integrating evidences in the determination of human carcinogenicity.'"[66]

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[61] In *In re Ephedra*, the district court had noted that "it is apparent that no scientific study has been conducted that 'proves' that ephedra or ephedrine 'causes' any of the listed injuries in the sense of establishing the high statistical relationship […] that meets accepted scientific standards for inferring causality. Nor, for that matter, are there studies that definitively disprove the hypothesis of causality. […However, the court held that] the absence of definitive scientific studies establishing causation […should not…] deprive a jury of having before it scientific opinions that, while less definitive and more qualified than the statistically significant scientific studies called for by [defendants' counsels], nevertheless meet scientific standards for determining the plausibility of a causal relationship. 393 F. Supp. 2d at 189-90. The court further noted that, "'gaps or inconsistencies in the reasoning leading to [the expert] opinion … go to the weight of the evidence, not to its admissibility.' […] Thus, although 'an expert's analysis [must] be reliable at every step,' *Amorgianos [v. National Railroad Passenger Corp.,*] 303 F.3d [256, 258 (2d Cir. 2002)], analogy, inference, and extrapolation can be sufficiently reliable steps to warrant admissibility so long as the gaps between the steps are not too great." *Third Edition*, *supra* note 4, at 23, n. 61.

[62] *Id*.

[63] *See* Michael D. Green, D. Michal Freedman, and Leon Gordis, *Reference Guide on Epidemiology*, at 564, in *Third Edition*, *supra* note 4.

[64] *Id*.

[65] *Id*. at ns. 48, 46 (the Third Edition n. 48 mistakenly cites n. 41 in referring to IARC).

[66] *Id*. at 564, n. 48.

 

The Third Edition, furthermore, devoted more than one entire page to its footnote 48 discussion of how an increasing number of federal and state courts have admitted into evidence animal studies for purposes of "proving causation in a toxic substance case." After briefly citing three cases (two state cases and one federal case) that had "take[n] a very dim view of their probative value," it emphasized how "[o]ther courts have been more amenable to the use of animal toxicology in proving causation." In particular, footnote 48 cited a 1986 Maryland federal district court decision in which "the court observed: 'There is a range of scientific methods for investigating questions of causation—for example, toxicology and animal studies, clinical research, and epidemiology—which all have distinct advantages and disadvantages."[67] The Third Edition also cited *Milward* in emphasizing how the First Circuit had "endorsed an expert's use of a *'weight-of-evidence' methodology*, holding that the district court abused its discretion in ruling inadmissible an expert's testimony about causation *based on that methodology*."[68] The Third Edition emphasized that, "[a]s a corollary to recognizing weight of the evidence as a valid scientific technique, […the [*Milward*] court noted…] the role of judgment in making an appropriate inference from the evidence," and that, "as with any scientific technique, [the weight-of-the-evidence methodology] can be improperly applied."[69]

In addition to these cases, the Third Edition's footnote 48 also cited two federal court rulings that admitted toxicological studies into evidence—*In re Heparin Prods. Liab. Litig.*, 2011 WL 2971918 (N.D. Ohio July 21, 2011) ("holding that animal toxicology in conjunction with other non-epidemiologic evidence can be sufficient to prove causation") and *Ruff v. Ensign-Bickford Indus., Inc.*, 168 F. Supp. 2d 1271, 1281 (D. Utah 2001) ("affirming animal studies as a sufficient basis for opinion on general causation"), and a third federal court decision that found the failure to admit toxicological evidence was an abuse of discretion—*Metabolife Int'l, Inc. v. Wornick*, 264 F.3d 832, 842 (9th Cir. 2001) ("holding that the lower court erred in per se dismissing animal studies, which must be examined to determine whether they are appropriate as a basis for causation determination"). Furthermore, the Third Edition quoted a 1994 Third Circuit decision—*In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717 (3d Cir. 1994)—holding animal studies admissible to prove causation in humans, provided each of the steps of an experts' analysis are found reliable.[70] Moreover, the Third Edition emphasized how the Supreme Court in *Joiner* had "*suggested that there is no categorical rule for toxicological studies, observing '[W]hether animal studies can ever be a proper foundation for an expert's opinion [is] not the issue* … The [animal] studies were so dissimilar to the facts presented in this litigation that it was not an abuse of discretion for the District Court to have rejected the experts' reliance on them.'"[71]

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[67] *Id*. at 564, quoting *Marder v. G.D. Searle & Co.*, 630 F. Supp. 1087, 1094 (D. Md. 1986), *aff'd sub nom. Wheelahan v. G.D. Searle & Co.*, 814 F.2d 655 (4th Cir. 1987).

[68] *Id*. at 565, n. 48, quoting *Milward*, 639 F.3d at 17-19 (emphasis added).

[69] *Id*. at n. 48, referencing *Milward*.

[70] *Id*. at 565, n. 48, quoting *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d at 743 ("[In] order for animal studies to be admissible to prove causation in humans, there must be good grounds to extrapolate from animals to humans, just as the methodology of the studies must constitute good grounds to reach conclusions about the animals themselves. Thus, the requirement of reliability, or 'good grounds,' extends to each step in an expert's analysis all the way through the step that connects the work of the expert to the particular case.").

[71] *Id*., quoting *General Electric Co. v. Joiner*, 522 U.S. at 144-45 (emphasis added).

 

In *Daubert*, the Supreme Court held that, to establish the reliability of the methodology serving as the basis of expert opinion, a party must show *inter alia* that the specific scientific technique utilized has a known or potential rate of error, and existing and maintained standards are controlling the technique's operation. The Third Edition discussed this standard in the context of epidemiological studies, noting that "epidemiologists prepare their study designs and test the plausibility that any association found in a study was the result of random error by using the null hypothesis."[72] "The null hypothesis is a statistical theory which suggests that no statistical relationship and significance exists in a set of given single observed variable, between two sets of observed data and measured phenomena."[73] "An erroneous conclusion that the null hypothesis is false (*i.e.*, a conclusion that there is a difference in risk when no difference actually exists) owing to a random error is called a false-positive error (also Type I error or alpha error)."[74]

As the Third Edition noted, epidemiologists use a *p*-value to "represent[] the probability that an observed positive association could result from random error even if no association were in fact present."[75] "*Thus*, a *p*-value of .1 means that there is a 10% chance that values at least as large as the observed relative risk could have occurred by random error, with no association actually present in the population."[76] "To minimize false positives, epidemiologists use a convention that the *p*-value must fall below some selected level known as alpha or significance level for the results of the study to be statistically significant."[77] This is known as "significance testing."

The Third Edition's *Reference Guide on Epidemiology* devoted two pages to footnote 85 to discuss the controversy among epidemiologists and biostatisticians about the appropriate role of significance testing and the "[s]imilar controversy" "among the courts that have confronted the issue of whether statistically significant studies are required to satisfy the burden of production."[78] The Third Edition related that, while "[a] number of post-*Daubert* federal courts have indicated strong support for significance testing as a[n evidentiary] screening device"[79] to determine the admissibility of testimony for general causation purposes, "a number of [other] courts are more cautious about or reject using significance testing as a necessary condition, instead recognizing that assessing the likelihood

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[72] *Id*. at 574-75.

[73] *See* Science Direct, *Null Hypothesis*, https://www.sciencedirect.com/topics/earth-and-planetary-sciences/null-hypothesis.

[74] *See* Green, Freedman, and Gordis, *supra* note 63, at 576.

[75] *Id*.

[76] *Id*.

[77] *Id*.

[78] *Id*. at 578 n. 85.

[79] *Id*. (citing, quoting, and summarizing *Good v. Fluor Daniel Corp*., 222 F. Supp. 2d 1236, 1243 (E.D. Wash. 2002) ("'In the absence of a statistically significant difference upon which to opine, Dr. Au's opinion must be excluded under *Daubert*.'"); *Miller v. Pfizer, Inc.*, 196 F. Supp. 2d 1062, 1080 (D. Kan. 2002) ("the expert must have statistically significant studies to serve as basis of opinion on causation"); *Kelley v. Am. Heyer-Schulte Corp.*, 957 F. Supp. 873, 878 (W.D. Tex. 1997) ("the lower end of the confidence interval must be above 1.0—equivalent to requiring that a study be statistically significant—before a study may be relied upon by an expert"), appeal dismissed, 139 F.3d 899 (5th Cir. 1998).

 

of random error is important in determining the probative value of a study"[80]—*i.e.*, *the weight of evidence*, *not* the admissibility of evidence. It then documented in footnote 85 those pre- and post-*Daubert* federal courts that have been more cautious or have rejected significance testing as a litmus test for admissibility. These courts include a Utah federal district court,[81] the Third Circuit,[82] the Sixth Circuit,[83] a District of Columbia federal district court,[84] a Minnesota federal district court,[85] a Colorado federal district court,[86] a New York federal district court,[87] and the First Circuit with *Milward*.[88] In *Milward*, the court "recogniz[ed] the difficulty of obtaining statistically significant results when the disease under investigation occurs rarely," and it "conclude[ed] that the district court erred in imposing a statistical significance threshold."[89]

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[80] *Id*.

[81] *See id.*, quoting *Allen v. United States*, 588 F. Supp. 247, 417 (D. Utah 1984) (pre-*Daubert*) ("'The cold statement that a given relationship is not 'statistically significant' cannot be read to mean there is no probability of a relationship.'").

[82] *See id.*, citing *DeLuca v. Merrell Dow Pharmaceuticals, Inc.*, 911 F.2d 941, 948–49 (3d Cir. 1990) (pre-*Daubert*) (which "described confidence intervals (i.e., the range of values that would be found in similar studies due to chance, with a specified level of confidence) and their use as an alternative to statistical significance.").

[83] *See id.*, quoting *Turpin v. Merrell Dow Pharms., Inc.*, 959 F.2d 1349, 1357 (6th Cir. 1992) (pre-*Daubert*) ("'The defendant's claim overstates the persuasive power of these statistical studies. An analysis of this evidence demonstrates that it is possible that Bendectin causes birth defects even though these studies do not detect a significant association.'").

[84] *See id*., citing *United States v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 1, 706 n.29 (D.D.C. 2006) (rejecting the position of an expert who denied that the causal connection between smoking and lung cancer had been established, in part, on the ground that any study that found an association that was not statistically significant must be excluded from consideration).

[85] *See id*., citing *In re Viagra Prods. Liab. Litig.*, 572 F. Supp. 2d 1071, 1090 (D. Minn. 2008) (holding that, for purposes of supporting an opinion on general causation, a study does not have to find results with statistical significance).

[86] *See id*., quoting *Cook v. Rockwell Int'l Corp.*, 580 F. Supp. 2d 1071, 1103 (D. Colo. 2006) ("'The statistical significance or insignificance of Dr. Clapp's results *may affect the weight given to his testimony, but does not determine its admissibility under Rule 702*.'"). (emphasis added).

[87] *See id*., quoting *In re Ephedra Prods. Liab. Litig.*, 393 F. Supp. 2d 181, 186 (S.D.N.Y. 2005) ("'[T]he absence of epidemiologic studies establishing an increased risk from ephedra of sufficient statistical significance to meet scientific standards of causality does not mean that the causality opinions of the PCC's experts must be excluded entirely.'").

[88] *See id*., citing *Milward*, 639 F.3d at 24-25.

[89] 639 F.3d at 24-25. Carl Cranor, the plaintiff's expert witness in *Milward*, has appeared to misrepresent federal courts' use of "significance testing" as a misapplication of the Bradford Hill criteria. *See* Raymond Richard Neutra, Carl F. Cranor, and David Gee, *The Use and Misue of Bradford Hill in U.S. Tort Law*, 58 JURIMETRICS J. 127, 151-53 (2018), https://www.americanbar.org/content/dam/aba/publications/Jurimetrics/Winter2018/the_use_and_misuse_of_bradford_hill.authcheckdam.pdf. Legal commentator Nathan Schachtman has shown to the contrary that the Hill criteria required use of the statistical method in interpreting medical data. *See* Nathan Schachtman, *Bradford Hill on Statistical Methods* (Sept. 24, 2013), http://schachtmanlaw.com/bradford-hill-on-statistical-methods/; Nathan Schachtman, *Carl Cranor's Conflicted Jeremiad Against* Daubert (Sept. 23, 2018), http://schachtmanlaw.com/carl-cranors-conflicted-jeremiad-against-daubert/#sdfootnote14anc (arguing *inter alia* that Cranor's "poor scholarship ignores Hill's insistence that this statistical analysis be carried out").

 

The Third Edition also noted how toxicological testing for chemical carcinogens by government agencies incident to performing a risk assessment[90] (in the regulatory context) can range from "relatively simple studies to determine whether the substance is capable of producing bacterial mutations[,] to observation of cancer incidence as a result of long-term administration of the substance to laboratory animals," to "a multiplicity of tests that build upon the understanding of the mechanism of cancer causation."[91] And, it noted that the "many tests that are pertinent to estimating whether a chemical or physical agent produces human cancer require careful evaluation."[92] To this end, the Third Edition identified IARC and the U.S. National Toxicology Program as having "formal processes to evaluate the *weight of evidence* that a chemical causes cancer. Each classifies chemicals on the basis of epidemiological evidence, toxicological findings in laboratory animals, and mechanistic considerations, and then assigns a specific category of carcinogenic potential to the individual chemical or exposure situation."[93]

## III. THIRD EDITION'S DEVELOPMENT AND PEER REVIEW OFFER CLUES ON WEIGHT-OF-THE-EVIDENCE EMBRACE

As explained above, the Third Edition of the *Reference Manual on Scientific Evidence* departs significantly from the Second Edition on several key principles. Those departures ease plaintiffs' efforts to admit expert evidence on the pivotal issue of whether defendant caused harm. The development and peer review of the Third Edition offer some clues as to how and why the FJC arrived at these changes.

The Third Edition came about through an institutional collaboration between the FJC and the National Academy of Science ("NAS"). FJC's Director during the edition's development was Judge Barbara J. Rothstein of the U.S. District Court for the Western District of Washington.[94] The document's development and peer review were funded by the

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[90] *See Third Edition*, *supra* note 4, at 650-51.

[91] *Id*. at 654.

[92] *Id*. at 655.

[93] *Id*. (emphasis added). *See* discussion *infra*.

[94] Judge Rothstein, appointed by former President Jimmy Carter in 1979, currently also serves in the capacity of a Visiting Senior Judge inter-circuit in both the United States District Court for the District of Columbia and in the United States District Court for the Western District of Pennsylvania. In addition, Judge Rothstein continues to serve simultaneously as the Chief Judge of the United States District Judge of the Western District of Washington. *See* United States District Court for the Western District of Washington, *Judge Barbara J. Rothstein Biography*,: https://www.wawd.uscourts.gov/judges/rothstein-bio; United States District Court for the District of Columbia, *Senior Judge Barbara J. Rothstein*, https://www.dcd.uscourts.gov/content/senior-judge-barbara-j-rothstein; United States District Court for the Western District of Pennsylvania, *Barbara J. Rothstein, Senior District Judge*, https://www.pawd.uscourts.gov/content/barbara-j-rothstein-senior-district-judge. *See also* Wikipedia, *Barbara Jacobs Rothstein*, available at: https://en.wikipedia.org/wiki/Barbara_Jacobs_Rothstein. Furthermore, Judge Rothstein has decided federal cases in the U.S. District Court for the Middle District of Alabama, the U.S. Court of Appeals for the 11th Circuit, the U.S. Court of Appeals for the Ninth Circuit, and the U.S. Court of Appeals for the District of Columbia Circuit. One recent law and economics research paper, which found that "judges tend to consistently hire clerks with similar measures of the judge's own ideology," scored Judge Rothstein as having the fifth most ideologically "left" mean CFscore of all U.S. district court law clerks evaluated from either political

 

Carnegie Foundation and the Starr Foundation and overseen by the National Research Council's (NRC) Committee on Science, Technology and the Law.[95]

A 2011 analysis of the Third Edition stated that because of the National Academy of Science's participation, "The third edition of the Manual should have even more significance than the first two editions." [96] The faith the authors of that analysis placed in the NAS/NRC's involvement in peer review may have been misplaced, however. As this author explained in a 2015 Washington Legal Foundation WORKING PAPER, the NRC's peer-reviewer selection process had previously failed to identify numerous institutional conflicts of interest in the group that reviewed seven National Oceanic and Atmospheric Administration climate-change-related scientific assessments. The Environmental Protection Agency relied heavily upon these assessments as support for its 2009 Greenhouse Gas Endangerment Findings.[97]

The NRC-selected peer-review panel for the Third Edition similarly featured an impressive array of academics, statisticians, and jurists, but it also similarly suffered from a significant lack of intellectual and professional diversity and included several members that arguably had a direct interest in lowering the admissibility standard for expert evidence.

Among the 29 individuals involved in the Third Edition's independent peer review, two were attorneys with predominantly plaintiff-sided practices who would reap substantial benefits if more judges accepted and applied the *Milward* court's approach. Another peer reviewer was the government affairs director for an environmental activist organization, Natural Resource Defense Council, whose legal and lobbying activities advance a European-style precautionary approach in civil litigation and federal regulation.[98] The NRC failed to

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party. *See* Adam Bonica, Adam S. Chilton, Jacob Goldin, Kyle Rozema and Maya Sen, *The Political Ideologies of Law Clerks and their Judges*, (Coase-Sandor Working Paper Series in Law and Economics No. 754, 2016), at 4, 6, Table A3 at 68, Table A4 at 72, https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=2432&context=law_and_economics (discussing how Hillary Clinton and Barack Obama, on the ideological left side of the spectrum, have CFscores of -1.16 and -1.65, respectively; Ron Paul and Scott Walker, on the ideological right, have CFscores of 1.57 and 1.28, respectively, and Chris Christie and Joseph Lieberman, ideologically more moderate, have CFscores of 0.46 and -0.54, respectively, and illustrating in Table A3 the law clerks selected by Judge Barbara Jacobs Rothstein having a mean CFscore of -1.49, clearly closer to Barack Obama than to Hillary Clinton).

[95] *See Third Edition*, supra note 4, Foreword, at ii, iii, ix.

[96] *See* Perkins Coie, *New Peer Reviewed Edition of Reference Manual on Scientific Evidence for Judges Released*, News & Insight (Oct. 14, 2011), https://www.perkinscoie.com/en/news-insights/new-peer-reviewed-edition-of-reference-manual-on-scientific.html.

[97] *See* Lawrence A. Kogan, *Revitalizing the Information Quality Act as a Procedural Cure for Unsound Regulatory Science: A Greenhouse Gas Rulemaking Case Study*, WLF WORKING PAPER, No. 191 (Feb. 2015), at 20-21, https://s3.us-east-2.amazonaws.com/washlegal-uploads/upload/legalstudies/workingpaper/2015Kogan.pdf; Lawrence Kogan, *A Second Look at EPA Findings*, FORBES.COM (Mar. 5, 2015), https://www.forbes.com/sites/realspin/2015/03/05/a-second-look-at-epa-findings/#5a6b52bf2c8d.

[98] *See* Lawrence A. Kogan, *A Chill Wind for Precaution? Broader Ramifications of Supreme Court's* Winter *Decision*, WLF WORKING PAPER No. 163 (Apr. 2009), https://s3.us-east-2.amazonaws.com/washlegal-uploads/upload/0409KoganWPFinal.pdf .*See also* Natural Resources Defense Council, *Comments from the Natural Resources Defense Council to the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) Scientific Advisory Panel (SAP) on the Carcinogenic Potential of Glyphosate* (Nov. 3, 2016), https://www.nrdc.org/file/11433/download?token=mtrATIRt; Jennifer Sass, *Health Experts Rebut Trump EPA*

 

balance those three individuals with an attorney whose primary work was on behalf of corporate defendants, or a representative from an interest group that advocates for constitutionally protected property rights and/or for aggressive judicial gatekeeping for scientific evidence.

In addition, the Third Edition peer-review group included Professor Carl Cranor, a University of California at Riverside philosophy professor[99] and a scholar at the Center for Progressive Reform.[100] Aas discussed below, Cranor is a precautionary-principle advocate who authored law review articles and a chapter in a European Environment Agency book that discussed *inter alia* how *ex ante* precautionary-principle-based regulatory policies would complement the weight-of-evidence methodology the First Circuit embraced in *Milward*.

## IV. FJC'S THIRD EDITION ENCOURAGES A METHODOLOGY MORE SUITABLE FOR REGULATION THAN FOR ESTABLISHING GENERAL CAUSATION AT TRIAL

In *Allen v. Pennsylvania Eng'g Corp.*, 102 F.3d 194 (5th Cir. 1996), the Fifth Circuit held that it had been "unpersuaded that the 'weight of the evidence' methodology […] used by [r]egulatory and advisory bodies such as IARC, OSHA, and EPA to assess the carcinogenicity of various substances in human beings and suggest or make prophylactic rules governing human exposure […was] scientifically acceptable for demonstrating a medical link between […] EtO exposure and brain cancer."[101] As the court found, "[t]his methodology results from the preventive perspective that the agencies adopt in order to reduce *public* exposure to harmful substances. *The agencies' threshold of proof is reasonably lower than that appropriate in tort law*, which 'traditionally make[s] more particularized inquiries into cause and effect' and requires a plaintiff to prove 'that it is more likely than not that another individual has caused him or her harm.'"[102]

Several years later, the Eleventh Circuit, in *Rider v. Sandoz Pharms. Corp.*, 295 F.3d 1194 (11th Cir. 2002), echoed the Fifth Circuit's concerns in *Allen*. The Eleventh Circuit held

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*Censoring Science Rule*, Natural Resources Defense Council Expert Blog (July 16, 2018), https://www.nrdc.org/experts/jennifer-sass/health-experts-rebut-trump-epa-censoring-science-rule; Jennifer Sass, *Comments from the Natural Resources Defense Council In Support of SB 70 – An Act to Amend Title 6 of the Delaware code Relating to Protecting the Health of Children by Prohibiting Bisphenol-A in Products for Young Children Sponsored by Senator Hall-Long*, https://www.nrdc.org/sites/default/files/hea_11062301a.pdf.

[99] *See* UC Riverside Department of Philosophy, *Carl Cranor*, https://philosophy.ucr.edu/carl-cranor/.

[100] Center for Progressive Reform, *Bio, Carl F. Cranor*, http://progressivereform.net/CPRBlog.cfm?fkScholar=12.

[101] 102 F.3d at 198.

[102] *Id*., quoting *Wright v. Willamette Industries, Inc.*, 91 F.3d 1105, 1107 (8th Cir. 1996) (emphasis added). *See also Johnson v. Arkema, Inc.*, 685 F.3d 452, 464 (5th Cir. 2012) (quoting *Allen*); *Mitchell v. Gencorp Inc.*, 165 F.3d 778, 783 n.3 (10th Cir. 1999) (holding that "The methodology employed by a government agency 'results from the preventive perspective that the agencies adopt in order to reduce public exposure to harmful substances."); Knight S. Anderson, *Government Action Does Not Equal Proximate Causation*, American Bar Association (June 11, 2012), https://www.americanbar.org/groups/litigation/committees/products-liability/articles/2012/gvt-action-does-not-equal-proximate-causation/.

 

that, "[t]he *Daubert* rule requires more"[103] scientific substantiation to prove medical causation than the FDA's standard of proof. The FDA "may choose to err on the side of caution."[104] The court had referred specifically to the FDA's public statement "that possible risks outweigh[ed] the limited benefits of the drug [Parlodel]," as "involv[ing] a much lower standard than that [the preponderance-of-the-evidence standard] which is demanded by a court of law."[105] The *Rider* court further held that, "[g]iven time, information, and resources, courts may only admit the state of science as it is. Courts are cautioned not to admit speculation, conjecture, *or inference* that cannot be supported by sound scientific principles."[106]

Contrary to the Fifth and Eleventh Circuits' decisions, *Milward* concluded that the Bradford Hill methodology permits an inference of causation as a generally acceptable and reliable way to determine *general* causation in toxic tort cases.[107] The court apparently grounded this holding on the relatively lesser burden of proof needed to establish general causation as compared to specific causation. As the court observed, "'[g]eneral causation' exists when a substance is capable of causing a disease,"[108] which requires a party to show that an association between a disease and an agent is merely plausible or possible, whereas, to establish "'[s]pecific causation,'" a party must show that "exposure to an agent caused a particular plaintiff's disease."[109]

In apparent defense of the *Milward* court's conclusion, the Third Edition emphasizes how inferences of association are commonly made in weighing evidence derived from different studies and lines of data by "many of the most well-respected and prestigious scientific bodies (such as the International Agency for Research on Cancer (IARC), the Institute of Medicine [IOM of the U.S. National Academy of Sciences], the [U.S National Research Council (NRC)], and the National Institute for Environmental Health Sciences [NIH NIEHS])" and the National Toxicology Program (NTP of the U.S. Department of Health and Human Services),[110] as well as, by the national and international regulatory advisory panels convened by the "NIH Toxicology Study Section, EPA [U.S. Environmental Protection Agency], FDA [U.S. Food and Drug Administration], WHO and IARC."[111] According to the Third Edition, such national and international organizations and bodies and their advisory panels "consider all the relevant available scientific evidence, taken as a whole, [*in the regulatory arena*,] to

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[103] 295 F.3d at 1202.

[104] *Id*. at 1201.

[105] *Id*.

[106] *Id*. at 1202, citing *Rosen v. Ciba-Geigy Corp.*, 78 F.3d 316, 319 (7th Cir. 1996) (emphasis added).

[107] The *Milward* court ultimately reversed the district court's exclusion of expert general causation testimony based on the weight-of-evidence methodology. 639 F. 3d at 14.

[108] *Milward*, 639 F.3d at 13, quoting *Restatement (Third) of Torts: Liability for Physical and Emotional Harm* § 28 cmt. c(3) (2010).

[109] *Id*., quoting *Restatement (Third) of Torts: Liability for Physical and Emotional Harm* § 28 cmt. c(4) (2010). *See also Short v. Amerada Hess Corp.*, Civ. No. 16-cv-204-JL (D.N.H. 2019), slip op. at 15, quoting *Milward*, 639 F.3d at 13 (personal injury action).

[110] *See Third Edition*, *supra* note 4, at 20; 218, n. 16; 563, n. 42; 564-565, fns. 46 and 48; 613, n. 193; 645, n. 30; 646; 655, fns 62-63; 656, fns 64-65; 660, n. 75.

[111] *Id*. at 678.

 

determine which conclusion or hypothesis regarding a causal claim is best supported by the body of evidence."[112] A 2016 NAS publication refers to such organizations, which "assess the evidence bearing on whether a chemical or other agent is a toxin and present their conclusion and the evidence bearing on the matter to the public," as "consensus organizations."[113]

Presumably, the authors of the Third Edition, which had been prepared and published in conjunction with the National Research Council of the NAS,[114] understood that, "unlike public health regulation, tort law requires proof that an individual defendant was responsible for an individual's harm, the reason for *specific* causation."[115] And, presumably, the Third Edition's authors well knew that, "[b]y contrast, in the area of risk regulation, such as that performed by the Environmental Protection Agency or the Food and Drug Administration, risk to a *group* of individuals or even to the entire population is sufficient for legal action. Thus, unlike, tort law, public health regulation is concerned solely with *general* causation and *not* specific causation."[116] In other words, unlike the adjudication of a tort claim, which "does not depend on whether a risk such as asbestos causes a public health calamity or one unfortunate individual suffers a unique and freakish overdose of a pharmaceutical that causes harm," "[r]isk regulation is concerned with the extent of [a risk's] impact on public health."[117] Additionally, "[w]hile a plaintiff in a civil [tort] case must establish causation, including general causation by a preponderance of the evidence, regulators have a lower burden of establishing that there is 'sufficient evidence' or in some cases 'substantial evidence' to support a determination of general causation."[118]

The 2016 NAS publication and the Third Edition describe the *ex ante* nature of the weight-of-evidence analyses that regulatory bodies routinely perform to identify and prevent the harms that agents can pose to human health in the general population. However, both curiously fail to properly identify such harms as "hazards" or "risks." The Third Edition sets forth the "standard" risk assessment definitions of hazard and risk *only* in a footnote as if to

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[112] *Id*.

[113] *See* Steve C. Gold, Michael D. Green and Joseph Sanders, *Scientific Evidence of Factual Causation: An Educational Model*, for the National Academies of Science Committee on Preparing the Next Generation of Policy Makers for Science-Based Decisions (Oct. 2016), 239, https://sites.nationalacademies.org/cs/groups/pgasite/documents/webpage/PGA_174994.pdf.

[114] *See Third Edition*, *supra* note 4, at Inside Cover: The Federal Judicial Center contributed to this publication in furtherance of the Center's statutory mission to develop and conduct educational programs for judicial branch employees. […] The project that is the subject of this report was approved by the Governing Board of the National Research Council, whose members are drawn from the councils of the National Academy of Sciences, the National Academy of Engineering, and the Institute of Medicine. [...] The development of the third edition of the *Reference Manual on Scientific Evidence* was supported by Contract No. B5727.R02 between the National Academy of Sciences and the Carnegie Corporation of New York and a grant from the Starr Foundation.).

[115] *See* Gold, Green, and Sanders, *supra* note 113, at 14.

[116] *Id*. (emphasis added).

[117] *Id*.

[118] *Id*.

 

minimize their distinction and its relative significance.[119] The Third Edition then emphasizes how the "first 'law' of toxicology ['the dose makes the poison'[120]] is particularly pertinent to 'questions of specific causation" at trial, "while the second 'law' of toxicology ['the biologic actions of chemicals are specific to each chemical'[121]] is particularly pertinent to questions of *general causation*."[122]

The Third Edition next distinguishes between toxic tort litigation's focus on "plaintiffs' claims that their diseases or injuries were caused by chemical exposures" (presumably, specific causation), and regulatory litigation's focus on "government regulations concerning a chemical or a class of chemicals."[123] It also emphasizes how, "[i]n regulatory litigation, toxicological evidence addresses the issue of how exposure affects populations [generally] rather than specific causation, and agency determinations are usually subject to the court's deference."[124] It would appear from this analysis that the Third Edition and the 2016 NAS publication have cleverly obscured and conflated the terms "hazard" and "risk"[125] to justify the use of the relatively lower but judicially acceptable evidentiary standard public bodies employ in assessing *ex ante* chemical hazards as part of the regulatory risk-assessment process as the evidentiary standard to be employed *post hoc* at trial to establish general causation. Thus, these publications intimate that, where an expert can infer, based on the weighing of multiple lines of evidence in accordance with the Bradford Hill factors requiring

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[119] *See Third Edition*, *supra* note 4, at 637, n. 7 ("In standard risk assessment terminology, hazard is an intrinsic property of a chemical or physical agent, while risk is dependent both upon hazard and on the extent of exposure.").

[120] *See* ChemicalSafetyFacts.org, *The Dose Makes the 'Poison,'* https://www.chemicalsafetyfacts.org/dose-makes-poison-gallery/; A.M. Tsatsakis, L. Vassilopoulou, *et al.*, *The Dose Response Principle From Philosophy to Modern Toxicology: The Impact of Ancient Philosophy and Medicine in Modern Toxicology Science*, TOXICOLOGY REPORTS 5 (2018), 1107-13, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6226566/pdf/main.pdf.

[121] *See* Encyclopedia.com, *Toxicology*, https://www.encyclopedia.com/medicine/divisions-diagnostics-and-procedures/medicine/toxicology; B. D. Goldstein and M. A. Gallo, *Profiles in Toxicology – Pare's Law: The Second Law of Toxicology*, 60 Toxicological Sciences, 194-95 (2001), https://academic.oup.com/toxsci/article/60/2/194/1644049.

[122] *See Third Edition*, *supra* note 4, at 637, n. 7 (emphasis added).

[123] *Id*. at 638.

[124] *Id*.

[125] *Id*. at 218-19 ("The next issue is crucial: Exposed and unexposed people may differ in ways other than the exposure they have experienced. For example, children who live near power lines could come from poorer families and be more at risk from other environmental hazards. Such differences can create the appearance of a cause-and-effect relationship. Other differences can mask a real relationship. Cause-and-effect relationships often are quite subtle, and carefully designed studies are needed to draw valid conclusions. […] With the health effects of power lines, family background is a possible confounder; so is exposure to other hazards. Many confounders have been proposed to explain the association between smoking and lung cancer, but careful epidemiological studies have ruled them out, one after the other."). *See also id*. at 505 ("The sciences of epidemiology[] and toxicology[] are devoted to understanding the hazardous properties (the toxicity) of chemical substances. Moreover, epidemiological and toxicological studies provide information on how the seriousness and rate of occurrence of the hazard in a population (its risk) change as exposure to a particular chemical changes. To evaluate whether individuals or populations exposed to a chemical are at risk of harm,[] or have actually been harmed, the information that arises from epidemiological and toxicological studies is needed, as is the information on the exposures incurred by those individuals or populations.").

 

"an informed exercise of scientific judgment,"[126] that an agent received from different sources is associated with a greater incidence of disease *in a population or group—i.e.*, it has been shown to be a sufficient, rather than, a necessary cause of that disease—a court should admit such testimony into evidence for purposes of proving general causation at trial.[127]

The plain meaning of words is critically important in this context. The plain meaning of "capable" is "susceptible; comprehensive; having attributes (such as physical or mental power) required for performance or accomplishment; having traits conducive to or features permitting something; having legal right to own, enjoy or perform; having or showing general efficiency and ability."[128] "Plausible" means "superficially fair, reasonable, or valuable, but often specious; superficially pleasing or persuasive; appearing worthy of belief."[129] "Plausible" is also defined as "possibly true; able to be believed,"[130] and "seems likely to be true or valid."[131] Synonyms of "plausible" include conceivable and possible,[132] as well as believable, likely, presumptive and probable.[133] The plain meaning of "possible" is "being within the limits of ability, capacity, or realization; being what may be conceived, be done, or occur according to nature, custom or manners; being something that may or may not occur; being something that may or may not be true or actual; having an indicated potential."[134] "Possible" also has been defined as "feasible but less than probable." Synonyms of "possible" include achievable, available, conceivable and potential,[135] as well as feasible, practicable, realizable, viable,[136] and plausible.[137] Based on these definitions and synonyms, the Third

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[126] *See* Gold, Green, and Sanders, *supra* note 113, at 55.

[127] *Id*. at 4. *See also id*. at 212-13 ("[S]cientists often accept 'weight of the evidence' as *sufficient* support for regulatory decisions based on hypotheses of toxicity that cannot be directly tested experimentally." (emphasis added). "One federal court of appeals reversed a trial court's decision excluding an expert's 'weight of the evidence' testimony as to general causation. *Milward v. Acuity Specialty Products Group, Inc.*, 639 F.3d 11 (1st Cir. 2011)." On remand, a different district judge excluded the testimony of the plaintiff's expert on specific causation. *Milward v. Acuity Specialty Products Group, Inc*., 969 F. Supp. 2d 101 (D. Mass. 2013), aff'd, 820 F.3d 469 (1st Cir. 2016).

[128] *See* Merriam-Webster, *Capable*, https://www.merriam-webster.com/dictionary/capable. *See accord*, Oxford Dictionaries, *Capable*, https://en.oxforddictionaries.com/definition/capable ("1 (capable of doing something) Having the ability, fitness, or quality necessary to do or achieve a specified thing. […] 2 Able to achieve efficiently whatever one has to do; competent."); Cambridge Dictionary, *Capable*, https://dictionary.cambridge.org/us/dictionary/english/capable ("having the skill or ability or strength to do something").

[129] *See* Merriam-Webster, *Plausible*, https://www.merriam-webster.com/dictionary/plausible.

[130] *See* Cambridge Dictionary, *Plausible*, https://dictionary.cambridge.org/us/dictionary/english/plausible.

[131] *See* Collins Dictionary, *Plausible*, https://www.collinsdictionary.com/us/dictionary/english/plausible.

[132] *See* Plausible, Thesaurus.com, https://www.thesaurus.com/browse/plausible. *See also* Collins Dictionary, Plausible – Synonyms (referring to "possible"), https://www.collinsdictionary.com/dictionary/english/plausible.

[133] *See* Merriam-Webster Thesaurus, *Plausible, Synonyms for Plausible*, https://www.merriam-webster.com/thesaurus/plausible.

[134] *See* Merriam-Webster, *Possible*, https://www.merriam-webster.com/dictionary/possible.

[135] *See* Possible, Thesaurus.com, https://www.thesaurus.com/browse/possible.

[136] *See* Merriam-Webster Thesaurus, *Possible, Synonyms for Possible*, https://www.merriam-webster.com/thesaurus/possible.

[137] *See* Collins Dictionary, *Synonyms of 'Possible,'* https://www.collinsdictionary.com/us/dictionary/english-thesaurus/possible.

 

Edition clearly insinuates that, in order to establish general causation at trial, one must show that an association is merely plausible or possible, rather than likely. This arguably is equivalent to treating that association as a hazard as opposed to a risk.

Furthermore, while the Third Edition identifies certain international organizations and bodies for their use of weight-of-the-evidence methodology, the edition does not discuss how other such entities have clearly defined and distinguished the critically important terms "hazard" and "risk." For example, the Federal Republic of Germany's prestigious Federal Institute for Risk Assessment has defined "hazard" as "the potential of a substance or situation to cause an adverse effect when an organism, system or (sub) population is exposed to that substance or situation." "The term 'hazard' refers to the inherent property of a substance (or a situation) to cause an adverse effect. In this context for example the [World Health Organization] International Programme on Chemical Safety (IPCS) defines a 'hazard' as the: 'Inherent property of an agent or situation having the *potential* to cause adverse effects when an organism, system, or (sub) population is exposed to that agent. (IPCS 2004, 12).'"[138] The Federal Institute for Risk Assessment has defined the term "risk," by contrast, as "the *likelihood* of an adverse effect in an organism, system or a (sub) population on exposure to a substance or situation under specific conditions."[139] The IPCS defines "risk" as "The *probability* of an adverse effect in an organism, system, or (sub) population caused under specified circumstances by exposure to an agent. (IPCS 2004, 13)."[140] "This definition [of risk] highlights the fact that the difference between 'hazard' and 'risk' lies in exposure. A risk exists when there is exposure to a 'hazard,' in a nutshell: risk=(hazard, exposure)."[141] "Based on these definitions, information about a 'hazard' is different from information about a 'risk' even if this difference is not always made clear."[142]

Moreover, the Third Edition conspicuously omits mention of the 1994 report findings and recommendations of another international body—the International Joint Commission (IJC).[143] The IJC had previously equated use of the weight-of-evidence approach, which "is not a value-neutral exercise," with the application of a *precautionary* inference, which focuses on the identification of *hazards* "[w]hen the harm is large, the uncertainty is great, and our ability to predict the future is limited." [144] In fact, "[i]n 1993, the Governments of the United

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[138] *See* Federal Republic of Germany, Federal Institute for Risk Assessment, *Evaluation of Communication on the Differences between "Risk" and "Hazard," Final Report* (E.Ulbigetal.eds., 2010), at 6-7, https://www.bfr.bund.de/cm/350/evaluation_of_communication_on_the_differences_between_risk_and_hazard.pdf (emphasis added).

[139] *Id*. at 6 (emphasis added).

[140] *Id*. at 8 (emphasis added).

[141] *Id*.

[142] *Id*. at 6.

[143] Article VII of the Canada–U.S. Boundary Waters Treaty of 190 established the International Joint Commission (IJC) 9. *See* Treaty Between the United States and Great Britain Relating to Boundary Waters, and Questions Arising Between the United States and Canada, U.K.-U.S., Jan. 11, 1909, 36 Stat. 2448, https://www.ijc.org/sites/default/files/2018-07/Boundary%20Water-ENGFR.pdf. The 1909 Boundary Waters Treaty covers water quantity and water quality issues in shared waterways and related watersheds along the entire Canada–U.S. border. *See id*. at "Preliminary Article."

[144] *See* Jack Weinberg & Joe Thorton, *Scientific Inference and the Precautionary Principle*, *in* APPLYING WEIGHT OF EVIDENCE: ISSUES AND PRACTICE, A REPORT ON A WORKSHOP HELD OCTOBER 24, 1993 (Michael Gilbertson & Sally

 

States and Canada "accepted the […] IJC['s] recommendation to use a weight of evidence approach in reaching conclusions about proposals to eliminate persistent toxic substances from the ecosystem."[145] The 1994 IJC report recommended that the European precautionary principle "must be built into the rules of inference," even though it "derives neither from scientific principles nor from some thoughtful consideration of public ethics and morality."[146] The 1994 IJC report also reassured advocates of the precautionary principle that, although

> [s]ome argue that the IJC's *'weight of evidence approach'* is weaker than the 'precautionary principle' [, said] interpretation [was] false, however, and in sharp conflict with the IJC's usage. The weight of evidence approach does not simply involve weighing positive against negative or inconclusive evidence according to traditional standards of proof. The Commission, rather, has called precaution the 'basic underpinning' of their strategy. The use of a precautionary context changes both the purpose and the practice of weighing evidence. The issue now being explored is the development of a methodology for *weighing evidence in a precautionary framework* – or what might be called '*precautionary inference*.'[147]

The 1994 IJC report also emphasized that the precautionary weight-of-evidence "approach reverses the burden of proof, framing the question with the null hypothesis: 'What evidence must we IGNORE to conclude that a causal relationship does not exist.'"[148] Moreover, according to the 1994 IJC report, "[p]recautionary inference requires a holistic consideration of an integrated body of direct and circumstantial evidence. *The focus shifts from whether or not causal relationships have been definitively proven to considering whether a body of direct and/or circumstantial evidence suggest a plausible hypothesis that harm has occurred*."[149]

Researchers from the University of British Columbia (UBC) have more recently shown how precautionary action can be incorporated within the weighting of the Bradford Hill criteria, at least, for *ex ante* regulatory purposes, "when risks of harm associated with false negatives are high but those of false positives are low."[150] These researchers first applied a

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Cole-Misch eds., 1994), at 23, https://nebula.wsimg.com/42e8204136024527b478aceb735b44c8?AccessKeyId=39A2DC689E4CA87C906D&disposition=0&alloworigin=1.

[145] *Id*. at 23.

[146] *Id*.

[147] *Id.* at 24 (emphasis added).

[148] *Id*. at 25.

[149] *Id*. at 26 (emphasis added).

[150] *See* Daniel Steel and Jessica Yu, *The Precautionary Principle Meets the Hill Criteria of Causation: A Case Study of Tuberculosis Among Gold Miners in South Africa* (2016), at 23-26, https://blogs.kent.ac.uk/jonw/files/2016/10/Slides_Steel.pdf; Daniel Steel and Jessica Yu, *The Precautionary Principle Meets the Hill Criteria of Causation*, 22 ETHICS, POL'Y & ENV'T 72 (2019), https://www.tandfonline.com/doi/abs/10.1080/21550085.2019.1581420?journalCode=cepe21.

 

simplified version of the Bradford Hill criteria (as revised into the three categories of *direct evidence*, *mechanistic evidence* and *parallel evidence*"[151]) to 12 criteria for precautionary action articulated by David Gee, a retired senior advisor at the European Environment Agency.[152] Gee also had been an editor and co-author of that agency's seminal publication, "Late Lessons from Early Warnings of Hazards from Chemicals, Food Additives, and Radiation, 1896-2013."[153] Of these 12 criteria the researchers then found that only two—intrinsic toxicity/ecotoxicity data and analogous evidence from known hazards—"fall into the category of parallel evidence [*i.e.*, replicability and similarity[154]], wherein related studies with similar results are called upon to bolster a causal claim."[155] Based on the above, they concluded that "[p]arallel evidence is sufficient to justify precautionary action when scientific uncertainty, false negative harm intensifiers, and false positive harm mitigators are present."[156]

Europe's precautionary principle "in its strongest version, […] is triggered once 'there is at least *prima facie* scientific evidence of a hazard,' rather than a risk."[157] "In this version, the [precautionary principle] creates an administrative presumption of risk which favors *ex ante* regulation, and tends to reverse the administrative and adjudicatory burden of proof (production and persuasion) from government to show potential harm to industry to show no potential of harm. Consequently, since it is impossible to prove the absence of risk, the outcome invariably is that the *hazard* is regulated."[158] "Where the burden of proof initially rests on the regulator, the strict reliance on peer-reviewed scientific evidence is replaced with use of broader, qualitative, rather than quantitative, evidence, and a 'weight-of-the-

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[151] *See* Jeremy Howick, Paul Glasziou, and Jeffrey K. Aronson, *The Evolution of Evidence Hierarchies: What Can Bradford Hill's 'Guidelines For Causation' Contribute?*, 102 J R SOC. MED. 186, 187 at Table 1, 192 (2009), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2677430/pdf/186.pdf.

[152] *See* National Institute of Health, National Institute for Environmental Health Sciences, *Gee Shares European Approach to Early Hazard Warning*, ENVT'L FACTOR (June 2016), https://factor.niehs.nih.gov/2016/6/science-highlights/gee/index.htm.

[153] *See* David Gee, *Chapter 27 – More or Less Precaution?*, in "Late Lessons from Early Warnings: Science, Precaution, Innovation, European Environment Agency, Implication (European Union , May 2013), at 653 Box 27.4, https://bit.ly/2vpqAvI.

[154] *See* Howick, Glasziou, and Aronson, *supra* note 151, at 190.

[155] *See* Daniel and Yu, *supra* note 150, at 26, citing Howick, Glasziou, and Aronson at 186, 190 ("If all the parallel studies gave similar results, then the causal hypothesis will be more strongly supported; if they don't, then we will have grounds to suspect either some of the parallel studies or the causal hypothesis itself.").

[156] *Id*. at 26.

[157] *See* Lucas Bergkamp & Lawrence Kogan, *Trade, the Precautionary Principle and Post-Modern Regulatory Process: Regulatory Convergence in the Transatlantic Trade and Investment Partnership*, EUR. J. RISK REG. 499 (2013), https://bit.ly/3bwxa48, quoting Peter Saunders, "The Precautionary Principle," in Organization for Economic Cooperation and Development, *Policy Responses to Societal Concerns in Food and Agriculture, Proceedings of an OECD Workshop* (2010), at 47, 52, https://portal.research.lu.se/portal/files/5991882/1770253 (describing how precautionary principle proponents define the term consistent with the 1998 Wingspread Declaration (Science and Environmental Health Network 1998): "When an activity raises threats of harm to human health or the environment, precautionary measures should be taken even if some cause and effect relationships are not fully established scientifically." In other words, "the precautionary principle […] does not come into play unless there is at least prima facie evidence of a ***hazard***.") (emphasis added).

[158] *Id*. at 499-500.

evidence,' rather than 'strength-of-the-evidence' approach at the regulatory level."[159]

At least one European commentator has opined that, "when we act on the basis of evidence that is not conclusive, we are saying that we have reason to be concerned that something is *hazardous* and we are sufficiently worried about the consequences that we are willing to go without it, or at least to delay its introduction until we have more evidence."[160] This commentator also has argued that the Bradford Hill criteria's creator developed the criteria in 1965 to address the scenario that regulators currently address through application of Europe's precautionary principle—*i.e.*, where although "epidemiology can show there is an association between two variables, that does not necessarily mean that one is the cause of the other. Something more is needed to establish causation. This led […] Sir Austin Bradford Hill, a professor of medical statistics in London University, to produce what are now called the Bradford Hill criteria."[161] These "criteria […] suggest the sorts of questions we should ask when we are faced with a *prima facie* case for hazard and we are trying to decide whether action is warranted."[162] Indeed, other commentators have construed a single quote from Sir Bradford Hill as "echo[ing] the precautionary principle."[163]

The Third Edition agrees that "the precautionary principle in many ways is a *hazard*-based approach."[164] The 2016 NAS publication since then identified how, in the context of risk regulation, "[s]ome [federal] statutes specify that regulations must be constructed conservatively so as to provide an adequate margin of safety, often referred to as the 'precautionary principle.'"[165] Yet, these publications, unlike the 1994 IJC report and the 2016 UBC analysis discussed above, stop short of explicitly acknowledging the precautionary

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[159] *Id*. at 500, citing Joel Tickner, "Putting Precaution into Practice: Implementing the Precautionary Principle," in Integrating Foresight and Precaution into the Conduct of Environmental Science, Report of the International Summit on Science and the Precautionary Principle (Sept.20–22, 2001). *See also* Massachusetts Precautionary Principle Project, *Putting Precaution into Practice: Implementing the Precautionary Principle*, Science and Environmental Health Network (Mar. 5, 2013), https://www.sehn.org/sehn/putting-precaution-into-practice-implementing-the-precautionary-principle; World Health Organization Europe, *The Precautionary Principle: Protecting Public Health, the Environment and the Future of Our Children*, (Marco Martuzzi and Joel A. Tickner, eds.) (2004) at 194, http://www.euro.who.int/_data/assets/pdf_file/0003/91173/E83079.pdf ("Consider the weight of the evidence on association, exposure and magnitude together to determine the potential threat to health or the environment.").

[160] Peter Saunders, "The Precautionary Principle," in Organization for Economic Cooperation and Development, *Policy Responses to Societal Concerns in Food and Agriculture, Proceedings of an OECD Workshop* (2010), *supra* note 157, at 48 (emphasis added).

[161] *Id*. at 50.

[162] *Id*. at 51.

[163] *See* Collaborative on Health and the Environment, *Sir Austin Bradford Hill: Echoing the Precautionary Principle*, https://www.healthandenvironment.org/environmental-health/social-context/history/sir-austin-bradford-hill-echoing-the-precautionary-principle ("There is a quote by Hill that echoes the precautionary principle: 'All scientific work is incomplete - whether it be observational or experimental. All scientific work is liable to be upset or modified by advancing knowledge. That does not confer upon us a freedom to ignore the knowledge we already have or postpone the action that it appears to demand at a given time.'"). *See also* Steel and Yu, *supra* note 150, at 13 (quoting Hill).

[164] *See* Bernard D. Goldstein and Mary Sue Henifin, *Reference Guide on Toxicology*, at 650, note 47, in *Third Edition*, *supra* note 4 (emphasis added).

[165] *See* Gold, Green, and Sanders, *supra* note 113, at 14

principle's incorporation within the weight-of-evidence methodology that *Milward* embraced and the Third Edition promotes.[166]

The writings of Dr. Carl Cranor, the *Milward* plaintiff's scientific methodology expert and a recognized precautionary-principle advocate,[167] provide the critical inverse link between Europe's hazard-based regulatory approach and the use of Bradford Hill weight-of-evidence methodology to prove general causation. Cranor deftly persuaded the First Circuit to effectively lower the admissibility threshold for expert testimony intended to show an association between an agent and a disease in a situation where the science is uncertain. The court allowed an expert to combine his subjective professional judgment with the qualitative or semi-quantitative risk assessments of consensus organizations (*e.g.*, WHO, IARC, NAS-IOM, NAS-NRC, NIH) in weighing and integrating those different lines of evidence to derive a "nondeductive inference[] to the best explanation."[168] Cranor has since asserted that the Third Edition "endorses the use of such scientific inferences in several articles,[] and further notes that this procedure is quite appropriate for toxicology and for circumstances in which toxicological, epidemiological, and other scientific evidence must be considered together."[169] Cranor also has emphasized that when national and international consensus bodies such as

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[166] Although Joseph Rodricks, the author of the Third Edition's *Reference Guide on Exposure Science*, did not mention the precautionary principle in that chapter, he has since argued in a 2019 article that *ex ante* precautionary policies "are inevitable when science is uncertain and decisions have to be made." *See* Joseph V. Rodricks, *When Risk Assessment Came to Washington: A Look Back*, Dose-Response (Jan.-Mar. 2019), at 13, https://journals.sagepub.com/doi/pdf/10.1177/1559325818824934.

[167] *See, e.g.,* Carl Cranor, *Chapter 24 – Protecting Early Warners and Late Victims*, 581-606, at 582, 584-85, 587, 591, 595-96, 600-03, https://www.eea.europa.eu/publications/late-lessons-2/late-lessons-chapters/late-lessons-ii-chapter-24/view, in European Environment Agency, "Late Lessons From Early Warnings: Science, Precaution, Innovation," EEA Report No. 1/2013 (Jan. 22, 2013), https://www.eea.europa.eu/publications/late-lessons-2; *see also*, Carl F. Cranor, *Do You Want to Bet Your Children's Health on Post-Market Harm Principles - An Argument for a Trespass or Permission Model for Principles - An Argument for a Trespass or Permission Model for Regulating Toxicants Regulating Toxicants*, 19 VILL. ENVTL. L.J. 251, 288 n. 157, 292 n. 171, 293 (2008), https://digitalcommons.law.villanova.edu/cgi/viewcontent.cgi?article=1059&context=elj; Carl F. Cranor, *Toward Understanding Aspects of the Precautionary Principle*, 29 J. OF MED. AND PHIL., 259 (2004), https://www.tandfonline.com/doi/pdf/10.1080/03605310490500491.

[168] *Milward*, 639 F. 3d at 13, 17-18. *See also*, Carl F. Cranor, Milward v. Acuity Specialty Products*: Advances in General Causation Testimony in Toxic Tort Litigation*, 3 WAKE FOREST J. LAW & POL'Y 105, 113-15, 116-18, 121-25 (2013), https://wfulawpolicyjournaldotcom.files.wordpress.com/2016/05/6-cranor.pdf; Carl Cranor, Milward v. Acuity Specialty Products*: How the First Circuit Opened Courthouse Doors for Wronged Parties to Present Wider Range of Scientific Evidence*, CPR Blog (July 25, 2011), http://progressivereform.net/CPRBlog.cfm?idBlog=616EE094-D602-ED68-85FD84E7EB0A212E; Carl F. Cranor, *Some Legal Implications of the Precautionary Principle: Improving Information-Generation and Legal Protections*, 11 Human and Ecological Risk Assessment: An International Journal 31, 48 (2005), http://rachel.org/files/document/Some_legal_implications_of_the_Precautionary_P.pdf and https://www.tandfonline.com/doi/abs/10.1080/10807030590919873 (discussing, in part, how, although "personal injury law is a post-market legal device with retrospective remedies, it has relatively modest deterrence effects that can be either enhanced or frustrated by how it functions. *In the US as a first step the tort law could function better if courts would admit all the evidence and respectable expert testimony that the scientific community recognizes, instead of imposing comparatively high standards of admissibility counter to respectable science as some courts have done*.") (emphasis added).

[169] Cranor, 3 WAKE FOREST J. LAW & POL'Y, *supra* note 168, at 115-16.

 

NIH and IARC employ nondeductive reasoning in their weight-of-evidence methodologies, those bodies "are identifying carcinogens, they are identifying *hazards* that can come from exposures to a substance. A cancer hazard is 'an agent that is capable of causing cancer under some circumstances, while a cancer 'risk' is an estimate of the carcinogenic effects expected from exposure to a cancer hazard.'"[170]

Legal commentator Sheila Jasanoff similarly supports the Third Edition's deference to consensus-based scientific organizations, their expert scientific advisory committees, and their organizational processes: "The central question to ask about science *in legal proceedings* […] is not how good it is, but how much deference the scientific community's claims deserve in specific legal contexts."[171] Jasanoff has proposed "a cascade of deference as science moves from high to low degrees of certainty and reliability" which features "[f]our stopping points: objectivity, consensus, *precaution* and [epistemic] subsidiarity." She roughly equates the scientific consensus achieved within public organizations and expert committees with objectivity, given the apparent transparency and understandability of their governance processes.[172] In fact, Jasanoff suggests that "[t]he existence of a strong scientific consensus [among such entities evidencing social choice] may dilute the need to scrutinize [the] scientific claims"[173] experts proffer regarding their evaluation and weighing of multiple lines of evidence at trial that may incorporate similar value choices.[174] "The exercise of expert judgment, moreover, necessarily involves making value choices, from the framing of relevant questions *to the weight accorded to specific piece of evidence*."[175] Thus, the precautionary principle and the associated subjective moral and societal value judgments of laypersons reflected in the decisions of "scientific" public bodies (what should be done, as opposed to what can be done) should apply at trial where there is scientific uncertainty and serious harm is likely.[176]

Legal commentator Barbara Pfeffer-Billauer more recently emphasized that because experts possess the ability to influence courtroom determinations, especially in toxic tort cases (as opposed to medical malpractice cases) which "are 'expert-determinative,'" expert testimony has become "one of the prominent areas in which science and law collide."[177]

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[170] *Id.* at 122, quoting National Toxicology Program, U.S. Dep't of Health and Human Services, Report on Carcinogens 3 (12th ed. 2011) and WHO-IARC *Preamble*, IARC Monographs on the Evaluation of Carcinogenic Risks to Humans 12 (Int'l Agency for Research on Cancer, World Health Org., 2006) (emphasis in original).

[171] *See* Sheila Jasanoff, *Serviceable Truths: Science for Action in Law and Policy*, 93 TEXAS L. REV.1723, 1724 (2015), http://texaslawreview.org/wp-content/uploads/2015/08/Jasanoff.Final.pdf (emphasis added).

[172] *Id*. at 1725, 1737. ("Scientific authority is on strongest ground when it lays claim to objectivity (i.e., unbiased knowledge of how things *are*), but consensus remains only a slightly weaker basis for demanding deference. […] If most or all members of the relevant thought collective are in agreement, then that collective judgment surely demands a high degree of respect from society in general and the law more particularly. Many governance processes in modern societies contain built-in mechanisms for producing scientific or technical consensus.") (italicized emphasis in original).

[173] *Id*. at 1741-42.

[174] *Id*. at 1742-43.

[175] *Id*. at 1743 (emphasis added).

[176] *Id*. at 1744-46.

[177] *See* Barbara Pfeffer-Billauer, *The Causal Conundrum: Examining the Medical-Legal Disconnect in Toxic Tort Cases From a Cultural Perspective or How the Law Swallowed the Epidemiologist and Grew Long Legs*

Since "testimon[ies] regarding causal proof are struggles over 'the authority of knowledge'" between conventional scientists and 'frontier' scientists, "challenges between accredited traditional experts are intense."[178] Pfeffer-Billauer notes Jasanoff's "recogni[tion of the] subjective elements experts bring to the courtroom," and that Jasanoff has "recommend[ed] deconstructing expert testimony and 'exposing … underlying subjective preconceptions…'"[179]

Pfeffer-Billauer notes the need for more subjective elements of expert testimony to fill in professional as well as public-knowledge gaps due to the dearth of probabilistic and statistics-driven "objective" epidemiological studies available to establish a causal connection. "When there is not enough 'objective' science to prove a causal connection," "intrepid advocates" have pursued "the matter using unconventional means of persuasion such as media and advocacy."[180] Pfeffer-Billauer also remarks that, as the result of the "deficiencies in epidemiology," and the search for "'epidemiological best evidence,'" scientists and lawyers involved in policymaking introduced at the regulatory level *quantitative* risk assessment, data quality, data relevancy, consistency and strength of evidence, evidentiary bias and methodology, while "social scientists introduced 'the precautionary principle" calling for administrative and legal, if not, scientific action.[181] According to Pfeffer-Billauer, this translated into "junk epidemiology" at trial which, in turn, inspired the *Daubert* trilogy "to prevent more bad science from polluting precedent."[182] She failed to note how the precautionary principle's pollution of human-health and environmental-risk assessments performed by both international *and* national consensus-based organizations[183] led to the enactment of the federal Information Quality Act.[184] Pfeffer-

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*and a Tail*, 51 CREIGHTON L. REV. 319, 356 (2018), https://dspace2.creighton.edu/xmlui/bitstream/handle/10504/117639/51CreightonLRev319_2018.pdf?sequence=1&isAllowed=y. *See also id*. at 323 and n. 28. (Pfeffer-Billbauer explains that, "in comparison with medical malpractice cases where many states allow licensed physicians to testify regardless of specialty, toxic tort cases are more restrictive." She cites one source as "(showing that as of 2014, twenty-three states had few or no rules governing the specialty of a medical expert allowed to testify in malpractice cases).").

[178] *Id.* at 356-58.

[179] *Id.* at 356 (quoting Sheila Jasanoff, "Science at the Bar: Law, Science, and Technology in American" (1995), https://monoskop.org/images/a/ae/Jasanoff_Sheila_Science_at_the_Bar_Law_Science_and_Technology_in_America_Twentieth_Century.pdf).

[180] *Id*. at 350.

[181] *Id*. at 368.

[182] *Id*. at 369.

[183] *See, e.g.*, Steel and Yu, *supra* note 150; Peter Saunders, *supra* note 157. *See also* Lawrence A. Kogan, *REACH Revisited: A Framework for Evaluating Whether a Non-Tariff Measure Has Matured Into an Actionable Non-Tariff Barrier to Trade*, 28 AM. U. INT'L L. REV. 489, 575-582 (2013), https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1769&context=auilr (discussing in the context of various prior and emerging World Trade Organization (WTO) disputes involving the use of disguised nontariff regulatory barriers to trade, "the ongoing efforts of these same WTO member governments at a more fundamental level to reform the international 'standards, guidelines,' and 'recommendations' (principles of risk analysis) developed by the several 'relevant international organizations' explicitly recognized and referenced within the text of the WTO SPS Agreement," so as to permit the more widespread performance and use of qualitative and semi-quantitative risk, and thus, hazard analysis-focused risk assessments with little or no reference to actual dose and exposure).

[184] *See* Kogan, *Revitalizing the Information Quality Act*, *supra* note 97.

 

Billauer also has overlooked how the precautionary principle's implementation through weight-of-evidence methodology at trial will only further erode the empirical nature of those assessments over time.[185]

Pfeffer-Billauer emphasizes that federal courts' and litigants' apparent confusion over the general-causation standard[186] (including whether it is tied to any particular dose or exposure level) opened the door for *Milward* and its embrace of weight of the evidence.[187] Factual causation in toxic tort cases requires the plaintiff to establish general causation. In *McClain v. Metabolife Intl., Inc.*,[188] the Eleventh Circuit quoted both the Tenth Circuit's holding in *Mitchell v. Gencorp*,[189] and the Eight Circuit's holding in *Wright v. Willamette Indus., Inc.*,[190] that, "to carry the burden in a toxic tort case, 'a plaintiff must demonstrate 'the levels of exposure that are *hazardous* to human beings generally [general causation], as well as the plaintiff's actual level of exposure to the defendant's toxic substance [specific causation] before he or she may recover.'"[191] Pfeffer-Billauer notes that the New York Court of Appeals, in *Parker v. Mobil Oil Corp.*,[192]—which had cited these cases[193] with the

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[185] *See, e.g.,* Lawrence A. Kogan, *The Europeanization of the Great Lake States' Wetlands Laws & Regulations (At the Expense of Americans' Constitutionally Protected Private Property Rights)*, 2019 MICH. ST. L. REV. 687, 734-43 (2019), https://digitalcommons.law.msu.edu/lr/vol2019/iss3/3/, (discussing how the National Research Council's 2014 review of USEPA's Draft Integrated Risk Information System (IRIS) had found that USEPA had utilized weight-of-evidence methodology (from which to draw *inferences* from a chemical's or compound's inherent toxicity or the putative mechanism by which a chemical might (possibly) cause harm in a scientifically unreliable manner, and discussing how the weight-of-evidence guidelines the USEPA SAB Risk Assessment Forum had released in December 2016, just prior to the close of the Obama administration, which define weight of the evidence "as an *inferential* process that assembles, evaluates and integrates evidence to perform a technical inference in an assessment" (emphasis added), had violated the federal Information Quality Act (IQA)'s objectivity and peer review standards.).

[186] *Id*. at 384-85. ("Does [general causation] mean: *Can* the substance cause disease in theory, because of its biological makeup? Or is mathematical certainty (or statistical significance) required? *Can* the substance cause disease in animals that serve as acceptable human surrogates? *Can* the substance cause disease in small doses? *Can* the substance cause any cancer, or just the cancer complained [of] by the plaintiff? Does general exposure include levels at which the plaintiff was exposed?") (emphasis added).

[187] *Id*. at 329-32 (discussing how, I*n re E.I. DuPont De Nemours & Co. C-8 Pers. Injury Litig.*, No. CV 2:13-md-2433, 2016 WL 2946195, at *1 (S.D. Ohio May 19, 2016), defendants' counsels believed they had only conceded by agreement the issue of general causation, not specific causation based on the extent of exposure, as well, and discussing how industry groups in their *amicus* brief had argued that general causation is not tied to any exposure level.). *See* Joint *Amicus Brief* of the U.S. Chamber of Commerce, Am. Tort Reform Ass'n, and Am. Chem. Council, *In re DuPont De Nemours & Co. C8 Pers. Injury Litig.*, No. 16-3310, 2016 WL 34115291 (6th Cir. June 20, 2016), at 2, 4-7, https://bit.ly/2tNxjzg.

[188] 401 F.3d 1233 (11th Cir 2005). *See also*, *Pluck v. BP Oil Pipeline Co.*, 640 F.3d 671, 676–77 (6th Cir. 2011).

[189] 165 F.3d 778 (10th Cir. 1999). *See also*, *Norris v. Baxter Healthcare Corp.*, 397 F.3d 878, 881 (10th Cir. 2005).

[190] 91 F.3d 1105 (8th Cir 1996).

[191] 401 F.3d at 1241, quoting 165 F.3d at 781 and 91 F.3d at 1106 (emphasis added).

[192] *See* Pfeffer-Billauer, *supra* note 177, at 322-23, citing *Parker v. Mobil Oil Corp.*, 857 N.E.2d 1114 (N.Y. 2006), 7 N.Y.3d 434 (2006).

[193] 7 N.Y.3d at 448 (2006) (In *Parker*, the New York Court of Appeals cited these cases and held that "the factors needed to prove causation in toxic tort cases are: (1) exposure, (2) general causation, and (3) specific causation. Exposure addresses whether the amount of toxin to which the plaintiff was exposed was

 

understanding that general causation is a separately required element—had defined general causation as whether a "toxin is capable of causing *the particular illness*."[194] "Most, but not all, [U.S.] jurisdictions require showing both aspects—but even where jurisdictions do not require both, evidence in favor of either form of causation can be probative as to establishing factual causation."[195]

Ultimately, Pfeffer-Billauer recommends that courts adopt the following presumption to ensure a "uniform scientific conclusion that a substance *can* cause" a disease: "if a substance is characterized as *probably* (more likely than not) carcinogenic by a reputable and neutral scientific organization, or regulated by a national environmental agency, general causation is established and the issue of sufficient exposure should be shunted to specific causation."[196] In support of this presumption, she states that, "[p]erhaps it can be said that 'public health' is concerned with 'general causation' (more accurately causal associations), while clinical medicine is concerned with specific causation."[197]

Pfeffer-Billauer's formulation of a presumption which requires a *risk and probability evidentiary threshold* would arguably be helpful in establishing general causation. The reality, however, as noted above, is that numerous regulatory policymakers, social scientists, and legal academicians have increasingly supported the incorporation of precautionary-principle-based safety margins expressed in qualitative and semi-quantitative terms of *hazard* and *possible/plausible harm* within the risk assessments of public consensus-based organizations where statistically significant quantitative epidemiological and dose-response data are lacking.[198] The use of these safety margins in the absence of such data arguably facilitated the

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sufficient to cause the disease in question. […] General causation asks whether a substance can cause the disease. Specific causation asks whether the substance did cause the disease in this plaintiff.")

[194] *Id*. (emphasis added). In *Parker*, the Court of Appeals had affirmed the Appellate Division (trial court)'s prior rejection of expert testimony as unable to meet the general causation standard. Such testimony had relied, in part, upon studies merely stating "that no level off benzene exposure can be considered 'safe,'" which the court found as "not tantamount to stating that any exposure to benzene causes AML," and upon regulatory standards regarding benzene exposure, which the court had found "are not measures of causation but rather are public health exposure levels determined by agencies pursuant to statutory standards." *See* 7 N.Y.3d at 449-450, affirming *Parker v. Mobil Oil Corp.*, 16 A.D.3d 648, 653 (2005) ("Key to this litigation is the relationship, if any, between exposure to gasoline containing benzene as a component and AML. Landrigan fails to make this connection perhaps because, as defendants claim, no significant association has been found between gasoline exposure and AML. Plaintiff's experts were unable to identify a single epidemiologic study finding an increased risk of AML as a result of exposure to gasoline. In addition, standards promulgated by regulatory agencies as protective measures are inadequate to demonstrate legal causation. Thus, the experts' opinions were properly excluded.").

[195] *See* Note, *Causation in Environmental Law: Lessons from Toxic Torts*, 128 HARVARD L. REV. 2256, 2261, n. 29 (2015), http://harvardlawreview.org/wp-content/uploads/2015/06/causation_in_environmental_law.pdf (distinguishing examples of separate general causation factors in federal court, from a single causation factor in some state courts). *See also* David E. Bernstein, *Getting to Causation in Toxic Tort Cases*, 74 BROOKLYN L. REV. 51, 53 (2008), https://www.law.gmu.edu/assets/files/publications/working_papers/0966GettingtoCausation.pdf (discussing how "proof of specific causation implicitly requires proof of general causation.").

[196] *See* Billauer, *supra* note 177, at 384 (italicized emphasis in original; underlined emphasis added).

[197] *Id*. at 387.

[198] *See* Gold, Green, and Sanders, *supra* note 113, at 14-15 ("Some statutes specify that regulations must be constructed conservatively so as to provide an adequate margin of safety, often referred to as the

 

*Milward* court's and its progeny's acceptance of a lower threshold of evidence that would allow for the use of differential diagnosis,[199] biological plausibility,[200] and parallel evidence[201] to establish general causation at trial. Unfortunately, *Milward*'s approach also allows for the exercise of subjective professional judgment to mask the incorporation of the precautionary principle when weighing these different subsidiary lines of cumulative evidence to reach an abductive inference to the best explanation.[202]

## V. ABDUCTIVE PRECAUTIONARY REASONING UNDERLIES WEIGHT-OF-THE-EVIDENCE METHODOLOGY AT TRIAL

Significantly, in *Milward*, the First Circuit distinguished between three distinct logical methods of reasoning or inference: deductive, inductive, and abductive.

### A. Deductive Inferences

Deductive inference or reasoning begins with a general premise, proposition, or principle and ends with a specific conclusion. "A conclusion obtained through deductive

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'precautionary principle.' Thus, regulatory risk assessments may be relevant to whether general causation exists but rarely have any salience for the matter of specific causation."). *See also*, Joseph V. Rodricks, *When Risk Assessment Came to Washington: A Look Back*, Dose-Response (Sage Publ. Jan.-Mar. 2019), at 6, 13, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6366000/pdf/10.1177_1559325818824934.pdf ("The temptation to leap beyond what is truly established knowledge can be great if that leap can advance some desired policy agenda, but doing so can threaten scientific credibility and backfire. At the same time, these 2 great minds agreed, in the area of public health protection, it may be necessary, for policy reasons, to introduce certain precautionary elements into the interpretation and uses of scientific information. […] "But, as I have tried to make clear in this article, such [precautionary] policies are inevitable when science is uncertain and decisions have to be made.").

[199] *See Third Edition*, *supra* note 4, at 672 ("In taking a careful medical history, the expert examines the possibility of competing causes, or confounding factors, for any disease, which leads to a differential diagnosis."). *See also id*. at Glossary, p. 681 ("**differential diagnosis**. A physician's consideration of alternative diagnoses that may explain a patient's condition.") (boldfaced emphasis in original); *id.* at 690-91 ("In the legal context, differential diagnosis refers to a technique "in which physician first rules in all scientifically plausible causes of plaintiff's injury, then rules out least plausible causes of injury until the most likely cause remains, thereby reaching conclusion as to whether defendant's product caused injury…[] In the medical context, by contrast, differential diagnosis refers to a set of diseases that physicians consider as possible causes for symptoms the patient is suffering or signs that the patient exhibits."[]).

[200] *Milward*, 639 F.3d at 15, 25-26. The district court in *Milward* had previously rejected differential diagnosis and theories based on biological plausibility as inadmissible under Federal Rule of Evidence 702 and *Daubert*. *Milward*, 664 F. Supp. 2d at 146-48.

[201] Both the district and appellate courts in *Milward* rejected plaintiff's expert testimony to establish general causation based on parallel evidence of a carcinogenic effect. 664 F. Supp. 2d at 146-47; 639 F.3d at 21-22.

[202] *Milward*, 639 F.3d at 18, citing *Restatement Third, Torts* § 28 cmt.(1) and *Cruz v. Bridgestone/Firestone N. Am. Tire, LLC*, 388 Fed. Appx. 803, 806-07 (10th Cir. 2010) ("The use of judgment in the weight of the evidence methodology is similar to that in differential diagnosis […] (explaining that differential analysis in general is best characterized as a process of reasoning to the best explanation)." *See also id*., at 23-26.

reasoning is certain. Mathematics is based on deductive reasoning."[203] "[A] deductive statement is always true – because it is true by definition."[204] In other words, "deduction is the formation of a specific conclusion based on generally accepted statements or facts. […] Its specific meaning in logic is 'inference in which the conclusion about particulars [always] follows necessarily from general or universal premises.'" "[I]n deduction, the truth of the conclusion is guaranteed by the truth of the statements or facts considered."[205]

"Deductive inference guarantees that one can be *reasonably certain* (certain after the use of one's reasoning), providing that the argument is ***valid***. A valid argument is 'one in which it is necessary that, if the premises are true, then the conclusion is true.' One way of ensuring a valid argument is to utilize a valid argument form" of deductive logic.[206] *Modus ponens* is one such form: "If *p*, then *q*; therefore, *q*. […] *In a forensic analysis, the conditional statement ['p'] is a scientific principle derived from the biological and physical sciences*. […] […*'q'*] is the physical evidence related to witness evidence." (italics in original).[207] *Modus tollens* is another such form: "If *p*, then *q*; not *q*; therefore, not *p*. […] With *modus ponens*, the witness account is consistent with the physical evidence as long as the physical evidence is adequately explained by the witness accounts according to a scientific principle expressed as a conditional statement. With *modus tollens*, the witness accounts are not consistent with the physical evidence when the physical evidence denies the truthfulness of the witness accounts according to a scientific principle expressed as a conditional statement."[208] Hence, a deductive inference is a necessary inference.[209]

### B. Inductive Inferences

"Inductive reasoning begins with a particular "proposition and ends either with a general proposition ('reasoning by generalization') or with a particular proposition ('reasoning by analogy'). […] A conclusion obtained through inductive reasoning is probable, not certain," because an inductive statement "is subject to being disproved upon discovery of new empirical evidence."[210] "In logic, induction refers specifically to 'inference of a generalized conclusion from particular instances.' In other words, it means forming a generalization based on what is known or observed. […I]nduction is a method of reasoning involving an element of probability."[211] Inductive reasoning can lead to a strong argument—

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[203] *See* Ronald S. Granberg, *Legal Reasoning* (2012) at 1, https://granberglaw.com/wp-content/uploads/2012/07/legal_reasoning.pdf.

[204] *Id*.

[205] *See* Merriam-Webster, *Usage Notes: 'Deduction' vs. 'Induction' vs. 'Abduction,'* https://www.merriam-webster.com/words-at-play/deduction-vs-induction-vs-abduction.

[206] *See* Thomas Young, *Putting It All Together: The Logic Behind the Forensic Scientific Method and the Inferential Test*, Heartland Forensic Pathology, LLC, http://www.heartlandforensic.com/writing/putting-it-all-together-the-logic-behind-the-forensic-scientific-method-and-the-inferential-test. (Emphasis in original).

[207] *Id*.

[208] *Id*. (italics in original).

[209] *See* Stanford Encyclopedia of Philosophy, *Abduction*, at Sec. 1.1, https://plato.stanford.edu/entries/abduction/.

[210] *See* Granberg, *Legal Reasoning, supra* note 203, at 2.

[211] *See* Merriam-Webster, *Usage Notes: 'Deduction' vs. 'Induction' vs. 'Abduction,' supra* note 205.

 

*i.e.*, one that is probable, "if the premises are true then the conclusion is true."[212] Inductive inferences "are based purely on statistical data, such as observed frequencies of occurrences of a particular feature in a given population."[213] With inductive reasoning, "there is only an appeal to the observed frequencies or statistics."[214] Since "the conclusion goes beyond what is (logically) contained in the premises, an inductive inference is a "non-necessary inference."[215]

### C. Abductive Inferences

Abductive inference (backward reasoning) is defined as "'a syllogism in which the major premise is evident but the minor premise and therefore the conclusion is only probable." It engenders "forming a conclusion from the information that is known. […] Abduction will lead [one] to the best explanation."[216] With abductive reasoning, the conclusion goes beyond what is logically contained in the premises. However, "in abduction there is an implicit or explicit appeal to explanatory considerations," and there also may be an appeal to frequencies or statistics. "[I]t may be possible to infer abductively certain conclusions from a *subset* of *S* of premises which cannot be inferred abductively from *S* as a whole."[217]

Abductive reasoning, therefore, is essentially argument based on explanatory power—*i.e.*, a hypothesis from which known facts can be inferred. "If explanations inferred from statements by witnesses explain phenomena observed by scientists during an autopsy or other scientific procedure, this increases the likelihood of the truthfulness of the statements."[218] However, "[i]f an expert offers abductive inferences as opinions 'made to a reasonable degree of medical or scientific certainty or probability' on the witness stand, then such opinions are probably incorrect (not truthful)." This result obtains because the ability of properly performed science to correct itself through formal and regular questioning of results and correcting of errors "does not exist among scientists for issues brought before a court. Instead, many experts make positive assertions on the witness stand and appeals to their own authority to do so. Having done this, they possess neither the interest nor the ability to determine if their own assertions are truthful or not."[219]

A witness, in other words, "who abductively infers with certainty has neither the knowledge of the limitations for what he or she is doing nor the capacity to consider carefully the accounts of witnesses who were present to see what happened."[220] To such end, these witnesses appeal to their own unreliable authority, and thus, commit an *ad verecundiam*

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[212] *Id*.
[213] *See* Stanford Encyclopedia of Philosophy, *Abduction*, at Sec. 1.1, *supra* note 209.
[214] *Id*.
[215] *Id*.
[216] *See* Merriam-Webster, *Usage Notes: 'Deduction' vs. 'Induction' vs. 'Abduction,' supra* note 205.
[217] *See* Stanford Encyclopedia of Philosophy, *Abduction*, at Sec. 1.1, *supra* note 209 (italics in original).
[218] *See* Young, *supra* note 206.
[219] *Id*.
[220] *Id*.

 

*fallacy*. Conversely, "an expert who acknowledges the limitations of his or her science, who knows how to compare witness statements to physical evidence in deductive fashion, and who knows better than to infer abductively on the witness stand has a great capacity to self-correct. Such witnesses actually learn from their experience, so their experience is probably reliable for courtroom purposes."[221] Furthermore, an expert witness who abductively infers with certainty also commits "a *fallacy of incomplete evidence*." "Experts who abductively infer from the witness stand familiarize themselves with a *q* but characteristically know little about *p* at the outset of a case, either unwittingly or by choice. This leads them to affirm the consequent consistently at the outset." And, such witnesses, thereafter, typically display "little interest in changing their initial impressions if further information and arguments are advanced regarding *p* […*i.e.*, ] an unwillingness to acknowledge the information or even to evaluate it carefully with an open mind […] perhaps for reasons of pride, arrogance, or self-preservation."[222]

## VI. FEDERAL COURTS ACCEPTING AND EMBRACING ABDUCTIVE REASONING IN *MILWARD*'S IMAGE

Legal commentators critical of weight-of-the-evidence methodology have argued that since "the purported 'weighing' of scientific evidence cannot be tested, it cannot be falsified, it cannot be validated against known or potential rates of error," as *Daubert* and FRE 702 require.[223] Consequently, one cannot determine whether the reasoning or 'weighting' methodology underlying the expert's testimony can be applied properly to the facts in issue.[224]

Notwithstanding these documented scientific and legal shortcomings, a growing number of federal district and appellate courts have accepted the type of abductive reasoning the First Circuit employed in *Milward*. The following federal caselaw review and Appendix A reveal, by reference to tradititional and nontraditional tort areas, that the FJC's institutionalization of *Milward* has metastasized throughout the federal circuits.

### First Circuit (Where *Milward* Is Binding Precedent)

***Jenks v. New Hampshire Motor Speedway*** (D.N.H. 2012)[225] (Products Liability)

Jenks was an employee of the New Hampshire Motor Speedway assigned to provide security services in the infield track area of the Speedway to volunteers. Another Speedway employee gave Jenks a ride on a golf cart to his assigned areas. Jenks rode in the rear area designed for placement of golf bags. The cart swerved and Jenks fell off, injuring his head.

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[221] *Id*.
[222] *Id*.
[223] *See* Bernstein and Lasker, *supra* note 3, at 41, citing *Daubert*, 509 U.S. at 593.
[224] *Daubert*, 509 U.S. at 593.
[225] Civ. No. 09-cv-205-JD (D.N.H. 2012).

Defendant Textron, ABL, Inc., the golf cart's manufacturer, sought to exclude the injured employee's expert testimony *inter alia* "on the ground that they [were] not based on reliable methods and principles as required under [FRE] 702."[226] "Textron contende[d] that [the plaintiff's e]xpert opinions [were] unreliable in three ways: i) he employed a flawed methodology when forming his opinion concerning the inadequacy of the golf car[t]'s warnings; ii) he did not 'perform scientific testing' on his proposed alternate warning; and iii) his proposed alternate warning was not subject to peer review and ha[d] not been implemented by other golf car[t] manufacturers."[227]

The district court disagreed with Textron, ruling that "[e]xpert opinion is admissible under [FRE] 702 if, among other things, 'the testimony is the product of reliable principles and methods.'" To this end, the U.S. Supreme Court, in *Daubert*, articulated four factors that "*may be considered* in determining whether an expert witness' opinion is based on reliable principles and methods."[228] "These factors 'do not function as a definitive checklist or test, but form the basis for a flexible inquiry into the overall reliability of a proffered expert's methodology.'"[229]

The district court, however, found that plaintiffs' expert Vigilante had based his analysis of the golf cart warnings on "more than his subjective evaluation," and had included consideration of "established standards and guidelines for product warnings, as well as warnings and human factors literature and his own extensive experience and training in human factors analysis."[230] The district court held that since Vigilante had "determined that Textron's warnings did not meet the American National Standards Institute guidelines for 'product safety signs and labels,' and was inconsistent with criteria set forth in various articles and literature on adequate product warnings, [s]uch opinions [went] beyond the mere 'ipse dixit of the expert,' and [were] sufficiently reliable to survive a *Daubert* challenge."[231]

The district court also held that "Textron's dissatisfaction with those opinions" because Vigilante "did not subject his proposed alternative warning to scientific testing," "[was] not appropriately addressed at this stage." The court instead characterized the issue as one entailing "'the correctness of the expert's conclusion…[which] are factual matters to be determined by the trier of fact.'"[232] Similarly, the district court held that Vigilante's failure to have his proposed warning subjected to third-party peer review was irrelevant for *Daubert* purposes. According to the court, "the proper inquiry is not whether Vigilante's proposed

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[226] Slip op. at 2.

[227] *Id*.

[228] *Id*. quoting *Milward v. Acuity Special Products Group, Inc.* 639 F.3d 11, 14 (1st Cir. 2011) (emphasis added).

[229] *Id*. at 2 quoting *Ruiz-Troche v. Pepsi Cola of P.R. Bottling Co.*, 161 F.3d 77, 81 (1st Cir. 1998).

[230] *Id*. at 3.

[231] *Id*.

[232] *Id*. at 4, quoting *Milward*, 639 F.3d at 22.

 

warning itself ha[d] been peer reviewed, but whether Vigilante's technique or theory ha[d] been subjected to peer review and publication."[233]

***West v. Bell Helicopter Textron, Inc.*** (D.N.H. 2013)[234] (Products Liability)

The pilot of a "Bell 407 helicopter equipped with a Rolls Royce engine featuring a 'Full Authority Digital Engine Control' system, including an […electronic control unit ('ECU')]," initiated a flight from an airfield in Connecticut. Approximately 45 minutes into the flight, the helicopter unexpectedly crashed on the ground in Bow, New Hampshire.

The pilot, who possessed twenty years of experience, survived the crash by employing a technique known as "autorotation" to land the helicopter on a residential street. He, nevertheless, filed suit against the helicopter's manufacturer, the helicopter engine manufacturer, and the successor-in-interest to the helicopter's ECU alleging that "the force of the landing caused him injuries," including "a worsening of his pre-existing gastrointestinal syndrome," and "post-traumatic stress disorder."[235]

Plaintiff retained Dr. Agarwal, the chief of trauma, acute care surgery, and burn and surgical care at the University of Wisconsin Hospital, as an expert. While serving previously at Boston University Medical Center, Dr. Agrawal focused on both trauma surgery and "acute care surgery (treating patients suffering from emergent conditions like gall bladder disease, obstructed hernias, and a variety of colonic diseases)."[236] Defendants moved to exclude the opinion of this expert, who concluded, after "reviewing plaintiff's medical records and speaking with him for an hour or so by telephone," that "the helicopter crash '*caused, or significantly contributed to causing*, [an] exacerbation' in [plaintiff's] condition so that he 'ha[d] virtually lost all ability to pass solid waste on his own,' *i.e.*, without assistance from an enema."[237]

Agarwal testified that he had reached his opinion by reason of his experience, by reviewing medical literature establishing "that local impact to the abdomen, as well as the body's systematic response to trauma generally, can worsen functional gastrointestinal disorders," and by "employ[ing] the 'standard scientific technique, widely used in medicine, of identifying a medical 'cause' by narrowing the more likely causes until the most likely culprit is isolated.' […] This technique is known as '*differential diagnosis*.'"[238]

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[233] *Id*. at 4, citing *Milward*, 639 F.3d at 14.

[234] Civ. No. 10-cv-214-JL (D.N.H. 2013).

[235] *Id*. at 1.

[236] *Id*. at 3.

[237] *Id*. (emphasis added).

[238] *Id*. at 3-4. *See also* Federal Judicial Center and National Research Council of the National Academies, *Reference Manual on Scientific Evidence—Third Edition* (2011) ("*Third Edition*") at 512-13, ns. 21, 22 and 26 (emphasis added), (stating that, even in the absence of quantification of exposure, causation may sometimes be established by reconstructing the past through indirect qualitative evidence based on differential diagnosis, citing as support *Best v. Lowe's Home Ctrs, Inc.*, 563 F.3d 171 (6th Cir. 2009); *Adams v. Cooper Indus. Inc.*, 2007

The district court noted that the universe of evidence identified as support for Agarwal's "view of the usual progression of pelvic floor dysmotility syndrome [was] not limited," and that it included: (1) testimony based on "medical articles and textbooks and an examination of "the timeline of disease for most of the patients that came to him "with problems of pelvic dysmotility" who he referred to other specialists; and (2) his finding that "this [is] a slow progression problem' so that 'most patients don't automatically go from mild disease to severe disease."[239]

The district court held that Agarwal's testimony "suffice[d] to show, at least at the pre-trial stage," that said expert's "opinion ruling out the natural progression of [plaintiff's] pelvic floor dysmotility as the cause of his post-accident symptoms is based on sufficient facts and data—namely, his personal experience in treating patients with that condition on a long-term basis, as well as the articles describing the typical evolution of the disease."[240] The district court also held, that while Agarwal's testimony was "arguably self-contradictory on some points and vague on others, the [First Circuit] Court of Appeals has cautioned that, '[w]hen the factual underpinning of an expert's opinion is weak, it is a matter affecting the *weight* and credibility of the testimony,' not its admissibility."[241]

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WL 2219212, 2007 U.S. Dist. LEXIS 55131 (E.D. Ky. 2007); *Westberry v. Gislaved Gummi AB,* 178 F.3d 257 (4th Cir. 1999); *Allen v. Martin Surfacing*, 263 F.R.D. 47 (D. Mass. 2009); *Hayward v. U.S. Dep't of Labor*, 536 F.3d 376 (5th Cir. 2008); *Hannis v. Shinseki*, 2009 WL 3157546 (Vet. App. 2009). *See also id*. at 613, n. 194, quoting *Cavallo v. Star Enterprises*, 892 F. Supp. 756, 771 (E.D. Va. 1995), *aff'd in relevant part*, 100 F.3d 1150 (4th Cir. 1996) ("The process of differential diagnosis is undoubtedly important to the question of "specific causation." If other possible causes of an injury cannot be ruled out, or at least the probability of their contribution to causation minimized, then the "more likely than not" threshold for proving causation may not be met. But, it is also important to recognize that a fundamental assumption underlying this method is that *the final, suspected 'cause' remaining after this process of elimination must actually be capable of causing the injury*. That is, the expert must 'rule in' the suspected cause as well as 'rule out' other possible causes. *And, of course, expert opinion on this issue of "general causation" must be derived from a scientifically valid methodology*.") (emphasis added). *See also id*. at 617, n. 210 ("Indeed, this idea of eliminating a known and competing cause is central to the methodology popularly known in legal terminology as differential diagnosis. […] Physicians regularly employ differential diagnoses in treating their patients to identify the disease from which the patient is suffering.") and at 617-18, n. 212 ("Courts regularly affirm the legitimacy of employing differential diagnostic methodology. *See, e.g.*, *In re Ephedra Prods. Liab. Litig*., 393 F. Supp. 2d 181, 187 (S.D.N.Y. 2005); *Easum v. Miller*, 92 P.3d 794, 802 (Wyo. 2004) ("Most circuits have held that a reliable differential diagnosis satisfies *Daubert* and provides a valid foundation for admitting an expert opinion. The circuits reason that a differential diagnosis is a tested methodology, has been subjected to peer review/publication, does not frequently lead to incorrect results, and is generally accepted in the medical community." (quoting *Turner v. Iowa Fire Equip. Co.*, 229 F.3d 1202, 1208 (8th Cir. 2000)); *Alder v. Bayer Corp., AGFA Div.*, 61 P.3d 1068, 1084–85 (Utah 2002)."). *See also id*. at 672 ("In taking a careful medical history, the expert examines the possibility of competing causes, or confounding factors, for any disease, which leads to a differential diagnosis."). *See also id*. at 681 ("**differential diagnosis.** A physician's consideration of alternative diagnoses that may explain a patient's condition.") (emphasis in original). *See also id*. at 690-91.

[239] *Id*. at 4.

[240] *Id*. at 4-5.

[241] *Id*. at 5, quoting *Milward*, 639 F.3d at 22. (emphasis added).

 

***Zagklara v. Sprague Energy Corp. (Zagklara II)*** (D. Me. 2013)[242] (Negligence/Wrongful Death)

The widow of the port captain of a cargo ship employed by Armada (Greece) CO., Ltd., an affiliate of Armada Singapore, brought this personal-injury action alleging negligence and wrongful death.[243] The ship had arrived in Portland, Maine "to discharge rock salt for storage at […] Merrill Marine Terminal."[244]

The port captain had been "responsible for Armada's equipment, including the grabs and the power reels […] to be utilized aboard the [ship] to discharge the salt."[245] After the ship docked, plaintiff/port captain and the ship's crew, "using the ship's cranes, brought the grabs and power reels aboard the vessel and proceeded to connect them to the cranes." "Whenever it was necessary to move the power reel boxes, [the port captain] was responsible for moving and positioning this equipment."[246] The port captain "was injured while attempting to move one of the power reel boxes on the deck of the vessel."[247] The port captain's widow alleged that he had been seriously injured due to the negligent/hazardous operation, by two of defendant Sprague Energy Corp.'s employees, of the second of five shipboard cranes while the port captain had been working on equipment attached to that crane after the ship had docked. At the time of the injury, one of defendant's employees operated the crane, while the other directed him from the vessel's deck.

Before trial, defendant Sprague Energy Corp. filed a *Daubert* motion to exclude the testimony of plaintiff's expert at trial. The trial judge denied defendants' motion to exclude without prejudice.[248] The district court reasoned that, "[s]o long as an expert's scientific testimony rests upon 'good grounds,' based on what is known, it should be tested by the adversarial process, rather than excluded for fear that jurors will not be able to handle the scientific complexities."[249] The court also reasoned 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."[250]

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[242] Civ. No. 2:10-cv-445-GZS (D. Me. 2013).

[243] *Zagklara v. Sprague Energy Corp.*, Civ. No. 2:10-cv-445-GZS (D. Me. 2012) ("*Zagklara I*").

[244] *Id*. at 9.

[245] *Id*. at 9-10.

[246] *Id*. at 11.

[247] *Id*. at 12.

[248] *Zagklara II*, Civ. No. 2:10-cv-445-GZS, slip op. at 1. Prior to filing this pretrial motion in limine, Defendant Sprague Energy Corp. had filed a pre-trial motion to exclude plaintiff's expert report on the grounds that plaintiff had failed without explanation to deliver the report to defendant before it was to be used to support plaintiff's opposition to defendants' filing of a summary judgment motion. *See "Zagklara I,"* slip op. at 5-6. Thus, although the district court granted defendants' pretrial motion to exclude plaintiff's expert report, it then proceeded to deny defendants' subsequent pretrial motion to exclude plaintiff's expert's testimony.

[249] *Id*. at 1.

[250] *Id*. at 1-2, quoting *Milward*, 639 F.3d at 15. *See* accord *Bertrand v. General Electric Co.*, Civ. No. 09-11948-RGS (D. Mass. 2011), slip op. at 4, quoting *Daubert*, 509 U.S. at 596 and *Milward*, 639 F.3d at 15.

 

The district court held that any objections regarding the factual underpinnings of an expert's investigation go to the weight of the proffered testimony, and not to its admissibility, and "is readily probed via cross-examination."[251] The court thus concluded that "on the [then] current available record," plaintiff's expert's "proposed testimony falls within [FRE] 702's limits."[252]

***Calisi v. Abbott Laboratories*** (D. Mass. 2013)[253] (Products Liability)

The plaintiff, who suffered from rheumatoid arthritis, alleged that defendant had failed to warn plaintiff and her treating rheumatologist of Humira's alleged risk of lymphoma. Although "rheumatoid arthritis itself is a risk factor for lymphoma," plaintiff also alleged that defendant had "heavily market[ed] and promote[d] Humira by 'educating physicians' including by directing its salespeople to tell doctors that 'all the risk of malignancy and/or lymphoma on the illness not the disease in its sales messages to [plaintiff's rheumatologist]."[254]

The defendant subsequently moved for summary judgment and exclusion of the testimony of plaintiff's four expert witnesses, especially the testimony of her "warnings" expert, Dr. Michael Hamrell, on issues of causation and the adequacy of Humira's label. The court focused on Hamrell's expert opinion on warning labels in the context of determining whether Abbott, as opposed to plaintiff's rheumatologist, had assumed a duty to warn[255] plaintiff about the alleged risk of lymphoma.[256] The court ultimately excluded Hamrell's expert testimony on the adequacy of defendant's warning, and the adequacy of the product's warning labels and granted defendant summary judgment.[257]

The district court reasoned that, the "*Daubert* analysis focuses on 'principles and methodology' used by the expert and a court may reject 'opinion evidence that is connected to existing data only by the *ipse dixit* of the expert.'"[258] As the district court found, "'[t]his does not mean that trial courts are empowered 'to determine which of several competing

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[251] *Id*. at 2-3.

[252] *Id*. at 3.

[253] Civ. No. 11-10671-DJC (D. Mass. 2013).

[254] *Id*. at 4.

[255] The Massachusetts "voluntary assumption of duty" doctrine is an exception to the Massachusetts "learned intermediary" doctrine, which "provides that a 'prescription drug manufacturer's duty to warn of dangers associated with its product runs only to the physician; it is the physician's duty to warn the ultimate consumer.'" Slip op. at 5 quoting *Cottam v. CVS Pharmacy*, 436 Mass. 316, 321 (2002) (quoting *McKee v. American Home Prods. Corp.*, 113 Wash. 2d 701, 709 (1989)). Pursuant to the "voluntary assumption of duty" exception, the court was required to determine "whether through the 'totality of … communications' [defendant] voluntarily assumed a duty that it would not otherwise have." *Id*. at 5-6.

[256] *Id*. at 5.

[257] *Id*. at 1, 4, 7-8.

[258] *Id*. at 9 quoting *Milward*, 639 F.3d at 14 (quoting *Daubert*, 509 U.S. at 595; *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997)).

 

scientific theories has the best provenance.'" [259] "Instead, the proponent of the expert testimony must show 'by a preponderance of proof' that the expert has used a 'sound and methodologically reliable' reasoning process to reach his or her conclusion, and that 'an expert, whether basing testimony on professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.'"[260] The district court, moreover, noted how the First Circuit had "cautioned that 'so long as an expert's scientific testimony rests upon 'good grounds,' based on what is known, it should be tested by the adversarial process, rather than excluded for fear that jurors will not be able to handle the scientific complexities.'"[261] "'Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.'"[262]

After evaluating Dr. Hamrell's expert opinion on the adequacy of Abbott's warnings, including its labeling accuracy and completeness, the district court concluded that such opinion, based on the record, was not admissible under *Daubert*/FRE 702.[263] According to the court, plaintiff failed to satisfy, the burden of showing "that Hamrell's opinion on adequacy [was] not 'connected to existing data only by the *ipse dixit* of the expert.'"[264]

The court reasoned that it was "not clear whether "Hamrell possessed sufficient facts or data to provide a basis for this opinion that the Humira labels 'failed to provide adequate information to doctors,' since Hamrell had not established a "baseline of what information" a doctor needed to make "his/her prescribing decision."[265] It also reasoned that Hamrell was "not a medical doctor and [did] not have 'qualifications to opine on what is clinically appropriate in terms of treating patients,'" and also that he had failed "to point to facts, such as those acquired through his experience, as to how the label's relevant target audience would interpret the Humira labels," and thus, to "what [facts] prescribing doctors would find adequate."[266] Consequently, the court concluded that Hamrell did not establish that his "adequacy" opinion had been based "on sufficient data so as to be reliable."[267]

The district court furthermore found that Hamrell did not show either, under FRE 702(c) "that his testimony would be the product reliable principles and methods," or under FRE 702(d) "that he reliably applied the principles and methods to the facts of the case." "Hamrell use[d] methodology other than his experience to assess the effect of the label on a

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[259] *Id*., quoting *Milward*, 639 F.3d at 15.

[260] *Id*., quoting *Milward*, 639 F.3d at 15, (quoting *Kumho Tire Co.*, 526 U.S. at 152; *Daubert*, 509 U.S. at 592 & n. 10.

[261] *Id*., quoting *Milward*, 639 F.3d at 15 (quoting *Daubert*, 509 U.S. at 590).

[262] *Id*.

[263] *Id*. at 11, n. 6, 12-14.

[264] *Id*. at 14-15, quoting *Milward*, 639 F.3d at 14.

[265] *Id*. at 15.

[266] *Id*. at 17.

[267] *Id*.

 

prescribing medical doctor. He took no steps to determine if the label is misleading, confusing or downplayed any relevant risk."[268] Because Hamrell lacked the training, knowledge, and expertise of a prescribing physician, the district court found that he was "not qualified to opine as to the adequacy for prescribing purposes or confusion that this may generate in the label's target audience."[269] Consequently, the court held that plaintiff had failed to show "that Hamrell's testimony as to adequacy or physician perception would be the product of reliable principles or methods or that he […] reliably applied the principles and methods to the facts of the case."[270] The district court concluded for the same reason that Hamrell "would not be qualified to testify as to [a] (proposed, alternative) label's impact on prescribing physicians."[271]

In sum, the district court held that plaintiff had failed to meet her burden "to show that Hamrell would base his testimony on sufficient facts or data, […] that Hamrell's testimony [was] the product of reliable principles and methods, or that he ha[d] reliably applied the principles and methods (*i.e.*, his knowledge to the facts of the case," and consequently excluded Hamrell's testimony as to adequacy and labeling.[272] The court also held that, because plaintiff had failed to establish Hamrell's qualification to opine "as to the impact of marketing communications on prescribing doctors," it excluded his testimony on such topic.[273]

The district court came to the same conclusion on Hamrell's expert opinion testimony (*i.e.*, expert report and deposition testimony) on Abbott's conduct with respect to lymphoma and Humira and its failure to meet the standard of care. The court reasoned that "[t]he proponent of expert evidence must show that 'the expert's conclusion has been arrived at in a scientifically sound and methodically reliable fashion.'"[274] It also reasoned that "Hamrel's proffered basis for his expert opinion [was] conclusory and circular,"[275] because he did "not know if there is 'a standard of care with respect to labeling,' […] did not use […the] 'industry practices and guidances on providing information' [to which he referred, and] did not meaningfully explain how he used the FDA labeling regulations (or other reasoning) to determine that Abbott's 'conduct f[ell] below the standard of care for a reasonably prudent pharmaceutical company.'"[276]

[268] *Id*. at 17-18.
[269] *Id*. at 18.
[270] *Id*.
[271] *Id*. at 19-20.
[272] *Id*. at 20-21.
[273] *Id*. at 21.
[274] *Id*. at 22, quoting *Milward*, 639 F.3d at 15 (citing *Daubert*, 509 U.S. at 85).
[275] *Id*. at 23.
[276] *Id*.

***Torres v. Mennonite General Hospital, Inc.*** (D.P.R. 2013)[277] (Medical Malpractice)

Plaintiff alleged that the "emergency" treatment provided to plaintiff's deceased husband by Mennonite General Hospital physician Dr. Omar Nieves caused his death. Dr. Nieves "had 'Associate' privileges," was "part of the on-call physician list of the Cardiology Department," "was the only Cardiologist available," and "was at the Emergency Room at the time of plaintiff's husband's emergency.[278] The court denied a motion in limine the defendant had filed to exclude the opinion testimony of plaintiff's medical expert, Dr. Carl Adams.[279]

The district court found that Adams was "'a witness qualified as an expert by knowledge, skill, experience, training, or education' and [that] his opinions [would] aid the trier [of fact] better to understand a fact in issue, *i.e.*, if Dr. Nieves applied the proper standard of care while treating the deceased."[280] The district court concluded that Adams possessed the requisite qualifications "to opine on the standard of care that should have been met by Dr. Nieves, a clinical cardiologists, in treating the deceased." It reasoned that Dr. Adams was "a licensed, board-certified cardiovascular, thoracic and board-certified trauma surgeon with over 32 years treating patients with cardiovascular disease."[281]

In response to defendant's claim that Dr. Adams' opinion was not supported by established guidelines and/or were irrelevant, the district court stated that, "the question of admissibility 'must be tied to the facts of a particular case.'"[282] The court further reasoned that, "'trial judges may evaluate the data offered to support an expert's bottom-line opinions to determine if that data provides adequate support to mark the expert's testimony as reliable.'"[283] It also noted that "[t]his does not mean, however, that trial courts are empowered 'to determine which of several competing scientific theories has the best provenance.'"[284]

According to the district court, "'*Daubert* does not require that a party who proffers expert testimony carry the burden of proving to the judge that the expert's assessment of the situation is correct.'"[285] Rather, "[t]he proponent of the evidence must show only that 'the expert's conclusion has been arrived at in a scientifically sound and methodologically reliable fashion.'"[286] The district court also emphasized that "[t]he object of *Daubert* is 'to make certain that an expert, whether basing testimony on professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes

[277] 988 F. Supp. 2d 180 (D.P.R. 2013).
[278] *Id*. at 189-90.
[279] *Id*. at 182.
[280] *Id*. at 183.
[281] *Id*.
[282] *Id*. at 184, quoting *Milward*, 639 F.3d at 14-15.
[283] *Id*., quoting *Milward*, 639 F.3d at 15.
[284] *Id*., citing *Ruiz-Troche*, 161 F.3d at 85.
[285] *Id*.
[286] *Id*.

the practice of an expert in the relevant field.'"[287]

On defendant's motion-in-limine challenge to Dr. Adams' reliability, the court held 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.'"[288] The court reasoned that Dr. Adams' opinion testimony "with regards to the standard of care used by Dr. Nieves while treating the deceased" had "[met] the requirements of Rule 702, Daubert and its progeny."[289] The court reasoned that Adams' testimony "both rest[ed] upon 'good grounds' and on a sufficiently reliable foundation based on the record and what [was] known," and that it was "also relevant to the task at hand, i.e., determining Dr. Nieves' (and Defendants') role, if any, on the demise of the deceased and if the proper standard of care was followed by Dr. Nieves (and Defendants) in treating the deceased."[290]

***Campos v. Safety-Kleen Systems, Inc.*** (D.P.R. 2015)[291] (Toxic Torts)

Plaintiffs (husband, wife, and their minor child) sought damages under Puerto Rican territorial law against defendants for exposure to a chemical agent (SK-105) that allegedly caused plaintiffs to develop chronic myelogenous leukemia ("CML").[292] Following discovery, defendants filed motions in limine to exclude plaintiffs' expert testimony, opinions, and reports as unreliable under FRE 702 and *Daubert*.

The court emphasized that district courts' role as gatekeepers of reliable evidence was "a flexible one" the focus of which "is based solely on principles and methodology, not the conclusions that expert testimony generates."[293] The district court held the four *Daubert* factors were intended to "assist a trial court in determining the admissibility of an expert's testimony." Such "factors do not constitute a definitive checklist or test," given the different kinds of experts, expertise, and issues to be addressed. "These factors may or may not be pertinent in assessing reliability, depending on the nature of the issue, the expert's particular expertise, and the subject of his testimony."[294] The court, furthermore, held that, "[a]s long as the expert's testimony rests upon 'good grounds based on what is known,' it should be tested by the adversarial process, rather than excluded for fear that jurors will not be able to handle the scientific complexities."[295]

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[287] *Id*.

[288] *Id*., quoting *Daubert*, 509 U.S. at 590, and citing *Currier v. United Techs. Corp.*, 393 F.3d 246, 252 (1st Cir. 2004) and *Milward*, 639 F.3d at 15.

[289] *Id*. at 184.

[290] *Id*. at 184-85.

[291] Civ. No. 12-1529 (PAD) (D.P.R. 2015).

[292] *Id*. at 1.

[293] *Id*. at 2, quoting *Daubert*, 509 U.S. at 580.

[294] *Id*. at 2, quoting *Milward*, 639 F.3d at 14, citing *Kumho Tire Co., Ltd.*, 526 U.S. at 150.

[295] *Id*. at 3, quoting *Milward*, 639 F.3d at 15, citing *Daubert*, 509 U.S. at 590, 596.

 

The district court denied defendant's motion to exclude the opinions of plaintiff's first expert, Goldsmith. It found that: (1) his opinion that benzene exposure may cause CML [was] consistent with published literature, medical institutions as well as the defendants' expert"; (2) Goldsmith had "examined all peer-reviewed published literature on benzene and CML, and there [were] no studies regarding the relationship between SK-105/mineral spirits and CML/leukemia"; and (3) Goldsmith "based his conclusions on the Bradford Hill Criteria, relying on the same methodology he use[d] in his epidemiology classes."[296] The district court, thus, held that Goldsmith's "opinions [were] based on reliable scientific evidence."[297]

The district court also denied defendant's motion to exclude the opinions of plaintiff's third expert, Frank. Defendants alleged that: (1) Frank had "considered the wrong substance in his report, inasmuch as SK-105 is not benzene"; (2) "the authorities on which Frank relie[d] [did] not support his opinion that benzene can cause CML"; (3) Frank "selectively picked studies favoring his conclusions while discarding the ones that did not"; (4) "because CML has no known cause, differential diagnosis alone is insufficient to pass the *Daubert* scrutiny"; (5) Frank's "diagnosis employs an unreliable methodology as there is no support for the opinion that benzene can cause CML"; and (6) Frank had "failed to consider the specific dose of benzene to which [plaintiffs were] exposed, and [could not] reliably rule out other potential sources of benzene apart from SK-105."[298] The district court held that "the core of defendants' arguments" went to the *weight* and credibility of [said expert's] contemplated testimony," and thus, were "more properly suited for cross-examination and presentation of contrary evidence."[299]

***Quilez-Velar v. Ox Bodies, Inc.*** (1st Cir. 2016)[300] (Wrongful death/Negligence)

The plaintiff filed this wrongful death/negligence and products liability action in 2013 after a Jeep Liberty SUV crashed into the rear of a stopped or slowly moving Municipality of San Juan truck. The truck was fitted with an underride guard designed by defendant Ox Bodies.[301] The force of the accident resulted in "[t]he front of [the Jeep…] underrid[ing] the truck's trash body such that the truck penetrated the Jeep's passenger compartment and struck" the 28-year-old wife and mother (Maribel Quilez), who died from lacerations to her head and face.[302]

Ox Bodies filed a pre-trial motion in limine to exclude the testimony of plaintiff's expert, Ponder. Defendant argued that "Mr. Ponder's report was 'devoid of any scientific analysis or calculations that would support' his conclusion that his proposed alternative

[296] *Id*. at 3.
[297] *Id*.
[298] *Id*. at 4.
[299] *Id*. (emphasis added).
[300] 823 F.3d 712 (1st Cir. 2016).
[301] *Id*. at 715.
[302] *Id*.

underride guard design 'would have been a safer design in the instant accident,' and that his opinions should be excluded under *Daubert* [...]"[303]The presiding magistrate judge denied the motion to exclude Ponder's testimony.[304] The district court found that defendant had failed to show that specific tests Ox Bodies argued Ponder should have performed "must have been carried out to provide a foundation for Ponder's opinions." The district court also found that Ponder's report contained well-explained conclusions and appeared to reflect the appropriate use of crash-test data.[305]

At the conclusion of trial, the jury found defendant "strictly liable for defective design and awarded plaintiffs damages totaling $ 6 million." It "assigned 20% of responsibility for the damages to defendant Ox Bodies [$1.2 million], 80% to the Municipality of San Juan, which was not a party in the suit, and 0% to" the deceased 28-year-old wife and mother.[306] Defendant Ox Bodies appealed the verdict and the district court order supporting judgment in that amount. It "contend[ed] that the court should not have allowed the plaintiff's expert to testify on an alternative underride guard design, and that absent such testimony, no reasonable jury could have found for the plaintiffs."[307]

The appellate court held that the district court did not abuse its discretion "in concluding that Ponder's testimony on alternative design was sufficiently reliable to survive the admissibility threshold."[308] The appellate court "decline[d] to adopt […] a bright-line rule" requiring that "an expert himself must have tested an alternative design, much less by building one."[309] It also held that the reliability "factors *Daubert* mentions do *not* constitute a 'definitive checklist or test'"[310] (*i.e.*, *inter alia*, the factor relating to) "whether a theory or technique can be and has been tested."[311] According to the court, *Daubert required only that the district court had "conduct[ed] a fact-specific 'reliability' inquiry*."[312]

## Second Circuit

***Drake v. Allergan, Inc.*** (D. Vt. 2015)[313] (Products Liability/Negligence)

In *Drake*, the parents of a 5 ½-year old minor child ("J.D.") afflicted with cerebral palsy

[303] *Id*. at 715-16, n. 3.

[304] *Id*., citing *Quilez-Velar v. Ox Bodies, Inc.*, No. CIV. 12-1780, 2015 WL 418151, at *7 (D.P.R. Feb. 1, 2015).

[305] *Id*.

[306] *Id*. at 712, 716 citing *Quilez-Velar v. Ox Bodies, Inc.*, No. CIV. 12-1780, 2015 WL 898255, at *1–3 (D.P.R. Mar. 3, 2015).

[307] *Id*. at 712.

[308] *Id*. at 718.

[309] *Id*. at 719.

[310] *Id*. (emphasis in original).

[311] *Id*. at 12, 13 and n. 7.

[312] *Id*. at 12 citing and quoting Milward, 639 F.3d at 16-20. (emphasis added).

[313] 111 F. Supp. 3d 562 (D. Vt. 2015).

 

filed suit against Allergan, Inc., the manufacturer of Botox. J.D. developed a seizure disorder after his physician injected Botox into J.D.'s calves to treat his lower limb spasticity.

During the first day of trial, the court denied Allergan's motion to strike the testimony of plaintiff's medical causation expert, Hristova. At the conclusion of the trial, by which time plaintiffs had narrowed their claims to negligence and Vermont Consumer Fraud Act violations, the jury awarded plaintiffs approximately $2.78 million in total compensatory damages and $4 million in punitive damages. Allergan then moved for a judgment notwithstanding the jury verdict. The defendant reasoned that plaintiffs *inter alia* had "failed to provide sufficient evidence to support a finding of causation."[314]

The district court held that it had correctly denied Allergan's pre-trial motion to strike Hristova's testimony on the ground that "she relied on the 'totality of circumstances.'"[315] The district court reasoned that during the pretrial phase, the court had not found the individual categories of evidence to be unreliable, [or that] they present[ed] 'too great an analytical gap between the data and the opinion proffered.'"[316] The district court held, rather, that "some pieces of evidence that may have been insufficient to support a finding of causation in isolation could be sufficient when considered together."[317]

The district court next cited *Milward* to justify its effective acceptance of Hristova's use of weight-of-evidence methodology. According to the district court, the First Circuit found that "[t]he trial court failed to appreciate that the expert *inferred causality 'from the accumulation of multiple scientifically acceptable inferences from different bodies of evidence*.'"[318] The district court held that, it was "valid for an expert to infer causation based on the totality of evidence when combined it supports such an inference."[319]

***Sullivan et al. v. Saint-Gobain Performance Plastics Corp.*** (D. Vt. 2019)[320] (Toxic Tort)

Plaintiffs, individual residents from Bennington and North Bennington, Vermont, filed suit against defendant, St. Gobain Performance Plastics Corp. In 2000, St. Gobain acquired Chem-Fab Corporation. Chem-Fab previously operated a plant located in Bennington where it produced Teflon-coated fabrics and other products from 1969 to 1979. Chem-Fab had also opened a second plant in 1978 in North Bennington where it continued to produce fabric in the same manner. In 2002, defendant St. Gobain closed the second plant and moved the fabric-coating process out of state to New Hampshire. The fabric-coating process employed by these plants required that fiberglass cloth and other fabrics be soaked in a water-based

[314] *Id*. at 566.
[315] *Id*. at 567-68.
[316] *Id*. at 568, quoting *Joiner*, 522 U.S. at 146.
[317] *Id*.
[318] *Id*., quoting *Milward*, 639 F.3d at 26 (emphasis added).
[319] *Id*., citing *Milward*, 639 F.3d at 23.
[320] Case No. 5:16-cv-125 (D. Vt., July 16, 2019).

solution containing Teflon, which, in turn, contained perflouroctanoic acid ("PFOA") as a dispersant. The court found, as a matter of fact, that PFOA is "highly resistant to degradation in the natural environment," is "readily transported by wind in the form of airborne particles as well as by ground and surface water," is known to "enter[] the food chain and [to] accumulate[] in the bodies of people and animals," and "is now detectable at low levels throughout the world."[321]

The results of a 2016 Vermont Department of Environmental Conservation ("VDEC") test of residential ground wells in and around Benning triggered plaintiffs' concerns about PFOA. "The results ranged from non-detectable levels to nearly 3,000 parts per trillion," with "[t]he contaminated wells [] primarily located in a 'zone of contamination' within the towns of Bennington and North Bennington."[322] These results prompted VDEC and the state health department to take immediate regulatory action, which included providing bottled water or individual filtration systems to residents with contaminated wells.

Plaintiffs' claims sought the establishment of "a system of medical monitoring to detect medical conditions such as certain cancers, high blood pressure in pregnant women, elevated cholesterol, and other conditions" alleged to be "strongly associated with exposure to PFOA." Plaintiffs also sought monetary damages for the contamination of their groundwater, lost property value, and for emotional harm.[323]

Plaintiffs proffered seven experts in support of their claims, four on the deposit of PFOA in groundwater, Hopke, Yoder, Siegel, and Mears, two on medical monitoring, Ducataman and Grandjean, and one on lost property values, Unsworth. Defendant thereafter filed *Daubert* motions to exclude the testimony of each of these experts. The district court understood the *Daubert* decision's "reliability" test as "entail[ing] a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid."[324] The court found that the *Daubert* Court had posited a "list of non-exclusive factors" for testing methodology, "includ[ing] testing, peer review and publication, error rate, the existence of standards for its application, and acceptance within the relevant scientific community."[325] It concluded, furthermore, that the *Daubert* "majority opinion [had] expressed a preference for resolving disputed issues through admission of contrary evidence and cross examination, not through rigid exclusion," and that the U.S. Supreme Court's majority opinion in *Joiner* "recognized the need for the court[, as gatekeeper, in evaluating the 'reliability' of expert opinions] to consider the strength of the logical connection between data and opinion."[326]

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[321] *Sullivan*, slip op. at 3.
[322] *Id*. at 5.
[323] *Id*. at 6.
[324] *Id*. at 9, citing *Daubert*, 509. U.S. at 592-93.
[325] *Id*.
[326] *Id*., citing *Daubert,* 509 U.S. at 596, and *Joiner*, 522 U.S. at 146.

 

The court also compared the *Joiner* majority opinion—which held that it "'was within the [trial court's] discretion to conclude that the studies upon which the experts relied were not sufficient, whether individually or in combination, to support their conclusions that Joiner's exposure to PCB's contributed to his cancer…'"[327]—with the *Kumho* majority opinion's emphasis on "the lack of a known, validated, measurable connection between observed data and conclusion that doomed the tire expert's testimony"—*i.e.*, its evaluation of "the *deductive* process by which the expert derives a conclusion from data and observation."[328] It then compared these majority opinions with Justice Stevens' concurring and dissenting opinion in *Joiner*, where he emphasized that "'*Daubert* quite clearly forbids trial judges to assess the validity or strength of an expert's scientific conclusions, which is a matter for the jury.'"[329]

The district court assessed the reliability of plaintiffs' experts' testimony by distinguishing between the requirement to evaluate an expert's methodology and the requirement to refrain from evaluating the *correctness* of the experts' opinion. It then "summarize[d] the data relied upon by the expert and then [sought] to identify and evaluate the method by which the data [led] *by inference* to a conclusion."[330] The court also noted that two of plaintiffs' medical-monitoring experts—Ducatman and Grandjean—had employed the "weight-of-evidence" approach in considering multiple studies.

Ducatman, a public health and occupational medicine specialist, opined in his report and testimony that drinking water-well contamination increased the levels of PFOA in the blood of hundreds of Bennington residents above average levels found in the general population. He also opined that "[t]he presence of PFOA in the bloodstream increases the risks of development of certain illnesses[,…] includ[ing], kidney and testicular cancer, hypertension and thyroid disease during pregnancy and problems with breast feeding, thyroid disease without pregnancy, liver disease, hyperlipidemia, gout, and ulcerative colitis."[331] Ducatman concluded that there was an *association* between PFOA and these illnesses, based, in part, on a 2017 Vermont Health Department report.[332] In addition he opined that since primary care physicians and other clinicians were "commonly unfamiliar with the effects of environmental toxins in general, and the class of PFAS of which PFOA is a member," medical monitoring would "increase the likelihood of early detection and improved outcomes for these conditions."[333]

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[327] *Id*. at 10, quoting *Joiner*, 522 U.S. at 146-47.

[328] *Id*. at 11, citing *Kumho Tire Co.*, 526 U.S. 137 (emphasis added).

[329] *Id*. at 10, quoting *Joiner*, 522 U.S. at 154.

[330] *Id*. (emphasis added).

[331] *Id*.

[332] *Id*. at 28-29. Apparently, Ducatman had reviewed the 2017 report prepared by the Vermont Department of Health entitled "Exposure to Perfluorooctanoic Acid (PFOA) in Benning and North Bennington, Vermont," which listed most of these illnesses as having an "*association*" with "PFOA in blood." (emphasis added).

[333] *Id*.

 

The court found that Ducatman used a weight-of-evidence approach because "there were very few clinical studies of the effects of PFOA on humans."[334] As a result, he "relied on a literature search of epidemiological studies" of which there were many, to draw "a conclusion that PFOA is associated with increased incidence of certain cancers and other conditions."[335] He also relied on Agency for Toxic Substances and Disease Registry ("ATSDR") regulations the agency uses to determine "whether medical monitoring is appropriate in cases subject to the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601 *et seq.*," which were "not directly applicable" to the case at bar. Ducatman relied on these regulations "to conclude that medical monitoring would be an appropriate way to reduce the danger of these conditions through early detection."[336]

The court held that Ducatman's overall methodological approach "satisfie[d] *Daubert* [reliability] criteria." First, the court reasoned that, although medical monitoring (effectively a public health recommendation) cannot be tested, Ducatman's familiarity with other medical monitoring programs, his experience "in monitoring for occupational exposure to harmful substances such as asbestos," and "[h]is familiarity with the successes and shortcomings of these efforts provides a reasonable assurance that medical monitoring has been 'tested' in the real world."[337] Second, the court reasoned that although Ducatman "ha[d] published extensively in peer-reviewed journals on the subject of medical monitoring," he derived his expert opinion that PFOA exposure poses a danger to human health from third-party peer-reviewed research.[338] Third, the court reasoned that Ducatman's reliance on the ATSDR regulatory standards qualified as the identification of "an independent authoritative source to guide his analysis," for *Daubert* purposes, whether or not the parties agreed on whether the ASTDR factors would support medical monitoring.[339] Fourth, the court reasoned that "[m]edical monitoring is recognized as appropriate in certain circumstances" and has been generally accepted as a concept "at least since promulgation of the ATSDR regulations in 1995."[340] The court held that "[t]hese traditional *Daubert* factors support the admissibility of Ducatman's testimony."[341]

The district court noted that Grandjean was a "highly distinguished public health researcher" holding "joint appointments at the University of Southern Denmark and the Harvard School of Public Health," having approximately 500 published scientific papers, and serving as advisor to both United States and European government agencies.[342] Grandjean opined in his rebuttal report and testimony that, despite the limited data available about the

[334] *Id*. at 26, 32.
[335] *Id*. at 32.
[336] *Id*.
[337] *Id*. at 32-33.
[338] *Id*. at 33.
[339] *Id*.
[340] *Id*. at 34.
[341] *Id*.
[342] *Id*. at 35.

health hazards PFOA pose to the overall population and researchers' focus on PFOA only during the past ten years, his review of the available literature (published data and research papers and of court-ordered reports from cases in Ohio and West Virginia) led him to conclude that "PFOA is *associated* with the development of autoimmune diseases such as ulcerative colitis, reproductive disorders in both genders, complications of pregnancy, high cholesterol, and certain cancers."[343] Grandjean opined that "evidence of adverse health results is incomplete but strong enough to support *a link* between PFOA and the onset of certain serious diseases that is sufficient to justify some form of medical monitoring."[344]

The district court found that Grandjean's research and report and his overall methodological approach "satisf[ied] the *Daubert* criteria," viewing the admissibility of that testimony "through the lens of a court that has already decided that medical monitoring is a legal remedy for exposure to a toxic chemical."[345] The court concluded, consistent with Justice Stevens' concurring and dissenting opinion in *Joiner*, that "[i]t is not intrinsically 'unscientific' for experienced professionals to arrive at a conclusion by weighing all available scientific evidence," that "the weight of the evidence process through which Grandjean considered the available scientific evidence is a legitimate and accepted method of arriving at a scientific conclusion."[346] According to the court, "Grandjean's opinion – that '[…] elevated human exposure to PFASs pose a substantial present and potential hazard to human health' – is likely to prove relevant and *sufficiently reliable* to play a role in guiding the court on the issue of causation."[347]

The district court reasoned, first, that although Grandjean primarily relied on "cross-sectional and longitudinal studies of population health which could not be reproduced and tested like a chemistry experiment," the consistency in results of these papers, his consideration of dozens of papers on the health effects of PFOA in which he identified similar results, and his consideration of animal studies that could be duplicated satisfied the court's concern that "the data on health effects was subjected to as much testing as can be undertaken without experimentation on human subjects."[348] Second, the court reasoned that Grandjean's testimony on PFOA was "reliable" because he relied on peer-reviewed studies, has been published in many peer-reviewed journals, and has worked "in the area of the effects of human exposure to chemicals in the environment [which] has been subjected to many years of peer review."[349] Third, the court reasoned that "it would be difficult to assign a particular error rate to a determination that the *weight of the evidence* supported an association between PFOA exposure and certain diseases," and that it was satisfied he had

[343] *Id*. at 35-36 (emphasis added).
[344] *Id*. at 36 (emphasis added).
[345] *Id*. at 36-37.
[346] *Id*. at 39, quoting *Joiner*, 522 U.S. at 153.
[347] *Id*. at 37 (emphasis added).
[348] *Id*. at 36.
[349] *Id*. at 38; *see also id*. at 40.

 

"not unduly exaggerated the strength of his conclusions."[350] Fourth, the court accepted the statement contained in Grandjean's report that he "employed a weight of the evidence approach, as is commonly accepted in the scientific community in reviewing studies on a particular topic," and concluded that Grandjean "also favor[ed] studies that have been accorded weight by regulatory agencies" because it "'allows [him] to focus on the key studies that carry the most weight.'"[351] Finally, the court reasoned that, although Grandjean's methods were "subjective in the sense that their application to the choice of one paper over another is not documented, … they are objective in the sense that he limits his inquiry to published work that is listed at length in his 'cited publications.'" Grandjean thereby "provided a description of his source materials and an explanation of the criteria by which he chooses research papers." The court found that such "documentation – 277 papers in all – provide[d] assurance that he [] appli[ed] a consistent method which can be assessed by the fact-finder."[352]

Thus, Grandjean's "weight of the evidence review [was] not a subjective, 'black box' opinion that c[ould] not be examined."[353] The court ruled that since '[p]opulation-based studies and the 'weight of the evidence' assessment have achieved wide acceptance in the field of epidemiology," the methods [Grandjean] employed in reaching his conclusions are generally accepted."[354]

## Third Circuit

***In re Fosamax*** (D.N.J. 2013)[355] (Products Liability)

In this MDL proceeding, plaintiffs alleged that Fosamax, FDA-approved for the treatment and prevention of osteoporosis, causes atypical femur fractures ("AFF") and that it caused plaintiff's (Glynn)'s femur fracture.[356] Before trial, defendant Merck, Sharp & Dohme Corp. filed an omnibus *Daubert* motion to exclude the testimony of plaintiff's experts (Cornell, Klein, Madigan, and Blume). The district court denied the motion as to all four expert witnesses after the close of oral argument.

The court noted how Dr. Cornell "formed his opinion [on whether Fosamax causes AFFs] using the Bradford Hill criteria."[357] It also noted "[i]n applying the nine Bradford Hill

[350] *Id*. at 38 (emphasis added).
[351] *Id*. at 38-39.
[352] *Id*. at 39.
[353] *Id*.
[354] *Id*. at 40.
[355] *In re Fosamax (Alendronate Sodium) Products Liability Litigation*, Civil No. 11-5304, 08-08 (D.N.J. 2013), aff'd Civ. No. 12-2250 (3d Cir 2014).
[356] *Id*., slip op. at 1.
[357] *Id*. at 3, quoting *Gannon v. United States*, 292 Fed. Appx. 170, 173 (3d Cir. 2008). Notably, the Third Edition emphasizes that "*an association is not equivalent to causation*," (emphasis in original) citing as support the Third Circuit case of *Soldo v. Sandoz Pharms. Corp.*, 244 F. Supp. 2d 434, 461 (W.D. Pa. 2003) (finding that

 

factors, [Cornell] reviewed [p]laintiff's medical records, his office notes and depositions of her treating physicians, 'past and current medical literature on the topics of osteopenia, osteoporosis and their prevention and treatment with bisphosphonate drugs including alendronate,'" and particular publications focusing on studies describing "the appearance of AFFs."[358] Cornell had also "'review[ed] the original trials, the randomized trials, which led to the approval of Fosamax for the treatment of osteoporosis.'"[359] According to the district court, Cornell "attempted to 'present a balanced analysis,' […] pointed out studies on both sides of the issue," and "concluded that Fosamax can cause AFFs and 'Fosamax use was a substantial contributing factor to Mrs. Glynn's femur fracture.'"[360] The court found that the methodology Cornell used "[was] sufficiently reliable." It reasoned that the Bradford Hill criteria are "'broadly accepted' in the scientific community 'for evaluating causation,' […] and 'are so well established in epidemiological research.'"[361]

The district court dismissed defendant's objections that plaintiffs did "not explain the scientific methodology used by Dr. Cornell or show that his methodology [was] sufficiently reliable," and that "Cornell's 'weight-of-the-evidence' methodology just list[ed] some studies, only some of which support[ed] causation, and conclude[d] that the *weight of the evidence* shows that Fosamax causes AFFs."[362] The court also dismissed defendant's objection that Cornell's "method [was] inadequate because Dr. Cornell does not discuss how these studies establish causation or why certain studies outweigh others that do not find causation."[363] It reasoned that, while defendant was "free to address these issues on cross-examination, […such] concerns do not prohibit Dr. Cornell from testifying as an expert because he is qualified and the methodology he used [was] sufficiently reliable."[364]

The district court noted how Dr. Klein, "[i]n applying the nine Bradford Hill criteria, reviewed human and animal studies, and studies performed by [d]efendant to form his opinion, [which] studies revealed a strong association between bisphosphonates, like Fosamax, and microdamage in the bones as well as decreased bone toughness."[365] The court also emphasized how Klein's report "noted a strong association between delayed fracture

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the Bradford Hill criteria had been "developed to assess whether an association is causal." *See Third Edition*, *supra* note 14, at 552, n. 7. However, this does not undo the potential prejudicial effect such testimony, once admitted, will have upon the trier of fact.

[358] *Id*. at 3-4.

[359] *Id*. at 4.

[360] *Id*.

[361] *Id*. at 4, quoting *Gannon*, 292 Fed. Appx. at 173. n. 1; I*n re Avandia Mktg., Sales Practices & Products Liab. Litig.*, 2011 WL 13576, at *3.

[362] *Id*. at 4 (emphasis added).

[363] *Id*.

[364] *Id*. at 4 citing and quoting *Milward*, 639 F. 3d at 15 ("stating '*Daubert* does not require that a party who proffers expert testimony carry the burden of proving to the judge that the expert's assessment of the situation is correct'; instead, the proponent of the evidence must show only that 'the expert's conclusion has been arrived at in a scientifically sound and methodologically reliable fashion.'").

[365] *Id*. at 6.

 

healing, due to altered bone quality, in patients and animals taking bisphosphonates," and that such "findings [had been] replicated in several studies discussed in Dr. Klein's report."[366] In addition, the court identified how Klein's report had cited studies "recogniz[ing] the '*duration*-dependent, as well as, dose-dependent effect bisphosphonates have on the skeleton,'" and "noted that the 'cessation of bisphosphonate treatment may be prudent for women on therapy who sustain nonvertebral fracture.'"[367] The court further found that Klein's review of such studies informed his conclusion that 'alendronate significantly alters the cellular property of bisphosphonate-treated bone."[368] The district court concluded that Klein had formed his opinion that "there [was] a causal relationship between Fosamax and AFFs" based on his use of "a sufficiently reliable methodology, the Bradford Hill criteria."[369]

The district court dismissed defendant's objections that "the Bradford Hill criteria apply to epidemiological studies" not discussed in Klein's report; that Klein failed to "provide[] support for the proposition that a general causation conclusion can be established using the Bradford Hill criteria and human or animal biopsy data"; that Klein failed to "demonstrate he is qualified to interpret that evidence because he has no expertise in epidemiology"; that Klein failed to establish "the mechanism regarding how bisphosphonates cause AFFs"; and failed to "prove[] with human data […] the theories [he] uses to support his conclusion about mechanism – microdamage, decrease in tissue heterogeneity, bone brittleness, and delayed healing."[370] Klein had "properly applied the Bradford Hill criteria to epidemiological studies," and cited the Third Edition for the proposition that "'toxicological models based on live animal studies … may be used to determine toxicity in humans' in addition to observational epidemiology."[371] The court also held that, "[f]or his testimony to be admissible, Dr. Klein is not required to show that the mechanism has been definitely established. Instead, he just needs to show that the methodology he used to arrive at his opinion is sufficiently reliable."[372]

The district court noted how Dr. Blume had reviewed published studies and other medical literature, other expert witness reports, epidemiological studies, FDA's Adverse Event Reporting System database, and FDA regulations and regulatory procedures specifically applicable to drug approval, labeling, post-marketing, surveillance and reporting, "using 'her years of experience' in 'the industry,'" to opine in her report that such information "confirmed the increasingly adverse risk-benefit profile related to long-term Fosamax use in the indicated populations."[373] The court also noted how Blume opined that defendant "should have changed the Fosamax label 'to include escalating warning and *precautionary*

[366] *Id.*
[367] *Id*.
[368] *Id*.
[369] *Id*.
[370] *Id*.
[371] *Id*. at 7, quoting *Third Edition*, *supra* note 14, at 563.
[372] *Id*., citing and quoting *Milward*, 639 F.3d at 15 (the same passage it quoted above).
[373] *Id*. at 10-11.

 

*risk information* related to' AFFs," since having "received reports that AFFs were '*associated with* Fosamax use as early as 2002,'" but failed to do so until 2009.[374]

The district court dismissed defendants' objections to admitting Blume's opinions, which included regulatory requirements and defendant's compliance with them; defendants' delay in amending the label to include femur fracture information and failure to add a precautionary warning; defendant's failure to timely investigate a potential link between Fosamax and AFF; defendant's alleged motives and state of mind; the causation or mechanism of AFF; and regarding safer alternative drugs. The court held that "it [wa]s not the appropriate time for [d]efendant to request that the Court preclude Dr. Blume from testifying about certain topics," and that defendant "may question Dr. Blume's opinions or methodology on cross-examination."[375]

***In re Zoloft (Sertraline Hydrochloride)*** (3d Cir. 2017)[376] (Products Liability)

*In re Zoloft* is one of federal cases discussed in this paper where the court cited *Milward* for the proposition that the weight-of-the-evidence approach for general causation is a generally reliable methodology, and that the Bradford Hill criteria implementing that methodology is generally reliable. Like the *Milward* court, however, the Third Circuit also ruled the experts' testimony inadmissible under *Daubert* because the expert had failed to properly apply the weight-of-the-evidence methodology to the facts of the case.[377]

The Third Circuit evaluated the reliability of the expert's weight-of-the-evidence analysis, which "'involves a series of logical steps used to 'infer[] to the best explanation[.]'"[378] The court emphasized that, because the weight-of-the-evidence methodology "can be implemented in multiple ways[,…] each application is distinct and should be analyzed for reliability."[379] Indeed, the appeals court noted how the district court had previously identified that "'[t]he particular combination of evidence considered and weighed here ha[d] not been subjected to peer review.'"[380]

The Third Circuit acknowledged the flexibility of a weight-of-the-evidence approach, stating that "[a]n expert can theoretically assign the most weight to only a few factors, or

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[374] *Id*. at 11 (emphasis added).

[375] *Id*. at 11, quoting *Milward*, 639 F.3d at 15 ("'[s]o long as an expert's scientific testimony rests upon 'good grounds,' based on what is known…, it should be tested by the adversarial process, rather than excluded'").

[376] 858 F.3d 787 (3d Cir. 2017).

[377] *See infra* discussions of *Jones v. Novartis Pharmaceuticals Corporation*, 235 F. Supp. 3d 1244 (N.D. AL 2017) (11th Circuit) and *In re: Bair Hugger Forced Air Warming Devices Products Liability Litigation*, MDL No. 15-2666 (D.C. MN 2019) (8th Circuit).

[378] *In re Zoloft*, 858 F.3d at 795, quoting *Milward*, 639 F. 3d at 17.

[379] *Id*., citing *In re Paoli*, 35 F.3d at 758.

[380] *Id*. at 796, citing *Magistrini v. One Hour Martinizing Dry Cleaning*, 180 F. Supp. 2d 584, 602 (D.N.J. 2002).

 

draw conclusions about one factor based on a particular combination of evidence."[381] The court then proceeded to compare the "flexible" generally accepted differential diagnosis that doctors had employed in *In re Paoli* to the analogously flexible weight-of-the-evidence analysis that plaintiffs' expert had employed in *In re Zoloft* to establish a general causal connection between Zoloft and birth defects.[382]

Notwithstanding its acceptance of weight-of-the-evidence analyses, the court emphasized that the manner in which the expert applies that methodology to the facts of the case must also be reliable, consistent with *Daubert* principles:

> The specific way an expert conducts such an analysis must be reliable; 'all of the relevant evidence must be gathered, and the assessment or weighing of that evidence must not be arbitrary, but must itself be based on methods of science.' [fn] To ensure that the […] weight of the evidence criteria 'is truly a methodology, rather than a mere conclusion-oriented selection process…there must be a scientific method of weighting that is used and explained.' [fn] For this reason, *the specific techniques by which the weight of the evidence […] methodology is conducted must themselves be reliable* according to the principles articulated in *Daubert*. [fn] (underlined emphasis added).[383]
>
> Ultimately, the fact [the expert] *applied […] different techniques inconsistently, without explanation*, to different subsets of the body of evidence raises real issues of reliability. Conclusions drawn from such unreliable application are themselves questionable."[384]

The appeals court embraced the district court's previous findings that the expert had failed to "consistently assess the evidence supporting each [weight-of-the-evidence] criterion or explain his method for doing so."[385] According to the court, "[c]laiming a consistent result without meaningfully addressing […] alternate explanations as noted in *In re Paoli*, undermines reliability."[386] The court then held that because the expert "unreliably applied the techniques underlying the weight of the evidence analysis," he rendered his testimony unreliable, and consequently, inadmissible under the *Daubert* standards, which are intended "to ensure that the testimony given to the jury is reliable and will be more informative than

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[381] *Id*.

[382] *Id*. at 795.

[383] *Id*. at 796 quoting *Magistrini*, 180 F. Supp. 2d at 602, 607.

[384] *Id*. at 798 (emphasis added).

[385] *Id*. at 799.

[386] *Id*., citing *In Re Paoli*, 35 at 760 "(noting the importance of explaining why a conclusion remains reliable in the face of alternate explanations.").

confusing."[387] "By applying different techniques to subsets of the data and inconsistently discussing statistical significance, [the expert] does not reliably analyze the weight of the evidence."[388]

The Third Circuit's *In re Zoloft* decision appears to scale back the less-rigorous approach previously taken by the District Court of New Jersey in *In re Foxamax*.

## Fifth Circuit

***Levitt v. Merck Sharp & Dohme Corp.* (*In re Vioxx Prods.*)** (E.D. La. 2016)[389] (Products Liability)

This MDL involved Vioxx, which Merck had designed, developed, manufactured, and marketed to relieve pain and inflammation resulting from osteoarthritis, rheumatoid arthritis, menstrual pain, and migraine headaches. FDA approved Vioxx on May 20, 1999, and then ordered its withdrawal from the market on September 30, 2004 after data from a clinical trial indicated that its use increased the risk of cardiovascular thrombotic events such as myocardial infarction (that is, heart attack) and ischemic stroke.[390]

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[387] *Id*. at 800.

[388] *Id*. At least one court sitting in the Second Circuit has expressed its agreement with the Third Circuit's assessment in *In re Zoloft* on the reliability of Bradford Hill methodology. According to the district court, in *In re Mirena IUS Levonorgestrel-Related Products Liability Litigation* (MDL No. II), 341 F. Supp. 3d 213 (S.D.N.Y. 2018), the Third Circuit had made clear that the nine proposed Bradford Hill criteria "'are metrics that epidemiologists use to distinguish a causal connection from a mere association.'" 341 F. Supp. 3d at 242, quoting *In re Zoloft*, 858 F.3d at 795. It found that they "'start with an association demonstrated by epidemiology and then apply' eight or nine criteria to determine whether that association is causal." 341 F. Supp. 3d at 242, quoting *In re Breast Implant Litig.*, 11 F. Supp. 2d 1217, 1234 (D. Colo. 1998). In addition, the district court held that it was "imperative that experts who apply multi-criteria methodologies such as Bradford Hill or the 'weight of the evidence' rigorously explain how they have weighted the criteria. Otherwise, such methodologies are virtually standardless and their applications to a particular problem can prove unacceptably manipulable." 341 F. Supp. 3d at 247. As support for this proposition, the district court quoted the Third Circuit's decision in *In re Zoloft*: "'To ensure that the Bradford Hill/weight of the evidence criteria is truly a methodology, rather than a mere conclusion-oriented selection process … there must be a scientific method of weighting that is used and explained.'" 341 F. Supp. 3d at 247, quoting *In re Zoloft*, 858 F.3d at 796. *Cf. In re Mirena IUS Levonorgestrel-Related Products Liability Litigation* (MDL No. II), 387 F. Supp. 3d 323, 356 (S.D.N.Y. 2019) (holding that "the items on which plaintiffs rely – following exclusion of their expert witnesses – to establish Mirena's causation of IIH do not do so. None comes remotely close."). *See id*. at 348, quoting *In re Zoloft*, 858 F.3d 787, 796 (3d Cir. 2017) ( "To ensure that the Bradford Hill/weight of the evidence criteria is truly a methodology, rather than a mere conclusion-oriented selection process…there must be a scientific method of weighting that is used and explained."). *See also id*., quoting *Milward*, 639 F.3d at 26 (holding that the First Circuit "has required that, in analyzing the Bradford Hill factors, the expert must employ 'the same level of intellectual rigor' that he employs in his academic work.").

[389] *Levitt v. Merck Sharp & Dohme Corp. (In re Vioxx Prods.)*, MDL No. 1657 Section L (E.D. La. 2016).

[390] *Id*. at 1.

 

Thousands of individual suits and numerous class actions were thereafter filed against Merck in state and federal courts alleging various products liability, tort, fraud, and warranty claims. Levitt brought this action against Merck in the Western District of Missouri. Her complaint alleged that she suffered two heart attacks in 2001 as a result of taking Vioxx and sought compensatory and punitive damages. On November 8, 2006, the matter became part of the Vioxx MDL before the Eastern District of Louisiana.[391]

Although the parties had reached a $4.85 billion master settlement agreement on November 9, 2007, Levitt chose not to participate as an "interested claimant," and proceeded instead to litigate her claim. Levitt, designated five expert witnesses to which Merck responded by moving to exclude their testimony.

Levitt *inter alia* selected Dr. David Madigan, a professor and chair of statistics at Columbia University who held a Ph.D. in statistics. He was not a medical doctor, had no clinical experience, had never held a position in a medical school, had no experience in weighing the risks and benefits of medical treatment, including pharmaceuticals, was not an epidemiologist, and had no experience designing or conducting clinical drug trials.[392] Dr. Madigan also was "not an expert in pharmacology, cardiology, rheumatology, gastroentology, neurology, vascular biology, or any other medicine related to Vioxx."[393] Yet, Dr. Madigan had "proffered opinions relating to statistical issues with Merck's internal studies regarding the potential risks of Vioxx," *and regarding "an undisclosed statistical analysis that a different Plaintiff's expert, Dr. Egilman, ha[d] testified that he intends to rely on*."[394]

Merck challenged Madigan's opinions on Merck's disclosure-of-risk information. Merck claimed that "only an expert qualified in the field of medicine can speak to the analysis of the cardiovascular risk data in the studies at issue," and that "Madigan should be prohibited from testifying regarding Merck's assessment of the value of trial data."[395]

The court found that Madigan's "expert experience [was] exclusively in the fields of mathematics and statistics." It also acknowledged that, while "[r]eliance upon specialized knowledge is an acceptable ground for admission of expert testimony […], an expert cannot 'go beyond the scope of his expertise in giving his opinion.'"[396] The court then held that

> since Madigan does have extensive experience with mathematics and statistics, […he] may offer opinions […] related to these fields […] regarding the field of statistics, how they are compiled, and

[391] *Id*.
[392] *Id*. at 4.
[393] *Id*. at 4-5.
[394] *Id*. at 2 (emphasis added).
[395] *Id*. at 4.
[396] *Id*. at 5, quoting *Kumho Tire Co.*, 526 U.S. at 152; *Pipitone v. Biomatrix, Inc.*, 288 F.3d 239, 247 (5th Cir. 2002); and *Goodman v. Harris County*, 571 F.3d 388, 399 (5th Cir. 2009).

 

> their general use. Inasmuch as Dr. Madigan's recently completed report aids in this testimony, he should be permitted to rely on it, as the report is no so prejudicial as to warrant exclusion. … Nonetheless, Dr. Madigan should not be allowed to opine on Merck's actions or inactions in disclosing or not disclosing various results. Similarly, Dr. Madigan should not offer opinions regarding Merck's interpretations of the test results or their significance. Such testimony would be outside his field of expertise.[397]

Levitt also "presented Dr. David Egilman as an expert in cardiology, toxicology, molecular biology, neurology, psychiatry, prescription drug marketing, regulatory compliance, ethics, corporate state of mind, and the law." Merck moved to exclude Egilman's testimony because he was "merely a retired general-practice physician who lack[ed] sufficient medical expertise to testify regarding any alleged risk of Alzheimer's disease, dementia, cognitive dysfunction, restenosis, or accelerated atherosclerosis," and that since he was "not qualified in the field of psychiatry," he was "unqualified to opine regarding Merck's state of mind, Merck's allegedly unethical marketing strategies, Merck's alleged noncompliance with regulatory opinions, and Merck's allegedly illegal activities."[398] Merck argued that "Dr. Egilman's study suggests that Vioxx is causally linked to a set of heart-related incidents that includes unstable angina, but does not in and of itself prove that Vioxx causes unstable angina. Merck contends that other cardiovascular endpoints such as cardiac arrest are driving the association in the study."[399]

Levitt countered that Egilman had "extensive training and experience that qualifie[d] him to opine on these points," namely, his Masters of Public Health degree from Harvard University, his "published articles on conflicts of interest in the context of public health," his testimony in the first Vioxx bellwhether trial in Texas, and his testimony "in numerous courts throughout the country on issues similar to the opinions presented in this case."[400] Merck responded that "Egilman may not rely on Dr. Madigan's causation analysis.[…that he] should not be permitted to testify regarding Dr. Madigan's study finding that Vioxx is linked to acute coronary syndrome, and therefore, to unsable angina. […] According to Merck, Fifth Circuit law requires statistical analyses to isolate the particular injury suffered by a plaintiff, and not merely a[n] umbrella category of diseases containing that specific disease."[401]

The court found that Dr. Egilman was "a board certified doctor and internist" who had "completed advanced study in the areas of epidemiology, occupational medicine, warnings, and risk communication, among other topics," and had "written extensively on the topic of medical epistemology," and thus, was "qualified to offer opinions based on his expertise,

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[397] *Id*.
[398] *Id*. at 8.
[399] *Id*.
[400] *Id*.
[401] *Id*. at 9.

including epidemiology."[402] The court continued, "Egilman's experience as a family doctor provide[d] him an adequate basis for rudimentary observations regarding Levitt's psychiatric and emotional well-being," and he was "qualified to offer basic opinions in the fields of neurology to the extent such opinions are limited to what may be observed by a general family doctor."[403] The court, however, precluded Egilman from offering any "diagnostic opinions regarding Levitt's emotional or psychiatric state, or extensive conclusions in the specialized field of neurology," which were "outside his area of expertise, and therefore inadmissible."[404] Furthermore, since FRE 703 enables an expert to "base opinions on facts or data he has been made aware of during the case[, which] includes other expert reports in the case," the court held that "Dr. Egilman's conclusions based on Dr. Madigan's report are admissible."

Moreover, the court agreed with Merck that under Fifth Circuit precedent, "Egilman's testimony would be restricted to the relationship between Vioxx and the specific injury at issue here – unstable angina." Consequently, the court held that, "[u]nder this rule, Dr. Egilman cannot utilize a study linking Vioxx to general cardiac events – which may include unstable angina – to prove that Vioxx is directly linked to unstable angina."[405] In other words, "Dr. Egilman's testimony that Vioxx is causally associated with unstable angina—as opposed to general cardiac events—likely has too great of an analytical gap between the data and his opinion to meet the *Daubert* standard."[406]

Most significantly, the court emphasized that, notwithstanding Fifth Circuit law, "this case [would] not be tried in the Fifth Circuit, and this Court [was] unaware of any Eighth Circuit or Missouri cases directly addressing this issue." In addition, the court noted that "the United States Court of Appeals for the First Circuit [in *Milward*] has taken a different approach, and has allowed experts to testify that a particular exposure was linked to a specific injury when statistical studies demonstrated the exposure caused a class of various injuries, including the specific disease at issue."[407] The court thus concluded that "the trial court should determine whether Dr. Egilman's testimony that Vioxx is causally associated with unstable angina meets the *Daubert* requirements under Missouri law." The court also emphasized that, although one Western District of Missouri case had relied on the Fifth Circuit *Allen* case, in which the court had applied Texas law to "exclude[] expert testimony, in part, because the expert was unable to provide a direct link between the exposure and the particular cancer at issue," the First Circuit had taken a different position in *Milward*. It had "allowed an expert to testify that because benzene causes acute myeloid leukemia …, it was also capable of causing a specific subtype of AML," where the expert had "noted 'all subtypes of AML likely have a common etiology,' and this particular subtype ha[d] been reported in

[402] *Id*. at 10.
[403] *Id*.
[404] *Id*.
[405] *Id*. at 10, citing *Allen v. Pennsylvania Eng'g Corp.*, 102 F.3d 194, 197 (5th Cir. 1996).
[406] *Id*. at 11.
[407] *Id*. at 11, citing *Milward v. Acuity Specialty Prod. Grp., Inc.*,639 F.3d 11, 20 (1st Cir. 2011).

many other workers who were also exposed to benzene."[408] The court granted in part, and denied in part, Merck's motion to exclude.[409]

***Sparling ex rel. Sparling v. Doyle*** (W.D. Tex. 2016)[410] (Products Liability)

Plaintiffs alleged that the decedent died after using defendants'[411] dietary supplement product containing DMAA—the compound 1,3-Dimethylamylamine.[412] Defendants sought to exclude the testimony of four of the Plaintiffs' six experts, arguing that their testimonies were unreliability under FRE 702. The magistrate judge granted defendants' motion to strike the testimony of three experts and denied their motion to strike the fourth.[413] Plaintiffs appealed to the district court.

The district court found that the magistrate judge had not committed clear error when concluding that one expert's "'mere assurances that dogs are a good model to predict human effects'" were "insufficient," and that another expert had failed to provide "support for his extrapolation from the dog data to human data other than his assurances that literature existed on the subject," and had "stated that even assuming such literature does exist, he 'freely admitted that he did not rely on that material to form his opinion.'"[414] The district court reasoned that, "[b]ecause 'studies of the effects of chemicals on animals must be carefully qualified in order to have explanatory potential for human beings' and Plaintiffs' experts did not take the steps necessary to qualify the dog studies for human extrapolation based on the circumstances of this case, [the magistrate judge] properly found that the opinions derived from the dog studies were unreliable."[415]

In addition, the district court referenced plaintiffs' argument that no evidence had been presented to demonstrate that the one expert "'was not qualified to make the analysis [n]or that the analysis was flawed."[416] The district court also noted plaintiffs' citation of "out of circuit cases for the proposition that the 'entire body of evidence relied on by the expert should be taken into consideration in evaluating the reliability of the opinion, and the court should refrain from an 'atomistic' approach that determines that each piece of evidence is

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[408] *Id*. at 11, quoting and citing *Milward*, 639 F.3d at 20.

[409] The Eastern District of Louisiana issued its decision on September 16, 2016, recommending that the case be transferred back to the transferor court in Missouri, and the Judicial Panel on Multidistrict Litigation issued a conditional remand on October 14, 2016, remanding said case to the Western District of Missouri.

[410] *Sparling ex rel. Sparling v. Doyle*, Civ. No. EP-13-CV-00323 DCG (W.D. Tex. 2016).

[411] *Sparling ex rel. Sparling v. Doyle*, Civ. No. EP-13-CV-323-DCG (W.D. Tex. 2015).

[412] *Id.*

[413] *Sparling ex rel. Sparling v. Doyle*, Civ. No. EP-13-CV-00323 DCG (W.D. TX 2016), Slip op. at 2.

[414] *Id.* at 10. The district court noted how the magistrate judge had "determined that the conclusions of Plaintiffs' experts based on studies of dogs were not reliable because Plaintiffs' experts failed to account for differences between the dog studies and the circumstances at issue in this case, specifically the delivery mechanism and the dosage.").

[415] *Id*.

[416] *Id*. at 11.

 

insufficient, on its own, to support the expert's conclusion.'"[417] According to plaintiffs, one expert's [Cantilena's] "'calculations bridge[d] the gap the Magistrate said existed in the class effect discussion by accounting for differences in route of administration, pharmacokinetics, potency, and by providing an established mechanism of action.'"[418]

The district court emphasized that plaintiffs relied primarily on *Milward*, which the court found "instructive […] for the issue at hand," notwithstanding that the Fifth Circuit had "generated a wide body of law to guide the Court's rulings."[419] The district court found helpful *Milward*'s "determination [in that action] that the trial court had improperly crossed over from gatekeeper to factfinder in making its reliability assessment."[420] The court also found helpful *Milward*'s warning to trial courts on the burden of proof for expert testimony. In particular, it "warned trial courts that proponents of expert testimony need not demonstrate that the assessments of their experts are correct," and warned trial courts that they were "not empowered 'to determine which of several competing scientific theories has the best provenance.'"[421]

The district court, furthermore, found helpful *Milward*'s word of caution to trial courts to ensure that proponents of expert testimony "show that 'the expert's conclusion has been arrived at in a scientifically sound and methodologically reliable fashion.'"[422] In other words, trial courts "may evaluate the data offered to support an expert's bottom-line opinions to determine if that data provides adequate support to mark the expert's testimony as reliable.'"[423] Moreover, the district court found that the magistrate judge had not made a "factual assessment of the weight of the experts' opinions," but rather had "focused on the reliability of using the studies that underpinned Dr. Cantilena's proffered opinion to 'bridge the gap,' explaining that 'Dr. Cantilena provides no indication that other experts in his field use similar methodologies to extrapolate between sympathomimetrics and he pointed to no literature making these comparisons to validate his approach.'"[424] Thus, the court "found that because the underlying studies were unreliable and could not be used to support Dr. Cantilena's conclusions, [the court] was left with nothing but the *ipse dixit* of the expert."[425] "Consequently, [the court] determined that Dr. Cantilena was unreliable."[426]

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[417] *Id*.

[418] *Id*.

[419] *Id*.

[420] *Id*. at 11-12, quoting *Milward*, 639 F.3d at 22. *See also id*. at 12 ("It based its conclusion in part on its finding that he trial 'court's analysis repeatedly challenged the factual underpinnings of [the expert's] opinion, and took sides on questions that are currently the focus of extensive scientific research and debate—and on which reasonable scientists can clearly disagree.'").

[421] *Id*. at 12, quoting 639 F.3d at 22 ("'[T]he fact that another explanation might be right is not a sufficient basis for excluding [the expert]'s testimony.'").

[422] *Id*., quoting *Milward*, 639 F.3d at 15, citing *Daubert*, 509 U.S. at 85.

[423] *Id*.

[424] *Id.* at 12.

[425] *Id.* at 12-13.

[426] *Id.* at 13.

**Sixth Circuit**

***In re Heparin Products Liability Litigation*** (N.D. Ohio 2011)[427] (Products Liability)

In this MDL, plaintiffs alleged that defendants' sale of contaminated heparin triggered a myriad of adverse reactions leading to serious injuries and deaths. Defendants moved for summary judgment based, in part, on several ancillary *Daubert* evidentiary challenges. Defendants had sought to exclude the general causation testimony proffered by plaintiffs' experts, Drs. Hoppensteadt, Jeske, Kiss, Buncher, Luke, and Ohr.[428]

Among defendants' *Daubert*-related claims, they alleged that the court must exclude the testimony of plaintiffs' experts "because the epidemiological evidence contradicts the evidence on which plaintiffs' experts rel[ied]."[429] The court recognized that courts "have rejected non-epidemiological evidence as unreliable where there is an overwhelming body of epidemiological evidence to the contrary."

However, the court found that there was "no such overwhelming body of contrary epidemiological evidence" in the case at bar. Although neither of the two epidemiological studies plaintiffs' experts cited were "designed to determine whether there was an association between contaminated heparin and any of the conditions identified" in defendants' summary judgment motion, and thus, did not "provide support for" plaintiffs' experts' theories, they also did not contradict them.[430]

Consequently, the court declined to "categorically exclude" plaintiffs' scientific evidence "solely on the basis that it [was] not epidemiological in nature." According to the court, *Daubert* required "only that the expert's methodology be sound," and the Sixth Circuit, as well as "numerous other [federal circuit] courts had made clear, '[n]o requirement exists that a party *must* offer epidemiological evidence to establish causation."[431] In partial support of this proposition, the court cited *Milward* ("'epidemiological studies are not per se required as a condition of admissibility regardless of context.'").[432]

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[427] *In re Heparin Products Liability Litigation*, 803 F. Supp. 2d 712 (N.D. Ohio 2011).

[428] *Id*. at 719.

[429] *Id*. at 727, citing *Turpin v. Merrell Dow Pharmaceutical Inc.*, 736 F. Supp. 737, 743 (E.D. Ky. 1990).

[430] *Id*. at 728.

[431] *Id*., quoting *In re Meridia Prods. Liab. Litig*., 328 F. Supp. 2d 791, 801 (N.D. Ohio 2004) (emphasis in original). *See also id*. at 800 ("Epidemiological evidence may be the 'primary generally accepted methodology for demonstrating a causal relation between [a] chemical compound and a set of symptoms or a disease,' but it is not the *only* methodology that scientists use.") (emphasis in original).

[432] *Id*. at 728, 756 n. 6, quoting *Milward*, 639 F.3d at 24.

***DeGidio v. Centocor Ortho Biotech, Inc.*** (N.D. Ohio 2014)[433] (Products Liability)

Plaintiff, who was suffering from Crohn's disease, claimed under Ohio state law that defendant failed to warn him that the immunosuppressant drug Remicade "can cause non-infectious interstitial lung disease."[434] Plaintiff was took Pentasa "(generic name mesalamine), a prescription drug used to treat ulcerative colitis," on a daily basis. Doctors at University of Michigan Hospital later reviewed plaintiff's lung biopsy and determined he had been suffering from 'Remicade-induced eosinophilic pneumonitis with no clear infectious etiology.'"[435] Defendant filed a partial summary judgment motion premised its *Daubert* motions, which, if granted, would leave the plaintiff without any admissible evidence to prove proximate cause.[436]

Plaintiff's expert witness, Dr. Mark Thorton, implicitly concluded that Remicade could cause interstitial pneumonitis based, in part, on case reports appearing in medical journals. Those reports "describe[d] 'clinical events in one or more individuals … [namely] …"new disease presentations, manifestations, or suspected associations between two diseases, effects of medication, or external causes.'"[437] Thorton had explained that, "as early as 2001, 'case reports began … noting the onset of noninfectious pulmonary complications of TNF inhibitor therapy, including eosinophilic pneumonitis, pulmonary fibrosis/interstitial lung disease, granulomatous disease and alveolar hemorrhage.'"[438]

One report Thorton had referenced concerned findings by Tel Aviv Medical Center doctors that, of thirteen patients treated with Remicade for Chrone's disease, four had been observed to suffer "from anaphylactic shock, disseminated eruption and eosinophilic pneumonitis."[439] Another report Thorton had cited "concerned a Crohn's patient who, "'[w]thin 48 hours after the second infliximab infusion,' developed 'severe respiratory distress,' which "near-fatal condition included 'partially organized intraaveolar hemorrhage,' or bleeding into the lungs."[440] The authors of this report had "hypothesized that infliximab [had been] responsible for the patient's injury"; yet, they also "acknowledged that '[t]he exact mechanism by which infliximab may have caused the observed lung results remain[ed] unknown.'"[441]

Thorton furthermore looked to the Bradford Hill criteria to support his professional opinion. Although Bradford Hill posited nine criteria, the *DiGidio* court emphasized that

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[433] *DeGidio v. Centocor Ortho Biotech, Inc.*, 3 F. Supp. 3d 674 (N.D. Ohio 2014).
[434] *Id.* at 675.
[435] *Id*., citing *De Gideo v. Centocor Ortho Biotech*, 2010 WL 4628903, at *1 (N.D. Ohio 2010).
[436] *Id.* at 675.
[437] *Id.* at 677.
[438] *Id*.
[439] *Id*.
[440] *Id.* at 678.
[441] *Id*.

Thorton's report addressed only two of them—"1) the temporal relationship between infliximab infusions and the onset of symptoms associated with interstitial lung disease; and 2) 'challenge/re-challenge,' which evaluates whether a patient's condition improves after a given medication is withdrawn or worsens after the same medication is reintroduced."[442]

Thorton also testified about the third Bradford Hill criterion—coherence—"which holds that '[c]oherence between epidemiological and laboratory findings increases the likelihood of an effect.'"[443] According to the district court, "Thorton's testimony on this issue[, however,] exposed a wide gulf between what the law and epidemiologists understand to be a proper opinion on general causation and Thorton's own opinion."[444] The court found that Thorton's testimony failed to "attempt to 'link' an association between Remicade and an 'event,' by which he mean[t] an injury or disease." The court found that Thorton's analysis only referred to coherence in the context of "'a post-marketing pharmacovigilance mindset of what makes sense within the disease[.]'"[445] It also found that Thorton's "analysis concerned the 'regulatory strength' of the association between Remicade and interstitial lung disease, not the 'statistical strength' of that association."[446]

The court also found that, while Thorton had acknowledged plaintiff had been taking "Pentasa concurrently with [Remicade]," and that "Pentasa is strongly associated with interstitial lung disease," he "did not try to determine whether Pentasa could have caused plaintiff's lung injury," and had relied instead on "another expert's conclusion that Remicade was more likely than Pentesa to have caused plaintiff's injuries."[447]

The court held *inter alia* that, although "the absence of epidemiological studies [was] not fatal to plaintiff's case," plaintiff's experts bore "the burden to explain how their general-causation methodologies remain reliable in the absence of that important evidence."[448] To this end, the court also held that Thorton and plaintiff's other experts had "relied exclusively on case reports to support their opinions that Remicade can cause interstitial pneumonitis and diffuse alveolar damage." And, it held how that methodological approach was problematic since federal courts had recognized that "'case reports along cannot prove causation.'"[449]

Among the many shortcomings of the case reports, the district court emphasized their failure: 1) "to screen out alternative causes for a patient's condition"; 2) to compare the rate

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[442] *Id*.
[443] *Id.* at 679.
[444] *Id*.
[445] *Id*.
[446] *Id*.
[447] *Id.* at 679-80.
[448] *Id.* at 684.
[449] *Id*., citing and quoting *In re Meridia Prods. Liab. Litig*., 328 F. Supp. 2d 791, 808 (N.D. Ohio 2004). *See also* 3 F. Supp. 3d at 685.

 

at which the observed "phenomena occur in the general population or in a defined control group"; 3) to "isolate and exclude potentially alternative causes"; 4) to "investigate or explain the mechanism of causation"; and 5) to include relevant facts about the patient's condition […] thereby hampering one's ability to apply any conclusions made in a given report to other cases." [450] Consequently, since "plaintiffs' experts' sole basis for opining that Remicade can cause interstitial pneumonitis [was] case reports," the district court held that, "those experts' methodologies [were] unreliable under *Daubert*, and their testimony [was] inadmissible on that basis alone."[451]

## Eighth Circuit

***Kuhn v. Wyeth, Inc.*** (8th Cir. 2012)[452] (Toxic Tort)

A National Institutes of Health ("NIH") Women's Health Initiative ("WHI") ("NIH-WHI") study prematurely released in 2002 and reported in the *AMA Journal* triggered lawsuits combined into an MDL. The study found that "the use of estrogen plus progestin increase[d] the risk of breast cancer. Plaintiffs Pamela Kuhn and Shirley Davidson each took Prempro, a Wyeth, Inc. hormone therapy drug for approximately three years, and nearly two years, respectively, and each developed breast cancer.[453] Prempro was "a combination hormone therapy composed of conjugated equine estrogen and medroxyprogesterone acetate. It [was] used to treat symptoms of menopause, including vasomotor symptoms and vaginal atrophy."[454]

Kuhn and Davidson filed separate lawsuits in the Western District of Arkansas alleging that Wyeth had failed to warn them of the increased risk of breast cancer posed by Prempro. The Judicial Panel on Multidistrict Litigation ordered the lawsuits' transfer to multidistrict proceedings in the Eastern District of Arkansas.[455]

The MDL judge chose Kuhn's and Davidson's claims for a bellwether trial. In proceedings before a magistrate judge, plaintiffs' expert, Dr. Donald Austin, "opined that short-term use of Prempro increase[d] the risk of breast cancer." That judge found Austin's testimony insufficiently reliable under *Daubert*. The district court affirmed the magistrate judge's *Daubert* order and granted Wyeth summary judgment.[456] Plaintiffs appealed, and an

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[450] *Id.* at 684, citing *Casey v. Ohio Med. Prods.*, 877 F. Supp. 1380, 1385 (N.D. Cal. 1995), and *Reference Manual on Scientific Evidence* 475 (Fed. Judicial Ctr.2000) ("'[c]ausal attribution based on case studies must be regarded with caution'"). The court cited the Second Edition, rather than, the Third Edition of the Reference Manual.

[451] *Id.* at 685.

[452] *Kuhn v. Wyeth, Inc.*, 686 F.3d 618 (8th Cir. 2012).

[453] 686 F.3d at 620-21.

[454] *Id*. at 621.

[455] *Id*. at 620.

[456] *Id*.

Eighth Circuit panel reversed the district court, ruling that the magistrate judge had abused his discretion in precluding plaintiff's expert's testimony, and remanded the case for further proceedings.[457] Below is a detailed discussion of the trial-court proceedings and the Eighth Circuit's reversal.

Before the MDL judge in Arkansas began pre-trial proceedings, Wyeth advised the court that a claim similar to Kuhn's and Davidson's was going to trial in the District of Puerto Rico. Wyeth intended to file a *Daubert* challenge to plaintiff's general-causation expert, who would be offering testimony similar to the expert in the Kuhn/Davidson trial. The Arkansas and Puerto Rico courts agreed to hold a joint *Daubert* hearing. During that November 29, 2010 hearing, which considered defendant's previously filed *Daubert* challenge to the general causation opinions of plaintiffs' experts, Wyeth moved to exclude the testimony on the ground there "existed no reliable scientific basis" for the conclusion that "taking Prempro for less than three years increase[d] a woman's risk of developing breast cancer."[458] Wyeth relied on the NIH-WHI report's finding that "women who took Prempro for three years or less had fewer incidents of breast cancer than those who took the placebo," and it argued that the NIH-WHI study had been well accepted in the medical and scientific communities, and that the studies upon which plaintiffs had relied were "methodologically flawed."[459] Wyeth also alleged that plaintiffs had "cherry-picked" from the observational studies comprising the NIH-WHI report, "relying upon the ones that showed an increased risk of breast cancer rather than the great weight of the studies that showed no increased risk."[460]

Prior to the November 2010 hearing, plaintiffs' expert, Austin, had filed a declaration setting "forth his standards for reviewing observational studies, including that he would not rely on 'underpowered' studies, which he defined as studies that were not likely to identify an association or an effect, if one existed."[461] He also opined that the NIH-WHI "study's estimate of short-term risk was 'quite poor' due to shortcomings 'that diminish[ed] the estimate of the effect of short-term exposure.'"[462] For example, the average age of the post-menopausal women who had participated in the study had been much older than the age of "the women who typically started[ed] hormone therapy. Moreover, the study tended to exclude women who were experiencing moderate hot flashes" who were "more likely to be susceptible to the carcinogenic effects of [estrogen plus progastrin] E + P."[463] And, Austin opined that the NIH-WHI "study's analysis necessarily underestimate[d] the relative risk because approximately forty percent of the participants dropped out of the study and about

[457] *Id*. at 621.

[458] *Id.* at 622.

[459] *Id*.

[460] *Id.* at 623. Interestingly, "[h]ormone therapy plaintiffs typically […] relied on the [NIH-]WHI study to show that the study was not powerful enough to detect whether short-term use of Prempro caused an increased risk." *Id.* at 622.

[461] *Id.* at 623

[462] *Id*.

[463] *Id*.

 

eleven percent of the placebo group began taking E + P."[464]

Although the district court had not considered Austin's declaration at the November 2010 hearing, which had been "limited to counsels' arguments," it later "ordered a second *Daubert* hearing and called for live testimony from the parties' experts," which took place on January 12, 2011 before a Magistrate Judge.[465] During the second hearing, Austin conceded that two of the studies upon which his opinion relied "should not have been included in his expert report," and that, he had "thus based his opinion that short-term use of Prempro causes breast cancer" on three other observational studies.[466] The Magistrate Judge ultimately granted Wyeth's motion to preclude expert testimony and entered summary judgment. He reasoned that Austin's expert testimony had "failed to discredit the [NIH-]WHI study's results and failed to base his opinion on epidemiological studies that 'reliably support[ed] his position.'"[467] The district court affirmed that decision.

In reviewing the magistrate judge's decision to exclude plaintiff's expert's testimony for an abuse of discretion, the Eighth Circuit cited *Milward* for the proposition that, "[p]roponents of expert testimony need not demonstrate that the assessments of their experts are correct, and that trial courts are not empowered 'to determine which of several competing scientific theories has the best provenance.'"[468] It also cited *Milward* for the proposition that a " district court's focus on 'principles and methodology, [and] not the conclusions that they generate,'" as the Supreme Court had directed in *Daubert*, "'need not completely pretermit judicial consideration of an expert's conclusion.'"[469]

The appellate court initially determined that plaintiffs did not bear the burden to disprove the NIH-WHI study, as the district court had found; rather, plaintiffs needed to "show that Dr. Austin arrived at his contrary opinion in a scientifically sound and methodological fashion."[470] It then determined that the magistrate judge had "abused his discretion in deciding that Dr. Austin's criticisms of the [NIH-]WHI study were unfounded and inconsistent with his reliance on the study in other hormone therapy cases."[471]

Unlike the district court, the Eighth Circuit found credible Austin's testimony that, while the NIH-WHI study "was an ideal study design – ' the gold standard for what it was designed for' – […] it was designed to show what effect E + P had on heart disease." "[A]lthough the study monitored incidents of breast cancer, the women were not selected to

[464] *Id*.

[465] *Id.* at 624.

[466] *Id*.

[467] *Id*. More specifically, it found that Austin had "failed to meet his burden 'to present reliable science to support his conclusion regarding the unreliability of the WHI.'" *Id*. at 626.

[468] *Id.* at 625, quoting *Milward*, 639 F.3d at 15.

[469] *Id.* at 625, quoting *Daubert*, 509 U.S. at 595 and *Milward*, 639 F.3d at 15.

[470] *Id.* at 626.

[471] *Id.* at 627.

test whether Prempro causes breast cancer."[472] The court held that, Dr. Austin's "reliance on the [NIH-]WHI study *to prove general causation* d[id] not foreclose his opinion that the study did not accurately assess the risk of breast cancer associated with the short-term use of Prempro."[473] In other words, "his previous reliance on and testimony regarding the [NIH-]WHI study d[id] not render his opinion inadmissible."[474] The court furthermore found that the three observational studies (one American and two foreign) upon which Dr. Austin's testimony relied, despite their limitations, "provide[d useful information and] support for Austin's opinion […] that short-term use of Prempro increases the risk of breast cancer. Taken together, the Calle study and the foreign studies constitute appropriate validation of and good grounds for Dr. Austin's opinion."[475]

***O'Neal v. Remington Arms Co.*** (D.S.D. 2016)[476] (Products Liability)

The widow of the deceased, who had been shot and killed in a hunting accident, brought suit in the District of South Dakota against Defendants Remington Arms, Co., LLC, Sporting Goods Properties, Inc. and E.I. Dupont de Nemours and Co. Defendants moved for summary judgment and to exclude the testimony of plaintiff's expert witness, Charles Powell.[477] The district court granted defendants' summary judgment motion, but it denied their motion to exclude Powell's testimony "as moot."[478] The Eighth Circuit reversed and remanded, concluding that "the record contained sufficiently disputed material facts to preclude entry of summary judgment in Defendants' favor."[479]

On remand, defendants renewed their motion for summary judgment and to exclude Powell's expert testimony. As the district court noted, the Eighth Circuit directed it to apply a three-part test when screening expert testimony under FRE 702: 1) the relevancy/usefulness of the scientific, technical, or other specialized knowledge to the trier of fact; 2) the qualification of the expert to assist the trier of fact; and 3) the reliability or trustworthiness of the evidence in an evidentiary sense.[480] The Eighth Circuit continued, "To satisfy the reliability requirement, the party offering the expert testimony must show by a preponderance of the evidence 'that the methodology underlying [the expert's] conclusions is scientifically valid,'" employing various factors.[481] The appeals court then quoted the *Kuhn* decision, which in turn had quoted *Milward*: Since, "[a]t times, conclusions and methodology are not entirely distinct from one another, […] the court 'need not completely pretermit judicial consideration of an

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[472] *Id*.
[473] *Id*. (emphasis added).
[474] *Id.* at 627-28.
[475] *Id.* at 629, 631, 632.
[476] *O'Neal v. Remington Arms Co.*, Civ. No. 4:11-CV-04182 (KES) (D.S.D. 2016).
[477] *Id*. at 1.
[478] *Id*.
[479] *O'Neal v. Remington Arms Co., LLC*, 803 F.3d 974, 982 (8th Cir. 2015).
[480] *O'Neal v. Remington Arms Co.*, *supra* note 252, slip op. at 2-3.
[481] *Id*. at 3, quoting *Barrett v. Rhodia, Inc.*, 606 F.3d 975, 980 (8th Cir. 2010).

 

expert's conclusions.'"[482]

Because the Eighth Circuit did not rule on the admissibility of Powell's testimony, it directed the district court on remand "to address the issue in the first instance."[483] The essence of Powell's expert testimony was that the Remington Model 700 rifle that killed plaintiff's deceased husband was manufactured in 1971, a year when Remington assembled Model 700 rifles "with the 'Walker' fire control system, the relevant parts of which included the trigger, the connector, the sear, and the safety lever."[484] After Powell's review of internal Remington documents, several law-enforcement reports from officers who had investigated Mr. O'Neal's death, statements from witnesses, the known history of the rifle, and "his own knowledge and experience from performing failure analyses in approximately fifty other cases involving firearms, some of which also involved Remington rifles," he concluded that the Remington Model 700 had been defective, and that the defect caused the accident that killed Mr. O'Neal.[485]

Powell "testified that all Model 700 rifles manufactured at the time with the Walker fire control system [were] defective," because dirt corrosion or condensation could "build up between the trigger and the connector" and "lead to misfires," and "because the fire control components [were] enclosed in a riveted housing" which prevented uses from "easily inspect[ing] the connector's engagement with the sear."[486] While Powell "acknowledged that he could not testify with certainty that this alleged design defect caused the accident in this case," he was able to testify that "the specific rifle involved in this case was defective."[487]

Powell based this testimony on his knowledge that "many of the older Model 700 rifles fired inadvertently when the user toggled the safety from the 'on' to the 'off' position, and that Remington had "acknowledged by 1979 that about 1% of the approximately 2,000,000 Model 700 rifles manufactured prior to 1975 (*i.e.*, 20,000 rifles) were defectively made."[488] According to Powell, the manufacturing defect consisted of "'an insufficient clearance between the sear and the connector such that if the safety is on and you pull the

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[482] *Id*., quoting *Kuhn v. Wyeth, Inc.*, 686 F.3d 618, 625 (8th Cir. 2012), quoting *Milward*, 639 F.3d at 15.

[483] *Id*. at 4.

[484] "The connector is an elongated U-shaped piece of metal located in front of the trigger. The sear is an independent piece of metal that interacts with the connector and the firing pin. When the rifle is not being fired, the bottom tip of the sear rests on and is supported by the top rear of the connector. The sear also restrains the firing pin. When the trigger is pulled, the connector is pushed forward and the bottom tip of the sear is allowed to fall behind the connector. This action releases the firing pin, which allows the rifle to fire a cartridge. When the safety is in the "safe" or "on" position, it physically lifts and restrains the sear away from its engagement point with the connector. When the safety is moved to the "fire" or "off" position, the sear is returned to its engagement point with the connector." *Id*. at 5.

[485] *Id*.

[486] *Id*.

[487] *Id*. at 6.

[488] *Id*.

 

trigger, the connector will get trapped in front of the sear and [be] allowed to drop.'"[489] He also based this opinion on the testimony of "Mark Ritter, the individual who [had] handled the gun at the time of the accident." Ritter testified that "the rifle discharged when he moved the safety from the 'on' to the 'off' position," which "supported" Powell's conclusion that "the rifle had the 1% defect because the defect allowed Model 700 rifles to discharge when the safety was toggled from the 'on' to the 'off' position."[490]

The greatest weakness in Powell's expert testimony was his admission that "he was unable to examine the rifle because it had been destroyed," and that therefore, he "could not determine definitively the amount of sear lift actually present in the rifle at the time of the accident."[491] Defendants also argued that Powell could not rule out other possible causes of the accident that did not support his theory. For example, since Powell could not inspect the destroyed rifle, he "could not be certain that the fire control system was improperly altered or adjusted."[492] And, because Powell could not examine the rifle, he also couldn't rule out whether the rifle's owner had improperly maintained, abused, or neglected it. Nevertheless, Powell testified that, although parts of the fire-control system, if broken, would have caused misfires, he was unaware of any evidence of improper maintenance, abuse or neglect of the rifle, or of broken fire-control system parts. "None of the officers noted the presence of broken parts or that the file showed signs of neglect."[493] Furthermore, because Powell could not examine the rifle, he could not "determine whether the original Walker fire-control system had ever been replaced" with an after-market trigger mechanism that could cause misfires.[494] In the absence of any evidence indicating that the Walker fire-control system had been replaced, Powell concluded that "Ritter's description of the accident was consistent with documented problems with the Walker fire control system."[495]

Although Powell was unable to definitively exclude other potential causes of the accident unrelated to a manufacturing defect, South Dakota law allows a plaintiff to "rely on circumstantial evidence to support a products liability cause of action." In other words, "the plaintiff need not 'eliminate all other possible explanations of causation that the ingenuity of counsel might suggest. It is sufficient that plaintiff negate his own and others' misuse of the product.'"[496] The district court then quoted *Kuhn*'s reference to *Milward*: "Thus, the '[p]roponents of expert testimony need not demonstrate that the assessments of their experts are correct, and trial courts are not empowered 'to determine which of several competing…theories has the best provenance.''"[497] "Rather, 'it is [O'Neal's] burden to show

[489] *Id*.
[490] *Id*.
[491] *Id*.
[492] *Id*. at 7.
[493] *Id*.
[494] *Id*.
[495] *Id*.
[496] *Id*. at 8, quoting *Crandell v. Larkin & Jones Appliance Co.*, 334 N.W.2d 31, 34 (S.D. 1983).
[497] *Id*., quoting *Kuhn*, 686 F.3d at 625 (quoting *Milward*, 639 F.3d at 15).

that [Powell] arrived at his…opinion in a scientifically sound and methodological fashion.'"[498]

The district court found that, "[a]lthough Powell agreed that he could not be absolutely certain about his conclusion, he also explained why he did not believe that any of the alternatives posed by defendants caused the accident." It also found that Powell "ha[d] offered sufficient justifications for his beliefs that those other conceivable causes are excludable."[499] Furthermore, the district court held that, although "Powell acknowledged that he could not pinpoint when the trigger was pulled [with Ritter having testified that he was sure he did not pull the trigger at any time while he was handling the rifle], … Powell believed that the trigger must have been pulled at some time after the rifle was loaded and that it was '*the best explanation* for what caused the fire-on-safe release.'"[500] The court apparently accepted Powell's explanations that "the trigger *could have been* pulled at any time after the rifle was loaded for the defect to manifest itself," and that "the trigger *could have been* pulled by accidental means, such as getting caught on an object or moved by an unaware individual," especially where it found that "the manner in which the rifle was kept inside the vehicle allowed for the possibility that someone, or some object depressed the trigger."[501] It would, therefore, seem that the district court had recognized Powell's use of abductive reasoning from which to derive an "inference to the best explanation," an approach that *Milward* had recognized as a reliable methodology in assessing the admissibility of expert testimony.[502]

***Sioux Steel Co. v. KC Engineering, P.C.*** (D.S.D. 2018)[503] (Negligence)

Plaintiff Sioux Steel Company designed and manufactured an agricultural grain-storage bin (the "Hopper Bin") for Mexican company, Agropecuaria El Avion. Sioux Steel hired defendant engineering firm KC Engineering, P.C. to perform a design review of the structure prior to delivery. After Agropecuaria took possession of and installed the bin, its employees filled it with soybean meal. The bin collapsed, killing two employees. Plaintiff alleged that during its review, defendant negligently failed to identify a design defect made by Sioux Steel

[498] *Id*.

[499] *Id*. at 8.

[500] *Id*. at 9 (emphasis added).

[501] *Id*.

[502] *See id*. at 10. ("While the events leading up to the accident and the destruction of the rifle create several unknowns, expert opinions 'must be supported by appropriate validation-i.e., 'good grounds,' based on what *is* known.' *Daubert*, 509 U.S. at 590" (emphasis added)). What is known is that the subject rifle was manufactured during a time when approximately 1% of Model 700 rifles were constructed with a manufacturing defect and that the rifle discharged in a manner that could be indicative of that defect. The record contains at least some circumstantial evidence supporting Powell's theory. The Eighth Circuit has admonished district courts that the better practice in close cases is to give the jury the opportunity to pass on the proffered expert opinion evidence. *Lauzon*, 270 F.3d at 695. The court will follow that practice here. Based on the Rule 702 factors identified by the Eighth Circuit, the court finds that Powell is qualified to provide an expert opinion, and that his opinion would be relevant and reliable.").

[503] *Sioux Steel Co. v. KC Engineering, P.C.*, Civ. No. 4:15-CV-04136-KES (D.S.D. 2018).

 

engineer Chad Kramer, a failure that plaintiff argues led to the bin's collapse and the employees' deaths.

KC Engineering designated John Carson as its expert witness. Carson prepared two expert reports discussing the cause of the grain bin's structural failure and the role defendant's review of the grain bin had played in causing or contributing to its failure.[504] Carson concluded in his first report that the grain bin had failed "because a dynamic load formed due to either collapsing of an arch or rathole or firing of the air cannons."[505] Carson based his expert opinion on thirteen other opinions, court documents, photos and documents obtained during discovery, as well as three expert reports and one U.S. and two foreign (Australian and European) engineering standards. Carson's first expert report focused on the applicability of the engineering standards (U.S. – ANSI/ASAE EP 433 for loads exerted by free-flowing grains on bins; Australian – AS 3774 for loads on bulk solid containers; European – EN 1991-4, Eurocode 1 for actions on structures). [506]

Carson's second report focused on the firing of air cannons based on his review of Agropecuaria's surveillance video of the failure.[507] An air cannon is a high-pressure device that contains compressed gas that is quickly released into an agricultural bin or silo to rid it of "ratholing"—which occurs when materials stick to the sides of such structures to prevent material flow—or of "bridging"—which occurs when materials stick together across the width of the silo or bin to prevent material flow.[508] Ratholing and bridging will not occur if a product is "free flowing"—*i.e.*, "sand, provided that the particles are reasonably round and approximately the same size, and that the sand is not moist."[509] Carson concluded that defendant's expert's lack of review had no bearing on the structural failure, and that "the firing of the air cannons 'likely resulted in greatly increased (compared to gravity alone) pressure on the hopper wall,' considering that "the initial failure occurred almost directly below one of the air cannons."[510] Plaintiff moved to exclude Carson's testimony based on his lack of expert qualifications and because his testimony was not reliable.[511]

In evaluating the reliability of Carson's testimony under FRE 702, the district court noted that the party offering the testimony bears the burden of showing "by a preponderance of the evidence 'that the methodology underlying [the expert's] conclusions

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[504] *Id*.

[505] *Id*.

[506] *Id*. at 2-3.

[507] *Id*. at 3.

[508] *See* Primasonics Acoustic Cleans, *Silo and Hopper Ratholing*, https://www.primasonics.com/silo-and-hopper-ratholing; Chicago Vibrator Products, *Air Cannons for Silos and Hoppers*, https://www.chicagovibrator.com/Store/c/air-cannon-systems; Martin Engineering, *Air Cannons*, https://www.martin-eng.com/content/product_subcategory/491/air-cannons-products.

[509] *See* SCE, *FAQ Overview: What is Bridging in a Silo?*, http://sce.be/en/faq/what-is-bridging-in-a-silo.

[510] *Sioux Steel Co. v. KC Engineering, P.C.*, slip op. at 3.

[511] *Id*.

 

is scientifically valid.'"[512] The district court also held that "when making the reliability inquiry, the court should focus on 'principles and methodology, not on the conclusions that they generate.'"[513] The district court quoted *Milward* for the following proposition: "At times, conclusions and methodology are not entirely distinct from one another, and the court 'need not completely pretermit judicial consideration of an expert's conclusions.'"[514]

The district court found Carson's expert testimony related to the agricultural industry grain-bin standard reliable[515] for the following reasons: 1) the evidence revealed that Carson's methodology consisted of reviewing and analyzing the parameters of an accepted U.S. standard/code (ANSI/ASAE EP 433, for loads exerted by free-flowing grains on bins) based on his experience, skill, education, and knowledge of storage structures, and then applying the standard to the facts of the matter, during which he had not relied on any new science for his opinions;[516] 2) there was no analytical gap between the data and Carson's opinions/statements that EPP 433 was "highly simplistic" because it "applies only to free-flowing agricultural whole grain," that soybean is not an agricultural whole grain, and that EPP 43 did not apply in this case because it does not address non-free-flowing grains;[517] and 3) although the methodology upon which Carson based his conclusion that EPP 433 was inapplicable to non-free-flowing grains had not been peer reviewed or tested, "Carson's plain reading and application [of the standard] to the facts [was] a reliable method."[518]

Moreover, the district court found Carson's testimony and report on air cannons reliable for the following reasons: 1) Carson found that, although the "Hopper Bin's upper portions had been under-designed to meet proper safety standards," it did not fail even though it had been filled for four days, thereby indicating that a "dynamic load" imposing a force greater than a "gravity-induced load" must have been present to cause the failure;[519] 2) Carson had based his explanation that "a dynamic load can develop in a bin from two possible means[, including]: by a collapse of an arch or rathole and by the firing of air cannons" upon his education, skill, experience and investigation;[520] 3) Carson had based his conclusion that the actual air cannon sequencing, based on their location (*i.e.*, where "the upper cannons fired before the lower ones") had been "contrary to 'good operating practice' (which caused the soymeal to "bec[o]me even more compacted than if the lower cannons were fired first," and "added even more pressure to the silo's walls") upon his own investigation and peer reviewed publications;[521] 4) Carson's examination of emails between

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[512] *Id*. at 5, quoting *Barrett v. Rhodia, Inc.*, 606 F.3d 975, 980 (8th Cir. 2010).

[513] *Id*. at 6, quoting *Kuhn v. Wyeth, Inc.*, 686 F.3d 618, 625 (8th Cir. 2012) (citing *Daubert*, 509 U.S. at 595).

[514] *Id*. at 6, quoting *Kuhn v. Wyeth, Inc.*, 686 F.3d at 625 (quoting *Milward*, 639 F.3d at 15).

[515] *Id*. at 11.

[516] *Id*. at 8-9.

[517] *Id*. at 10.

[518] *Id*. at 10-11.

[519] *Id*. at 13-14.

[520] *Id*. at 14.

[521] *Id*.

 

Sioux City and its contractor, Kramer, revealed Kramer's concern and "uncertainty about the 'kinds of loads the cannons would place on the hopper structure'";[522] and 5) Carson had drawn conclusions from his review and analysis of the Mexican company Agropecuaria's surveillance video of the failure and of plaintiff's expert reports based on his "extensive experience of investigating other silo failures";[523] and 6) although Carson's "opinions have not been tested nor subject to peer review," they were "based on his review of other peer reviewed material and his own publications."[524]

In sum, the district court concluded that Carson's report conclusions did "not amount to guesswork or speculation" because he "relied on facts in evidence and disclosed a reliable investigation to support his testimony," and consequently, his methodology "m[et] the *Daubert* standards."[525]

***In re: Bair Hugger Forced Air Warming Devices Products Liability Litigation*** (D. Minn. 2019)[526] (Products Liability)

In this MDL, the District of Minnesota acknowledged the acceptability of the weight-of-the-evidence methodology to determine the admissibility of expert testimony on general causation, but rejected as unacceptable the experts' specific application of this methodology to the facts of the case at bar.

"Plaintiffs alleged that Defendant's Bair Hugger Forced Air Warming Device ('the Bair Hugger') [, a device for keeping surgical patients warm, consist[i]ng of a portable heater or blower connected by a flexible hose to a disposable blanket that is placed over (or in some cases under) surgical patients,] caused their periprosthetic joint infection ('PJI') as a sequela to orthopedic-implant surgery."[527] Plaintiffs based their allegations on two theories. Pursuant to the "'airflow disruption' theory," "the Bair Hugger's warm air flow escapes the bottom edge of the surgical drape, creating turbulence in the operating room ('OR') which lifts squames (shed skin flakes that can carry bacteria) into the air and into the surgical site, and increased the risk of infection."[528] Plaintiff's engineering expert, "Dr. Elghobashi, a recognized expert in computational fluid dynamics ('CFD'), built a CFD simulation to model this theory," which "purports to show that the Bair Hugger generates extreme turbulence in the OR causing squames to reach the surgical site."[529] Pursuant to the "'dirty machine' theory," "the

[522] *Id*.
[523] *Id*. at 16.
[524] *Id*.
[525] *Id*. at 16-17.
[526] *In re: Bair Hugger Forced Air Warming Devices Products Liability Litigation*, MDL No. 15-2666 (D. Minn. 2019). *See also* discussions re *In re Zoloft (Sertraline Hydrochloride) Products Liability Litigation*, Civ. No. 16-2247 (3d Cir. 2017) (precedential), and *Jones v. Novartis Pharmaceuticals Corporation*, 235 F. Supp. 3d 1244 (N.D. Ala. 2017) (11th Circuit).
[527] *Id.*, slip op. at 1.
[528] *Id*. at 2.
[529] *Id*.

 

device, which lacks an adequate filtration system, emits contaminants into the OR, and thus, increases the bacterial load reaching the surgical site."[530]

Having reviewed studies supporting both theories of causation, including Elgohashi's CFD simulation and "one epidemiological study that found a statistically significant association between the Bair Hugger and PJI," plaintiffs' three medical experts, Drs. Jarvis, Samet, and Stonnington, opined that the Bair Hugger causes PJI.[531] Defendants countered that "the scientific literature expressly disclaims causation," and, prior to trial, they moved "the Court to exclude these opinions for this reason," and for summary judgment.[532] The district court wrote that "[f]or purposes of general causation, the issue in this litigation [was] whether use of the Bair Hugger device increase[d] the risk of PJI compared to the risk of infection when the device is not used."[533]

In its December 13, 2017 order in one of eight selected bellwether cases, the district court denied defendants' *Daubert* motions to exclude such testimonies, finding Plaintiffs' engineering and medical experts' testimonies admissible. Specifically, the court found Elghobashi's simulation used "accepted physics principles to show how the Bair Hugger's warm air flow could cause squames to float upward toward the surgical wound." It also found the Jarvis, Samet, and Stonnington medical testimonies had relied on "Elgobashi's testimony as well as on the epidemiological study for reliable mechanistic and statistical evidence that the Bair Hugger causes PJI."[534]

During the April 2018 hearings on the parties' case-specific dispositive motions in the first bellwether case to make it to trial—*Gareis*—the court denied defendants' motions to exclude the testimonies of plaintiffs' engineering and medical experts.[535] However, the court granted defendants' May 2018 pretrial motions in *Gareis* to exclude evidence pertaining to plaintiffs' 'dirty machine' theory, having "determined that 'Plaintiffs [had] no evidence that however many *Staphylococcus epidermidis* might be in the Bair Hugger, that that number would have a meaningful impact on the bacterial load of that pathogen in the operating room.'"[536]

Although plaintiffs' experts Elghobashi, Jarvis, and Stonnington testified during the subsequent May 2018 trial, the jury ruled in favor of defendants. It concluded that plaintiffs had failed to "prove by a preponderance of the evidence that the Bair Hugger caused [their] infection," and that "[…] the Bair Hugger system was unreasonably dangerous and a safer

[530] *Id*.
[531] *Id*.
[532] *Id*. at 2, 3.
[533] *Id*. at 2.
[534] *Id*. at 3.
[535] *Id*.
[536] *Id*. at 4.

 

alternative design existed."[537] During August 2018, 3M requested leave to move for reconsideration of the court's earlier *Daubert* rulings on the basis that "new evidence [had] undermine[d] the scientific support proffered by plaintiffs' medical experts in their general causation opinions."[538]

In reviewing 3M's motion for reconsideration of its prior *Daubert* rulings, the district court ultimately excluded Elghobashi's testimony. It did so because Elghobashi's "conclusion relie[d] on an unproven and untested premise, … there [was] too great an analytical gap between the CFD results and [his] conclusion that the surgical team's movement would only increase the Bair Hugger's effect in the real world," and "the CFD simulation [had been] developed for litigation, which raise[d] concerns about its reliability and objectivity."[539] The district court also excluded as "unreliable" under *Daubert* the expert opinions/testimonies of plaintiffs' three medical experts. The court reasoned that "(1) there [was] too great an analytical gap between the literature and the experts' general causation opinions; (2) the experts failed to consider obvious alternative explanations; and (3) the causal inferences made by the experts [had] not been generally accepted by the scientific community."[540]

In explaining the reasoning behind its conclusion that there was too great an analytical gap between the literature and the medical experts' causation opinion, the court focused, in part, on the sole epidemiological observational (*i.e.*, not a blinded and controlled) study the medical experts had relied upon.[541] In so doing, it emphasized that, "'[i]n evaluating epidemiological evidence, the key questions […] are the extent to which a study's limitations compromise its findings and permit inferences about causation.'"[542] The court pointed out that the authors of the study, which "compared infection rates at Wansbeck Hospital in Northumbria, England, during a period when the Bair Hugger and […] when a conductive warming device were in use," had "warned against conflating correlation with causation: '[t]his study does not establish a causal basis…the data are observational and may be confounded by other infection control measures instituted at the hospital."[543] The court also emphasized that the study's authors had "expressly acknowledged that there was a period when different anti-thrombotic and different prophylactic antibiotic drugs were being used with the two groups of patients," and that the authors had been "unable to consider all factors that have been associated with [PJI], as the details of blood transfusion, obesity, incontinence and fitness for surgery, which have been identified elsewhere as important predictors for deep infection, were not sufficiently detailed in the medical record.'"[544]

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[537] *Id*.
[538] *Id*.
[539] *Id*. at 10.
[540] *Id*. at 22-23.
[541] *Id*. at 34.
[542] *Id*., quoting *Third Edition*, *supra* note 14, at 55-3.
[543] *Id.* at 34-35.
[544] *Id*. at 35, quoting the observational study (the McGovern (2011) Observational Study), at 8.

 

The court emphasized above all else how "it is unreliable for an expert to rely on studies to support conclusions that the study authors were themselves unwilling to reach."[545] As support for that proposition, the court noted how federal district courts had "analyzed whether an expert addresses a study's limitations as a way of determining if the study reliably supports a causation opinion."[546] The court next compared how plaintiffs' medical experts had "fail[ed] to address the McGovern researchers' caveats about confounders and alternative explanations" and had "inappropriately treat[ed] the association as affirmative evidence of causation." [547]According to the court, "[b]oth Drs. Jarvis and Stonnington cite[d] the Observational Study without discussing the study's limitations and possible confounders. And although Dr. Samet mentione[d] potential confounders acknowledged by the study's authors, his description of them [was] misleading."[548]

The court also primarily emphasized how Samet had "depart[ed] from his own description of reliable methodology when opining about causation."[549] The court specifically referred to Samet's application of "several criteria to determine if causation exists. With regard to 'strength of association'" (*i.e.*, his having reported that the Observational Study established a "'statistically significant association unlikely to be explained by confounding or other bias'").[550] It also specifically referred to Samet's application of the criteria of consistency: "Dr. Samet acknowledges, however, that this factor is not applicable to the Observational Study since this factor is generally related to the 'findings of multiple observational studies.' […] Instead, Dr. Samet points to the series of empirical studies which […] found that the Bair Hugger's convection currents increase the number of particles in the sterile field. But these studies do not establish – let alone consider – whether there was an association between the Bair Hugger and infection.").[551]

Indeed, the court found that, "[w]ithout further explanation of Dr. Samet's thought process and how he weighted these criteria, […] Dr. Samet's application of the factors [did] not reassure the Court that he ha[d] bridged the gap between the scientific literature and his causation opinion."[552] In support of this conclusion, the court compared Samet's failure to

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[545] *Id*. at 36, quoting *Joiner*, 522 U.S. at 145-46, and citing *Huss v. Gayden*, 571 F.3d 442, 459 (5th Cir. 2009) ("It is axiomatic that causation testimony is inadmissible if an expert relies upon studies or publications, the authors of which were themselves unwilling to conclude that causation had been proven.").

[546] *Id.* at 36, citing and quoting as an example, the U.S. District Court for the Southern District of New York's decision in *In re Mirena Ius Levonorgestrel-Related Prod. Liab. Litig*. (No. II), 341 F. Supp. 3d 213, 277 (S.D.N.Y. 2018), where the district court "found that an expert "'failed to consider the alternative, and benign, explanations that that study identified for the correlation it found between Mirena and IIH,' and consequently held that "the report inappropriately treated the correlation as 'affirmative evidence of causation' and excluded the expert's testimony because it did not meet the standards for reliability articulated in *Daubert*." *Id*. *See* discussion *supra* note 164 of *In re Mirena*.

[547] *Id*. at 37.

[548] *Id*.

[549] *Id*. at 37, quoting *Junk v. Terminix Int'l Co.*, 628 F.3d 439, 448 (8th Cir. 2010).

[550] *Id*. at 37.

[551] *Id*. at 37-38.

[552] *Id*. at 38.

follow his follow his own methodology with his failure "to employ 'the 'same level of intellectual rigor' that he employs in his academic work.'"[553] The district court also referred, once again, to *In re Mirena (No. II)* for the proposition that "courts have recognized [that] it is imperative that experts who apply multi-criteria methodologies such as Bradford Hill or the 'weight of the evidence' rigorously explain how they have weighted the criteria. Otherwise, such methodologies are virtually standardless and their applications to a particular problem can prove unacceptably manipulable. Rather than advancing the search for truth, these flexible methodologies may serve as vehicles to support a desired conclusion."[554]

## Ninth Circuit

***In re Roundup Products Liability Litigation*** (N.D. Cal. 2018)[555] (Toxic Tort)

In this recent toxic-tort MDL involving more than 400 cases, plaintiffs alleged that their exposure to glyphosate, which is the active ingredient in Roundup, a widely used herbicide, had caused them to contract Non-Hodgkin's Lymphoma ("NHL"), a form of cancer.[556] During the "general causation" phase of the action, Monsanto moved for summary judgment and the trial court evaluated "whether a reasonable jury could conclude […by a preponderance of the evidence…] that glyphosate, a commonly used herbicide, *can* cause [*i.e.*, "is capable of causing"] [NHL] at exposure levels people realistically may have experienced."[557] Although the district court concluded that it was a "close question" whether to admit the "shaky" opinions of three of plaintiffs' experts that glyphosate *can* cause NHL at human-relevant doses, it found those opinions admissible under Ninth Circuit caselaw.[558] According to the court, Ninth Circuit caselaw "emphasizes that a trial judge should not exclude an expert opinion merely because he thinks it's shaky, or because he thinks the jury will have cause to question the expert's credibility."[559] As "long as an opinion is premised on reliable scientific principles, it should not be excluded by the trial judge."[560]

The district court identified "two significant problems" with plaintiffs' expert opinions that made its *Daubert* determination on *reliability* such a "close call." The first was plaintiff's and their experts' heavy reliance on IARC's 2015 decision "to classify glyphosate as 'probably

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[553] *Id*., quoting *Milward*, 639 F.3d at 26 (quoting *Kumho Tire Co.*, 526 U.S. at 152).

[554] *Id*., quoting *In re Mirena (No. II)*, 341 F. Supp. 3d at 247.

[555] *In re Roundup Products Liability Litigation*, MDL No. 2741, Civ. No. 16-md-02741-VC (N.D. Cal. 2018) (Pretrial Order No. 45: Summary Judgment and *Daubert* Motions).

[556] *Id*., slip op. at 4, 5.

[557] *Id*. at 1, 2, 5 (emphasis added).

[558] *Id*. at 3, 67-68. Indeed, in the next "specific causation" phase of this case, the trial judge noted that, "it was "again a close question, but *the plaintiffs have barely inched over the line*." (emphasis added). *See In re Roundup Products Liability Litigation*, MDL No. 2741, Civ. No. 16-md-02741-VC (N.D. CA 2018) (Pretrial Order No. 85: Denying Monsanto's Motion for Summary Judgment on Specific Causation).

[559] *Id*. at 3.

[560] *Id*.

 

carcinogenic to humans.'"[561] According to the court, this presented a significant problem because the IARC determination "'that a substance is 'probably carcinogenic to humans'" constituted only "a public health assessment" comprised of an identification of *hazards*," which "essentially asks whether a substance is cause for concern."[562] "IARC leaves the second step," an "evaluation of the *risk* that the hazard poses at particular exposure levels"—*i.e.*, "whether the substance currently presents a meaningful risk to human health,"—"to other public entities."[563] IARC admits that, "although it uses the word 'probably,' it does not intend for that word to have any quantitative significance."[564] Thus, the general public-health inquiry inherent in a hazard assessment "does not map nicely onto the inquiry required by civil litigation," which is whether the jury, at the general causation phase, "could conclude by a preponderance of the evidence that glyphosate can cause NHL at exposure levels people realistically could have experienced."[565]

The second problem was that plaintiffs' "evidence of a causal link between glyphosate exposure and NHL in the human population seems rather weak." The court found that "[s]ome epidemiological studies suggest that glyphosate exposure is slightly or moderately associated with increased odds of developing NHL. Other studies, including the largest and most recent, suggest there is no link at all."[566] In other words, "[a]ll the [relied upon] studies le[ft] certain questions unanswered, and every study ha[d] its flaws." Consequently, "[t]he evidence, viewed in its totality, seem[ed] too equivocal to support any firm conclusion that glyphosate causes NHL."[567]

The district court grounded its admission of plaintiffs' three experts' testimony relying upon the IARC assessment as "reliable" within the meaning of *Daubert* on its perception that these experts "went beyond the inquiry conducted by IARC, offering independent and relatively comprehensive opinions that the epidemiological and other evidence demonstrate[d] glyphosate causes NHL in some people who are exposed to it."[568] Thus, the court held that it could "not go so far as to say these experts ha[d] served up the kind of junk science that requires exclusion from trial."[569]

Expert testimony will be deemed reliable, the court concluded, if it "falls within the range of accepted standards governing how scientists conduct their research and reach their conclusions,"[570] based *inter alia* on the following four factors: "(1) whether the expert's

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[561] *Id*. at 1.
[562] *Id*. at 2 (emphasis added).
[563] *Id*. (emphasis in original).
[564] *Id*.
[565] *Id*.
[566] *Id*.
[567] *Id*.
[568] *Id*. at 3.
[569] *Id*.
[570] *Id*. at 7-8, quoting *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (*Daubert II*), 43 F.3d 1311, 1317 (9th Cir. 1995).

 

theory or method is generally accepted in the scientific community; (2) whether the expert's methodology can be or has been tested; (3) the known or potential error rate of the technique; and (4) whether the methods has been subjected to peer review and publication."[571] The district court further held that courts must "consider whether the expert's testimony springs from research independent of the litigation."[572] The court noted that, if expert testimony does not spring from research independent of the litigation, then "the expert should point to other evidence that the testimony has a reliable basis, like peer-reviewed studies or a reputable source showing that the expert 'followed the scientific methods, as it is practiced by (at least) a recognized minority of scientists in their field.'"[573] The district court emphasized that the factors are "not a mandatory or inflexible checklist," and that courts have "broad discretion to determine which factors are most informative in assessing reliability in the context of a given case."[574] It also held that courts "must also consider whether, for a given conclusion, 'there is simply too great an analytical gap between the data and the opinion proffered.'"[575] In sum, "both unsound methods and unjustified extrapolations from existing data can require the Court to exclude an expert."[576]

Finally, the district court noted how the Ninth Circuit had narrowly interpreted the *Daubert* gatekeeping function as being intended only to "'screen the jury from unreliable nonsense opinions, but *not* to exclude opinions merely because they are impeachable.'" It also explained how the Ninth Circuit had granted more "deference to experts in close cases than might be appropriate in some other Circuits," where "the traditional and appropriate means of attacking shaky but admissible evidence" are available—*i.e.*, "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof."[577]

The district court justified its decision to admit the testimonies of plaintiffs' three experts—Drs. Beate Ritz, Christopher Portier, and Dennis Weisenburger—in part on epidemiological research/studies. Unlike the First Circuit in *Milward*, the district court found that where epidemiological studies that "examine whether an association exists between an agent like glyphosate and an outcome like NHL" exist, they are "central to the general causation inquiry"[578] employing the Bradford Hill criteria.[579] Accepting that reasonable

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[571] *Id*. at 8, citing *Daubert*, 509 U.S. at 593-94.

[572] *Id*. at 8, citing *Daubert II*, 43 F.3d at 1317.

[573] *Id*. at 8, citing *Daubert II*, 43 F.3d at 1317-19.

[574] *Id*. at 8, citing *Kumho Tire Co., Ltd.*, 526 U.S. at 141-42.

[575] *Id*. at 8, quoting *Joiner*, 522 U.S. at 146.

[576] *Id*. at 8.

[577] *Id*. at 8-9, contrasting a less deferential standard federal courts employ in the Third and Eleventh Circuits, citing *In re Zoloft (Sertraline Hydrochloride) Products Liability Litigation*, 858 F.3d 787, 800 (3d Cir. 2017), and *McClain v. Metabolife International, Inc.*, 401 F.3d 1233, 1244-45 (11th Cir. 2005).

[578] *Id*. at 13, contrasting the First Circuit's holding in *Milward* (that, "[e]pidemiological studies are not per se required as a condition of admissibility regardless of context"), citing *Milward*, 639 F. 3d at 24.

[579] *Id*. at 13-14. *See also id*. at 35, citing Michael D. Green, D. Michal Freedman, and Leon Gordis, *Reference Guide on Epidemiology*, in *Third Edition*, *supra* note 14, at 597 ("the Bradford Hill criteria are generally

 

scientists will have disagreements "about which evidence to emphasize in cases where the evidence does not point unequivocally toward a particular conclusion," the district court reasoned, consistent with the Third Edition of the *Scientific Reference Manual*[580] and *Milward*,[581] that, as long as "the plaintiffs' experts' analysis of [] studies 'falls within the *range* of accepted standards governing how scientists conduct their research and reach their conclusions," the testimony will be considered "reliable" for purposes of admissibility.[582]

According to the district court, application of the Bradford Hill criteria "requires an expert to consider more than the epidemiology literature." The "framework asks experts to survey all the available evidence that might support or disprove causation."[583] Consistent with *Milward*, the district court determined that a "broad survey of the available evidence is neither unusual in expert testimony nor necessarily inappropriate."[584] The court also recognized that "this feature of the Bradford Hill [weight-of-the-evidence] methodology is likely to be quite broad, the inquiry involves the exercise of subjective judgment, and an expert may opine on matters outside of her core area of expertise."[585] And, to the extent scientists "clearly disagree" "on questions that are currently the focus of extensive scientific research and debate," the court emphasized, citing *Milward* as support, that it "may not 'take sides.'"[586]

The court found the testimony of plaintiffs' most important expert, Portier, to be "reliable," and thus, admissible, for several reasons.

First, the court concluded that Portier was qualified to examine epidemiological literature to ascertain whether an association between glyphosate and NHL exists and if so, to engage in a Bradford Hill analysis, although epidemiology was *not* his core area of expertise.[587] It reasoned that he was a biostatistician whose graduate research focused on rodent studies design, and that he had been long employed by the National Institute of Health's Institute of Environmental Health Studies and the Center for Disease Controls'

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associated with epidemiology, and a reliable assessment that an association between glyphosate and NHL exists in the epidemiological literature *is a prerequisite to application of the criteria*") (emphasis added).

[580] *See* Green, Freedman, and Gordis, *supra*, at 564, quoting *Marder v. G.D. Searle & Co.*, 630 F. Supp. 1087, 1094 (D. Md. 1986), *aff'd sub nom. Wheelahan v. G.D. Searle & Co.*, 814 F.2d 655 (4th Cir. 1987) ("the court observed: 'There is a range of scientific methods for investigating questions of causation – for example, toxicology and animal studies, clinical research, and epidemiology – which all have distinct advantages and disadvantages.").

[581] In *Milward*, the First Circuit had determined that an evaluation of only six of nine Bradford Hill criteria was required, including the "consider[ation of] a *range* of plausible explanations for the association." *See Milward*, 639 F.3d at 17-18.

[582] *In re Roundup Products Liability Litigation*, MDL No. 2741, Civ. No. 16-md-02741-VC (N.D. Cal. 2018) (Pretrial Order No. 45: Summary Judgment and *Daubert* Motions) *supra*, slip op. at 34 (emphasis added).

[583] *Id*. at 35.

[584] *Id*. at 35 citing *Milward*, 639 F.3d at 19-20.

[585] *Id*.

[586] *Id*., citing and quoting *Milward*, 639 F.3d at 22.

[587] *Id*. at 36.

National Center for Environmental Health.[588]

Second, the court found most of Portier's "epidemiology-related conclusions – both his finding of an association between glyphosate exposure and NHL and his application of the Bradford Hill factors that turn[ed] on epidemiology studies" to be "sufficiently reliable to be admissible."[589]

Third, the court found reasonable and "reliable" Portier's heavier weighting of "the case-control studies than the AHS [Agricultural Health Study], a cohort study[590] […] of more than 57,000 licensed pesticide applicators from Iowa and North Carolina" who had been "surveyed between 1993 and 1997" and "asked about their use of 50 pesticides, including glyphosate."[591] The court reached this conclusion despite the potential flaws in the data from these respective studies and from the meta-analyses Portier had reviewed, reasoning that since such weighting by an expert fell "'within the range of accepted standards governing how scientists conduct their research and reach their conclusions,'" such weighting "cannot be excluded as categorically unreliable." [592]

Fourth, the court held that, "although IARC's overall conclusion that glyphosate is a 'probable human carcinogen' is not squarely relevant to the general causation question in this case, IARC's narrower conclusion about carcinogenicity in lab animals is quite relevant" and would support plaintiffs' case if there was "sufficient evidence [showing] glyphosate causes cancer in animals."[593] It reasoned that "[d]emonstrating that a chemical is carcinogenic in rodents would logically advance the plaintiff's argument that glyphosate is capable of causing NHL in humans, because it is pertinent to, at least, the biological plausibility criterion that is part of the Bradford Hill analysis."[594] The court then adjudged Portier's assessment of animal carcinogenicity data, and thus his biological plausibility conclusion as admissible, except for his pooled analysis.[595]

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[588] *Id*.

[589] *Id*. at 39.

[590] *Id*.

[591] *Id*. at 24-25.

[592] *Id*. at 29. *See also id*. at 47 ("Dr. Portier explained that he weighted these studies heavily, as they demonstrate[d] DNA damage in living organisms with intact DNA repair mechanisms, making them more probative of potential DNA damage in humans than in vitro studies.").

[593] *Id*. at 30-31.

[594] *Id*. at 30.

[595] *Id*. at 46-48. *See also id*. at 17 ("In a pooled analysis, the study authors combine the raw, participant-level data from earlier studies and then analyze these data as one combined dataset. […] Pooling allows for uniform analysis of the data in the underlying studies and increases the statistical power of the earlier, smaller studies."). *See also id*. at 44 (The court noted further that, "[w]ithout pooling, the remainder of [Portier's] analysis evinces relatively minor disagreements with the other toxicology experts on how to interpret the studies, and his positions in these debates do not depart from the realm of reasonable science.").

 

Fifth, the court ruled that despite Portier's participation in the IARC Monograph process and his advocacy in favor of "increased regulatory attention to glyphosate," such participation and advocacy suggested "his position [was] not one he ha[d] taken solely for purposes of this litigation."[596]

Sixth and finally, although Portier's conclusions regarding glyphosate and NHL were not peer reviewed, "the studies underlying his opinion were in large part published in peer-reviewed journals."[597]

In sum, the court concluded that Portier had "adequately demonstrated that his opinion regarding general causation [was] sufficiently 'within the range of accepted standards governing how scientists conduct their research and reach their conclusions' to proceed to a jury." The court, in effect, endeavored to bring the weight-of-the-evidence approach experts employ to establish general causation closer to the preponderance of-the-evidence standard employed by finders-of-fact to evaluate claims of specific causation.

## Tenth Circuit

***Cattaneo v. Aquakleen Products, Inc.*** (D. Colo. 2012)[598] (Negligence/Wrongful Death)

Plaintiffs Nick and Roxanne Cattaneo alleged on their own and their minor child's behalf that the installer of defendant AquaKleen Products, Inc., from which they purchased an AcquaKleen water refinement system for their home in 2006, had improperly installed that system, "creating a 'cross-connection' between the AquaKleen system and a sewer pipe in the home."[599] Plaintiffs claimed that, as a result AquaKleen's negligent, incorrect installation of the system, they became severely ill, with the child contracting Hepatitis A and Mr. Cattaneo contracting Crohn's disease.[600]

The court found that AquaKleen exercised sufficient control and supervision over the installer, and that the local county water district representative had come to the Cattaneos' home and "discovered the cross-connection."[601] It then denied defendant's motion for summary judgment because it concluded there was insufficient evidence on whether AquaKleen had "knowingly or recklessly sent an unqualified person to inspect and investigate Plaintiffs' complaints, said person misrepresented the company had tested the water for the presence of contaminants, and the company had thereafter failed or otherwise refused to retest the water subjecting Plaintiffs to further sewage contaminated water."[602]

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[596] *Id*. at 48.
[597] *Id*. at 47, citing *Daubert II*, 43 F.3d at 1318.
[598] *Cattaneo v. Aquakleen Products, Inc.*, Civ. No. 10-cv-02852-RBJ-MJW (D. Colo. 2012).
[599] *Id.*, slip op. at 1.
[600] *Id.* at 1, 5.
[601] *Id.* at 2, 4.
[602] *Id.* at 4-5.

After the court denied summary judgment, defendant moved to exclude the causation testimony of plaintiff's toxicology expert, Dr. Steven Pike, "primarily on the ground that it [was] not sufficiently reliable to pass muster under [FRE 702] and [*Daubert*]." Since neither party had requested a *Daubert* hearing, the court determined Defendant's *Daubert* motion based on the parties' briefs.[603] Noting that the "principle of Rule 702 and *Daubert* is that Rule 702, both before and after *Daubert*, […] mandates a liberal standard for the admissibility of expert testimony," the court found that Pike's opinion had been based on his review of "documents concerning the improper installation of the water refinement unit[,] various individuals' observations regarding the Cattaneos' water[,] medical records[,] and published literature, specifically including a publication by an epidemiologist concerning inferences of causality that was cited as an authoritative work in *Milward*."[604]

Moreover, the court held Pike's expert opinion that the Cattaneo's child had contracted Hepatitis A and Mr. Cattaneo had contracted Crohn's disease as the result of the improper installation, had not unreasonably been "based on *inferences* he [had drawn] from the facts […]", and that, "in his opinion, there [was] no plausible alternative explanation for the development of the illnesses."[605] The facts from which plaintiff's expert had apparently drawn inferences included the following: (1) the existence of a cross-connection; (2) "the water in the home had a foul odor"; (3) "allegedly coincident with the presence of the water refinement system"; (4) the water refinement system removed chlorine which had been added by the water district's treatment system as a disinfectant"; and (5) the timing of the development of the illnesses fits the timing of the alleged contamination of the water supply."[606]

Because neither party had "tested the water for the presence of contamination that would be caused by sewage," the court ruled that "[t]he combined failure to do the elementary testing that would presumably have answered the question one way or the other has caused both parties to have to approach causation differently."[607] The court noted that, while plaintiffs relied on their expert's toxicological opinion establishing "that sewage can cause these diseases and the absence of any alternative explanation for them," defendant relied on their expert's "engineering opinion that renders the ability of contaminants to get into the Catteneos' water, despite the cross-connection, unlikely." According to the court, since "[b]oth opinions [were] based on facts, data and inferences drawn from the facts and data," and neither party had "produced opinions of experts in the specialties of the other side," the court had "no basis to find that these opinions [were] not relevant and reliable within the meaning of Rule 702." Thus, the court ultimately held that "[t]he criticisms of Dr. Pike's opinions go to the weight to be given to them, and that [was] the province of the

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[603] *Id.* at 5.
[604] *Id.*, citing *Milward*, 639 F.3d at 17-19.
[605] *Id.* at 5 (emphasis added).
[606] *Id*.
[607] *Id.* at 6.

jury."[608]

***Walker v. Spina*** (D.N.M. 2019)[609] (Personal Injury)

Defendant Gregory Spina, who had been speeding in a commercial vehicle owned by Defendant Valley Express, Inc., ran through a red light in between two cars sitting side-by-side at an intersection, side-swiping and knocking both of them into the intersection. The collision caused causing Plaintiff Shirley Walker, the driver of one of the vehicles, physical and emotional injuries.[610]

Plaintiff indicated she would call, William Patterson, an economic consultant, as an expert on "'economic damages, including loss of household services, future medical expenses, and loss of value of enjoyment of life,'"[611] as an expert witness. After deposing Patterson, defendant moved to exclude his testimony, reasoning that "Patterson base[d] his opinions on 'speculation and generalities,' and not on facts, and that 'his methods [were] not supported by economic principles or literature.'"[612] Specifically, defendants "explain[ed] that courts and economic literature criticize[d] 'hedonic damages,' and the 'disparity of results reached in published value-of-life studies and trouble regarding their underlying methodology' ha[d] led courts to reject hedonic damages. […] The Defendants indicate[d] that 'the trend [was] away from allowing expert opinion testimony on valuation of hedonic damages.'"[613] Defendants also explained that Patterson's testimony "relie[d] on statistical-life values drawn 'from governmental studies, such as wage differential or willingness to pay studies,' which courts have recognized as 'based on assumptions that have not been, and cannot be, validated.' [Since] the statistical-life valuations are anonymous, hedonic damages valuations do not reflect the 'injured individuals' loss of enjoyment of life.'"[614] They also noted that "Patterson ha[d] not 'purport[ed] to give an opinion' on the value of S. Walker's loss of enjoyment of life or 'a specific value the jury should award,' but proffer[ed] only a 'benchmark for the jury to consider.'"[615]

Plaintiff Walker responded by noting how "New Mexico ha[d] rejected the federal rule for experts and that New Mexico does not apply 'the standard of scientific reliability' to experts testifying based on specialized knowledge."[616] Defendants replied that, because it was a federal diversity action, the FRE governed the admissibility of expert testimony on the subject of hedonic damages. They specifically argued that, "although the Tenth Circuit and

[608] *Id*.
[609] *Walker v. Spina*, Civ. No. 17-0991 JB\SCY (D.N.M. 2019).
[610] *Id*., slip op at 2.
[611] *Id.*
[612] *Id.* at 3.
[613] *Id.* at 4.
[614] *Id*.
[615] *Id*.
[616] *Id.* at 5.

New Mexico federal district courts 'have allowed economists to testify about the meaning of hedonic damages and how they differ from other damages,' the court should exclude computations of such damages."[617]

At a November 2018 hearing, plaintiff Walker informed defendants of "her decision not to seek 'loss of wages, cost of household services, future medical expenses, or medical care,' and to seek only hedonic, quality-of-life damages."[618] Defendants' replied that "federal law should govern whether Patterson may testify as an expert to hedonic damages, and argued both that federal law should apply and that, under federal law, the court should not permit Patterson to testify to such damages"[619] because "New Mexico federal district courts routinely exclude such testimony."[620]

The court indicated that, while "experts cannot quantify hedonic damages for the jury, […] experts can explain that methodologies for quantifying hedonic damages exist and can define hedonic damages."[621] Recognizing that FRE 702 governs the admissibility of expert testimony and that '*Daubert* require[d] the Court to 'scrutinize the proffered expert's reasoning to determine if that reasoning is sound,'"[622] the court concluded that expert testimony should be liberally admitted under FRE 702, and that it had "broad discretion in deciding whether to admit or exclude expert testimony."[623] In particular, the court noted its gatekeeper role under *Daubert*, pursuant to which it "must assess the reasoning and methodology underlying an expert's opinion, and determine whether it is both scientifically valid and relevant to the facts of the case, i.e., whether it is helpful to the trier of fact."[624] To this end, the court also recited the five non-exclusive factors "that weigh into a district court's first-step reliability determination,[625] and explained the court's inquiry related to adjudging reliability. "'[A] district court must […] determine if the expert's proffered testimony…has a reliable basis in the knowledge and experience of his [or her] discipline.' […] In making this determination, the district court must decide 'whether the reasoning or methodology underlying the testimony is scientifically valid.'"[626]

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[617] *Id*.

[618] *Id*.

[619] *Id.* at 6.

[620] *Id*.

[621] *Id.* at 6-7.

[622] *Id.* at 7, quoting *United States v. Gutierrez-Castro*, 805 F. Supp. 2d 1218, 1224 (D.N.M. 2011).

[623] *Id.* at 8.

[624] *Id*., citing *Daubert*, 509 U.S. at 594-95.

[625] These include "(i) whether the method has been tested; (ii) whether the method has been published and subject to peer review; (iii) the error rate; (iv) the existence of standards and whether the witness applied them in the present case; and (v) whether the witness' method is generally accepted as reliable in the relevant medical and scientific community." *Id*.

[626] *Id.* at 9, quoting *Norris v. Baxter Healthcare Corp.*, 397 F.3d 878 (10th Cir. 2005) (quoting *Daubert*, 509 U.S. at 589, 592).

 

The court noted in a footnote the difficulty of satisfying FRE 702's "sufficiency of basis" standard. According to the court, this difficulty has provoked a conflict in the decisions on "whether the questions of sufficiency of basis, and of application of principles and methods, are matters of weight or admissibility."[627] The court quoted, on the one hand, the Second Circuit's *Ruggiero v. Warner-Lambert Co.*, 424 F3d. 249 (2d Cir. 2005), as favoring the treatment of sufficiency of basis and application of principles and methods as a matter of admissibility, and the decision of the First Circuit's *Milward* as favoring the treatment of sufficiency of basis and application of principles and methods as a matter of weight.[628] *Ruggiero* held that "'when an expert opinion is based on data, a methodology, or studies that are simply inadequate to support the conclusions reached, *Daubert* and Rule 702 mandate the exclusion of that unreliable opinion testimony."[629] *Milward* held that "the soundness of the factual underpinnings of the expert's analysis and the correctness of the expert's conclusions based on that analysis are factual matters to be determined by the trier of fact."[630]

Curiously, the *Spina* court concluded that such conflict "suggest[ed] that *Daubert* and Rule 702 are too academic," and that "*Daubert* and Rule 702 write better than they work in the courtroom and in practice."[631] The court further held in dicta that the basis of this conflict derives from the discomfort lower federal district courts have experienced excluding evidence on the basis of sufficiency, which they have "rightfully" equated with the usurpation of the jury's role at trial, the court's abuse of discretion, and ultimately, the violation of "the Sixth and Seventh Amendments to the Constitution protecting the right to jury trials in civil and criminal cases."[632] Consistent with this concern and based on Tenth Circuit law, the court admitted Patterson's testimony for the sole purpose of explaining hedonic damages and their calculation to the jury. The court, however, excluded his testimony for purposes of quantifying those damages, which the court noted had "'met considerable criticism in the [academic] literature of economics as well as in the federal court system.'"[633]

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[627] *Id.* at 20, n. 4.

[628] *Id*.

[629] *Id*., quoting *Ruggiero*, 424 F.3d at 255.

[630] *Id*., quoting *Milward*, 639 F.3d at 22.

[631] *Id.* at 20, n. 4.

[632] *Id*., citing *Manpower, Inc. v. Ins. of Pa.*, 732 F.3d 796, 806 (7th Cir.) and Ronald J. Allen, Esfand Fafisi, Daubert *and its Discontents*, BROOKLYN L. REV., 131, 147 (2010) ("describing an argument for *Daubert*'s unconstitutionality under the Seventh Amendment").

[633] *Id.* at 18, quoting *Smith v. Ingersoll-Rand Co.*, 214 F.3d 1235, 1246 (10th Cir. 2000) holding ("'The district court also made an appropriate decision regarding reliability, excluding the quantification which has troubled both courts and academics, but allowing an explanation adequate to insure the jury did not ignore a component of damages allowable under state law.'").

 

## Eleventh Circuit

***In re Chantix (Varenicline) Products Liability Litigation*** (N.D. Ala. 2012)[634] (Products Liability)

In this MDL, plaintiffs alleged that Chantix, an FDA-approved smoking-cessation product/nicotine replacement therapy, "cause[d] depression and other psychiatric disorders, some so severe that reports of suicide and attempted suicide from Chantix use ha[d] been made." Plaintiffs also alleged that defendant Pfizer "either knew or should have known about such side effects, but for [D]efendant's intentional failure to design studies which were reflective of their targeted population."[635] Defendant "denie[d] there [was] any merit to such allegations, and assert[ed] that numerous studies show[ed] the side effects of Chantix to be in line with those of other nicotine replacement therapies (NRTs), such as nicotine patches."[636] Defendant moved to exclude certain general causation and liability opinions offered by plaintiffs' experts."[637]

In evaluating the admissibility of plaintiffs' experts' testimonies, the court recognized that FRE 702, as construed in *Daubert*, "'establishes a standard of evidentiary reliability' […] 'requir[ing] a valid…connection to the pertinent inquiry as a precondition to admissibility.'"[638] The court also recognized that, "[w]here such testimony's factual basis, data, principles, methods, or application is called sufficiently into question, the trial judge must determine whether the testimony has 'a reliable basis in the knowledge and experience of [the relevant] discipline.' […] This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue."[639] The court also recognized that "the inquiry required by *Daubert* is meant to be a 'flexible one,' and that expert testimony that does not meet all or most of the *Daubert* factors[640] may still be admissible based on the specific facts of a particular case," since "[t]he correctness of an expert's conclusions is […] left to the trier of fact to determine" following "'vigorous cross-examination, presentation of contrary evidence, and careful instruction o the burden of proof.'"[641]

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[634] *In re Chantix (Varenicline) Products Liability Litigation*, 889 F. Supp. 2d 1272 (N.D. Ala. 2012).

[635] *Id*. at 1277.

[636] *Id*.

[637] *Id*.

[638] *Id*. at 1279, quoting *Daubert*, 509 U.S. at 592.

[639] *Id*. at 1279, quoting *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 149, 119 (1999), and citing *Daubert*, 509 U.S. at 592-93.

[640] *See id*. at 1280 (reciting the *Daubert* factors and noting how they "do not exhaust the universe of considerations."). These factors include: "(1) testability; (2) error rate; (3) peer review and publication; and (4) general acceptance."

[641] *Id*. at 179-80, citing *United States v. Brown*, 415 F.3d 1257, 1267-68 (11th Cir. 2005), and quoting *Daubert*, 509 U.S. at 596.

 

Defendant's reliability challenge to the testimony of the plaintiff's first expert, Dr. Richard Olmstead, focused on the failure to "use all of the data available" and on the expert's methodology of "combining […] data from controlled and uncontrolled trials." The court ruled that "[n]othing inherent in the[D]efendant's objections to Dr. Olmstead's methodology addresses the reliability of his findings. The fact that no other researcher combined data in the manner Dr. Olmstead did [did] not make [his] data necessarily flawed. Rather, these and other objections […] are matters of credibility, not reliability, and are strictly within the province of the jury."[642]

Defendant's reliability challenge to the testimony of the second expert, Dr. Curt Furberg, focused on "his failure to discuss matters favorable to the [D]efendant in his expert report," especially "the analysis of the European Medicines Agency (EMA) … and its finding that the clinical trial data 'does not support a causal link' between Chantix use and serious neuropsychiatric events.'" Defendant also "asserted that '[t]o establish causation Dr. Furberg must demonstrate a valid statistical association between Chantix and serious neuropsychiatric events.'" [643] The court concluded that defendant "misse[d] the point of *Daubert*," holding that Plaintiffs had been required only to "establish that their experts opinions 'are based on sufficient facts or data' and will help the jury 'to understand the evidence.' […] What the [P]laintiffs do not have to do at this juncture is prove their case."[644]

In reaching this conclusion, the court referenced the U.S. Supreme Court's decision in *Mattrixx Initiatives, Inc. v. Siracusano*, as holding that "'[a] lack of statistically significant data does not mean that medical experts have no reliable basis for inferring a causal link between a drug and adverse events … medical experts rely on other evidence to establish an inference of causation."[645] The court also cited to the Supreme Court's recognition of the Eleventh Circuit decision *Wells v. Ortho Pharmaceutical Corp.*, which held that "courts 'frequently permit expert testimony on causation based on evidence other than statistical significance."[646] The court declined to find Furberg's testimony inadmissible because he could not "'establish a valid statistical association between Chantix and serious neuropsychiatric events.'"[647]

Defendant's reliability challenge to the testimony of plaintiffs' third expert, Dr. Shira Kramer, focused on her basing her opinions on uncontrolled data, her inability to establish a

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[642] *Id*. at 1282-83. *See also id*. at 1283-84 (the court reasoned that Olmstead had "considered the data used by defendant to reach his conclusion that 'the incidence of certain neuropsychiatric symptoms including depressed mood disorders and disturbances…should have merited additional scrutiny and concern by Pfizer…[…] In fact, Dr. Olmstead set[] forth the various methodologies he employed to calculate the increase in risk of various neuropsychiatric injuries from taking Chantix as compared to placebo. Thus, he accounted for background risk in the identical manner the defendant did.").

[643] *Id*. at 1285.

[644] *Id*.

[645] *Id*. at 1286, quoting *Mattrixx Initiatives, Inc. v. Siracusano*, 131 S. Ct. 1309, 1319 (2011).

[646] *Id*., quoting *Mattrix Initiatives, Inc*.(quoting *Wells*, 788 F.2d 741, 744-45 (11th Cir. 1986)).

[647] *Id*.at 1286.

statistical association, and her failure "consider the presence or absence of a dose-response relationship."[648] In addition, defendant objected to Kramer's consideration of "all evidence concerning Chantix, from whatever source, and whatever result, in performing a Weight of Evidence analysis,"[649] given how Kramer had "note[d] that determinations about the weight of evidence are 'subjective interpretations' based on 'various lines of scientific evidence' [and] a unique set of experiences training and expertise [and p]hilosophical differences […] between experts…"[650]

The court responded by highlighting Kramer's conclusions "[b]ased on her Weight of Evidence approach," namely that: "(1) defendant designed its trials inadequately to evaluate neuropsychiatric safety; that (2) varenicline is causally associated with increased risks of adverse neuropsychiatric events; and that (3) defendant had data which reflected safety concerns with Chantix as early as 2005, before the drug was placed on the market."[651] According to the court, "[t]he fact that Dr. Kramer did not credit certain studies with the same weight as [D]efendant is 'not necessarily evidence of flawed scientific reasoning or methodology, but rather differences in judgment between scientists,' especially since Kramer had "considered many of [D]efendant's clinical trials in reaching her conclusions." The court found that "[w]hy Dr. Kramer chose to include or exclude data from specific clinical trials is a matter for cross-examination, not exclusion under *Daubert*."[652] It held that "Dr. Kramer's weight of evidence methodology [was] persuasive," and that "[D]efendant's attempt to isolate individual pieces of evidence as a basis to exclude all of Dr. Kramer's testimony ha[d] been rejected by other courts."[653]

Defendant's reliability challenge to the testimony of the sixth expert, Dr. Antoine Bechara, "offered for the purpose of explaining why Chantix causes the alleged neuropsychiatric effects," focused on the animal studies that served as the basis of his "theory – that an increase in dopamine receptors reflects a decrease in overall dopamine ['dopamine depletion'] and that this is what Chantix does."[654] Defendant objected on the ground that animal-study "findings are not a basis to extrapolate to humans," especially since Bechara "cite[d] no support for his ascertain that an increase in dopamine receptors is evidence that dopamine is depleted, and because not all animal studies may be extrapolated to humans."[655] The court recognized the difference in opinion between Bechara and defendant's expert, Dr. Charles Dackis, over whether dopamine depletion can occur with

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[648] *Id*. at 1287.

[649] *Id*. at 1288.

[650] *Id*.

[651] *Id*.

[652] *Id*. *See also id*. at 1292 (the court, furthermore found that Kramer did not "cherry pick" data as defendant had alleged, but instead had "reviewed all of the information, including the studies and trials [D]efendant chose not to publish. The fact that some of the studies Dr. Kramer considered may have weaknesses is not a basis to exclude her testimony.").

[653] *Id*. at 1292-93.

[654] *Id*. at 1298-99.

[655] *Id*.at 1299.

 

varenicline, which it attributed to the larger "debate in the scientific community as to whether Bechara's dopamine depletion theory for Chantix can explain major depression and other neuropsychiatric injuries."[656] The court, however, held that "debate is not a basis for exclusion, quoting the conclusion *Milward* reached, that, "'[w]hen the factual underpinning of an expert's opinion is weak, it is a matter affecting the weight and credibility of the testimony – a question to be resolved by the jury.'"[657] "Hence, the court is of the opinion that Dr. Bechara may testify as to his theory, Dr. Dackis may testify as to why Dr. Bechara's theory is mistaken, and the trier of fact may determine which of these dueling experts' conclusions is more correct."[658]

***Jones v. Novartis Pharmaceuticals Corporation***, (N.D. Ala. 2017)[659] (Products Liability)

Plaintiff Ernesteen Jones alleged that "she developed atypical femur fractures as a result of taking [defendant] Novartis' medication Reclast, which is a type of bisphosphonate […] Jones [had been] prescribed […] by Dr. Thomas Traylor, her treating physician, for her osteoporosis."[660] Defendant moved to exclude the testimonies of plaintiff's four medical experts, Drs. Parisian, Hinshaw, Taylor, and Worthen, as inconsistent with the *Daubert* standards for admissibility.[661]

The court's discussion of *Daubert's* gatekeeping standard in light of *Milward* focused on Hinshaw's testimony. His testimony consisted of an expert report and a supplemental expert report[662] which plaintiff had offered to establish general causation.[663]

The court recognized how Hinshaw had "primarily relie[d] on the Bradford Hill methodology to reach his conclusion that Reclast generally causes atypical femoral fractures. [AFF]"[664] Citing *Milward* for the proposition that "Sir Bradford Hill was a world-renowned epidemiologist who articulated a nine-factor set of guidelines in seminal methodological article on causality inferences,"[665] the court then noted how the Bradford Hill factors are "'widely used in the scientific community to assess general causation."[666] The court cited

[656] *Id*. at 1300.

[657] *Id*., quoting *Milward*, 639 F.3d at 22.

[658] *Id*. at 1301. In support of its ruling, the court cited *Kuhn v. Wyeth, Inc.*, 686 F.3d 618, 625-626 (8th Cir. 2012), which in turn cited *Milward*, 639 F.3d at 15, and *Daubert,* 509 U.S. at 600-01.

[659] *Jones v. Novartis Pharmaceuticals Corporation*, 235 F. Supp. 3d 1244 (N.D. Ala. 2017). *See also* discussions on *In re Zoloft (Sertraline Hydrochloride) Products Liability Litigation*, Civ. No. 16-2247 (3d Cir. 2017) (precedential), and *In re: Bair Hugger Forced Air Warming Devices Products Liability Litigation*, MDL No. 15-2666 (D.C. MN 2019) (8th Circuit).

[660] *Jones*, 235 F. Supp. 3d at 1249.

[661] *Id*.

[662] *Id*. at 1265.

[663] *Id*. at 1266-67.

[664] *Id.* at 1267.

[665] *Id*. citing *Milward*, 639 F.3d at 17.

[666] *Id*. at 1267, quoting *In re Stand `N Seal Products Liab. Litig*., 623 F. Supp. 2d 1355, 1372 (N.D. Ga. 2009) (citing *Gannon v. United States*, 292 Fed. Appx. 170, 173 (3d Cir. 2008)).

*Milward* again in stating that "Sir Bradford Hill's article explains that 'one should not conclude that an observed association between a disease and a feature of the environment (e.g., a chemical) is causal without first considering a variety of [nine] 'viewpoints' on the issue.'"[667]

The district court, in addition, found that, while the Eleventh Circuit had "not yet directly commented on the Braford Hill criteria," numerous other circuit courts and district courts within the Eleventh Circuit had approved of an expert's use of the Bradford Hill criteria, thereby strengthening the reliability of such methodology.[668] It also noted how "the Third Restatement of Torts states that if an association is found between a substance and a disease, 'epidemiologists use a number of factors (commonly known as the 'Hill guidelines') for evaluating whether that association is causal or spurious.'"[669]

The court, furthermore, emphasized that, despite Hinshaw's application of all nine Bradford Hill criteria to reach his conclusion that Reclast causes AFF (as compared to the plaintiff's expert's testimony which used only three of those criteria when the Ninth Circuit excluded his testimony in *In re Nexium Esomeprazole*[670]),[671] Hinshaw's inability to "point to [an existing] study that establishes a casual association between Novartis' drug Reclast and AFFs" otherwise rendered such testimony inadmissible under *Daubert*. The court reasoned that both the *2011 Reference Guide on Epidemiology* and the *Restatement of Torts Third* conditioned the use of the Bradford Hill methodology to establish general causation on a preliminary finding that reliable existing medical studies establish an association between a substance and a disease.[672] "These resources explain that the Bradford Hill factors cannot be applied without first establishing a causal association,"[673] consistent with *Milward*.[674]

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[667] *Id*. at 1267-68, quoting *Milward*, 639 F.3d at 17.

[668] *Id*. at 1268.

[669] *Id*., quoting *Restatement (Third) of Torts: Liability for Physical and Emotional Harm* § 28 cmt. c(3) (2010).

[670] *See In re Nexium Esomeprazole*, 662 Fed. Appx. 528, 530-31 (9th Cir. 2016) ("At best, Dr. Bal analyzed three of the nine Bradford Hill factors that guide scientists in drawing causal conclusions from epidemiological studies. *See Milward*, 639 F.3d at 17 (citing Arthur Bradford Hill, *The Environment and Disease: Association or Causation?*, 58 PROC. ROYAL SOC'Y MED. 295 (1965)). We agree with the district court that Dr. Bal's analysis of the factors he did discuss was "extremely thin.").

[671] *Id*. at 1268-69.

[672] *Id*.

[673] *Id*. at 1267. *See also id*. at 1269, quoting *In re Lipitor*, 174 F. Supp. 3d 911, 925 (D S.C. 2016) ("'Courts exclude expert testimony that attempts to start at step two, applying the Bradford Hill criteria without adequate evidence of an association.'").

[674] *Id.* at 1269, citing *In re Lipitor*, 174 F. Supp. 3d at 925, and n. 12 ("[I]t is well established that the Bradford Hill method used by epidemiologists *does* require that an association through studies with statistically significant results. […] *Milward v. Acuity Specialty Products Grp., Inc.*, 639 F. 3d 11 (1st Cir. 2011) on which Plaintiffs rely is no exception. There the expert 'noted that *epidemiological studies have found a statistically significant increased incidence of AML in benzene-exposed workers* and have identified a dose-response relationship.'") (emphasis in original).

 

Moreover, the court emphasized how because Hinshaw had failed to identify any peer-reviewed study defining a "'statistically significant AFF association for Reclast specifically,'" his effort to overcome this hurdle by grounding "his general causation opinion on a causal association found between the entire class of BP drugs, of which Reclast is one type, and femoral fractures," was fatally flawed.[675] The court reasoned that since Hinshaw had "not substantiated his claim that a causal association between Reclast and AFFs may be extrapolated from a class-wide association between BPs and femoral fractures," "the court would have been required to 'make several scientifically unsupported 'leaps of faith' in the causal chain' in order to admit the plaintiff's evidence."[676] The court ultimately held that, given Hinshaw's failure to first establish that an association between Reclast and AFFs had existed, it would exclude his general causation opinion that relied on the Bradford Hill methodology as unreliable under *Daubert*.[677]

The court additionally held, citing *Milward*, that although the weight-of-the-evidence methodology "can be considered reliable," Dr. Hinshaw had "not described the process he used or the steps he took in applying this methodology, including whether he ranked plausible rival explanations."[678] The court concluded that since "both Dr. Hinshaw's 'weight of the evidence' and Bradford Hill methods were applied unreliably, his general causation opinion [was] due to be excluded."[679]

***In re Abilify (Aripiprazole) Products Liability Litigation*** (N.D. Fla. 2018)[680] (Products Liability)

In this MDL, plaintiffs alleged that, as the result of taking Aripiprazole (Abilify), an antipsychotic drug, "they developed impulsive and irrepressible urges to engage in […] impulsive gambling, eating, shopping, and sex."[681] Defendant manufacturers and marketers (Otskuka Pharmaceutical Co., Ltd., Otsuka America Pharmaceutical, Inc., and Bristol-Myers Squibb Co.) moved for summary judgment on the issue of general causation.

Following an evidentiary hearing, the district court denied the motion because genuine issues of material fact remained concerning "whether Abilify can cause

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[675] *Id*. at 1269-70.

[676] *Id*. at 1270-71, quoting *Rider v. Sandoz Pharms. Corp.*, 295 F.3d 1194, 1202 (11th Cir. 2002), citing *Joiner*, 522 U.S. at 152. *See also* 235 F. Supp. 3d at 1271 (quoting *Joiner*, 522 U.S. at 146 (where the court "elaborated that 'the studies in question [did] not directly address the relationship between [the specific drug] and [the alleged injury]' and critiqued the plaintiff for presenting 'no expert analysis as to how one might extrapolate' from the drug's effect on a group with one syndrome to another group who took the drug for a different purpose.").

[677] *Id*. at 1272.

[678] *Id.* at 1272-73.

[679] *Id.* at 1273.

[680] *In re Abilify (Aripiprazole) Products Liability Litigation*, 299 F. Supp. 3d 1291 (N.D. Fla. 2018).

[681] *Id.* at 1300-01.

 

uncontrollable impulsive behaviors in individuals taking the drug."[682] In particular, the court noted how, as early as 2010, "[t]he scientific community, the [US]FDA, Defendants and public health agencies worldwide took notice and began examining whether Abilify [was] linked to impulse control disorders."

Defendants challenged the reliability of the general-causation testimony of plaintiffs' five experts.[683] In the Eleventh Circuit, a plaintiff "must establish both general and specific causation through reliable expert testimony" in order "[t]o prevail in a pharmaceutical products liability case. […] General causation is established by demonstrating, often through a review of scientific or medical literature, that a drug or chemical can, in general, cause the type of harm alleged by the plaintiff."[684] In addition, the Eleventh Circuit has held "three 'primary' methodologies 'indispensable' for proving that a drug can cause a specific adverse effect: epidemiological studies,[685] dose-response relationship,[686] and background risk of disease."[687] Consequently, "[a] general causation opinion that is not supported by at least one of these primary methodologies is unreliable as a matter of law."[688] So long as an expert has reliably applied one of these primary methodologies, he/she "may bolster [his/her] general causation opinion with evidence from 'secondary' methodologies, such as: biological plausibility,[689] case studies and adverse event reports, extrapolations from [*in vivo*] animal[690] and *in vitro* studies,[691] and extrapolations from analogous drugs."[692]

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[682] *Id*. at 1301.

[683] *Id*. at 1304.

[684] *Id.* at 1306.

[685] Epidemiology is "the branch of science that studies the incidence, distribution, and cause of disease in human populations." *Id*.

[686] Dose-response relationship "is a 'relationship in which a change in amount, intensity, or duration of exposure to [a drug] is associated with a change – either an increase or decrease – in risk of' adverse effects from that exposure." *Id.* at 1307.

[687] "Background risk is the risk that members of the general public would have of developing the disease without exposure to the drug. [] It encompasses all causes of the disease, whether known or unknown, except for the drug in question." *Id*. at 1308.

[688] *Id*. at 1306, citing *Chapman v. Procter & Gamble Distributing, LLC*, 766 F.3d 1296, 1308 (11th Cir. 2014).

[689] "Biological plausibility refers to a credible scientific explanation of the physiological processes or mechanisms by which a drug can cause a particular disease or adverse effect, based on the current biological and pharmacological knowledge." *Id.* at 1308. To the extent biological plausibility exists, it "'lends credence to an inference of causality' drawn from other, more substantial evidence." *Id*.

[690] In *in vivo* studies, "laboratory animals are exposed to a particular drug, with the outcomes monitored and compared to those for an unexposed control group." Although "they can be conducted as true experiments with exposure controlled and measured, […] are replicable […], usually follow a general accepted methodology, […] and […] present fewer ethical limitations than human experimentation," they "are almost always fraught with considerable, and currently unresolvable, uncertainty […] because biological 'differences in absorption, metabolism, and other factors may result in interspecies variation in responses," and "most animal studies involve significantly higher doses of a drug than would ever be present in humans," making it difficult to extrapolate from animals to humans. *Id.* at 1310.

[691] "*[I]n vitro* studies […] analyze the effects of drugs on human and animal cells, organs, or tissue cultures in a controlled laboratory setting," "but the chemical reactions that occur in the artificial environment

The district court considered epidemiological studies as providing the "'best evidence of causation in toxic tort actions.'"[693] It noted that [general] causation may be established through epidemiology, first, by demonstrating an association between a drug with a particular disease or adverse effect, and, second, by determining "whether that association represents a 'true cause-effect relationship' between exposure and the disease."[694] The district court emphasized that the "nine well-established" Bradford Hill factors, none of which is dispositive, serve to guide the causation inquiry."[695] It also cited *Milward* in emphasizing that the ultimate determination of "whether an association is causal is a matter of scientific judgment," and that "scientists reliably applying the Bradford Hill factors may reasonably come to different conclusions about whether a causal inference may be drawn."[696] According to the court, "[a]n epidemiological study identifying a statistically significant association between the use of a drug and a particular adverse effect, accompanied by a reliable expert opinion that the association is causal, is 'powerful' evidence of general causation."[697]

In addition, the Eleventh Circuit emphasized that, while any one or more of the individual categories of scientific evidence may support an expert opinion on general causation, many experts, in practice, "form a general causation opinion by weighing an entire body of scientific evidence."[698] To be considered "reliable," within the meaning of *Milward*, "[t]his 'weight of the evidence' approach to analyzing [general] causation" must "consider[] all available evidence carefully and explain[] how the relative weight of the various pieces of evidence led to [the expert's] conclusion."[699] Again citing *Milward*, the court emphasized that the expert also must show that he/she had applied the weight of evidence methodology reliably to derive an inference to the best explanation "with 'the same level of intellectual

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of a test tube or petri dish may differ from how the drug will react in, and impact, the complex biological system that is the human body." *Id.* at 1310.

[692] *Id*. at 1306.

[693] *Id.* at 1306, quoting *Rider v. Sandoz Pharmaceuticals Corp.*, 295 F.3d 1194, 1199 (11th Cir. 2002),

[694] *Id.* at 1306-07.

[695] *Id.* at 1307.

[696] *Id*., citing *Milward*, 639 F.3d at 18. *See also id*. at 1352 (supporting the court's conclusion that "the fact that [plaintiffs' expert] Dr. Glenmullen [had] found that all of the Bradford Hill factors supported a causal inference does not, standing alone, render his methodology unreliable.").

[697] *Id*. at 1307, citing *Rider*, 295 F.3d at 1198. *See also id*. at 1352, citing *Milward*, 639 F.3d at 18 .

[698] *Id.* at 1311.

[699] *Id.* citing *Milward*, 639 F.3d at 17; *In re Zoloft (Sertraline Hydrochloride)*, 858 F.3d at 795-97; *Jones v. Novartis Pharmaceuticals Corporation*, 235 F. Supp. 3d at 1272-73. In other words, to demonstrate that weight-of-the-evidence methodology has been properly applied to derive an inference to the best explanation, the "scientist must: (1) identify an association between an exposure and a disease, (2) consider a range of plausible explanations for the association, (3) rank the rival explanations according to their plausibility, (4) seek additional evidence to separate the more plausible from the less plausible explanations, (5) consider all of the relevant available evidence, and (6) integrate the evidence using professional judgment to come to a conclusion about the best explanation." 299 F. Supp. 3d at 1311, quoting *Milward*, 639 F.3d at 17-18; J*ones*, 235 F. Supp. at 1273.

 

rigor' used by experts in the field."[700]

The district court evaluated the admissibility of an epidemiological case study ("Etminan Study") that three of plaintiffs' experts had relied upon, and it found that it had met Bradford Hill's statistical significance factor. The court reached this conclusion because the study had "described the existence and strength of the association found between Abilify, pathological gambling, and impulse disorder in the random sample of the entire LifeLink database," and since it "reported a relative risk of 5.23 for pathological gambling in individuals exposed to Abilify as compared to unexposed individuals" which the court found "statistically significant."[701] The court also considered the defendants' objections to the study's deficient design, failure to consider the risk of confounders,[702] and the presence of bias. It found that while these deficiencies may impact the weight afforded to the study's conclusions, they did not render the study unreliable, and thus, inadmissible under *Daubert*.[703] In addition, the court reviewed the defendants' objections to the statistical analysis of the Etminan study performed by one of plaintiffs' experts, Madigan, and to his published literature. It found that while they may impact the weight of the expert's opinion, they would not affect its admissibility.[704] The district court ultimately held that the Etminan Study was "a scientifically sound epidemiological study, and therefore, reliable evidence of general causation in this case."[705]

In addition, the court examined plaintiffs' experts' evidence of a dose-response relationship. It found that the experts' evidence of a dose-response relationship "lack[ed] the intrinsic reliability that is the hallmark of a primary methodology under the Eleventh Circuit's *Daubert* jurisprudence."[706] The court reasoned that the experts' failure to "present[] any controlled, experimentally derived evidence of a dose-response relationship between Abilify and impulse control disorders […] weaken[ed] the force and reliability of their conclusions as to dose-response."[707] Significantly, although the experts had presented published case studies and adverse event reports indicating "'a temporal relationship between the initiation of [Abilify] treatment and the onset of' impulse control problems," the court found that "the lack of meaningful scientific controls limit[ed] the weight that these case studies and adverse event reports may reliably bear on an expert's general causation opinion under Eleventh

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[700] *Id.* at 1312, citing *Milward*, 639 F.3d at 17; *In re Zoloft (Sertraline Hydrochloride)*, 858 F.3d at 795-97; *Jones*, 235 F. Supp. 3d at 1272-73.

[701] *Id.* at 1313-14.

[702] *Id*. at 1322 ("When assessing the reliability of an epidemiological study, a court must consider whether the study adequately accounted for confounding factors, or confounders."). *See also id*. ("Counfounding occurs where an extraneous variable, or set of variables, may wholly or partially explain an apparent association between exposure to a drug and a disease, but that variable is not accounted for in the study.").

[703] *Id*. at 1315-21 (design); at 1321-25 (confounding); at 1325-27 (bias).

[704] *Id*. at 1327-29.

[705] *Id*. at 1330.

[706] *Id*.

[707] *Id*. at 1331.

Circuit standards." Consequently, the court held that such evidence was "relevant and admissible, but only as a *supplement* to the other, more substantial evidence of general causation (*i.e.,* the Etminan Study)."[708]

Furthermore, the court examined plaintiffs' experts' evidence "provid[i]ng] the background risk or prevalence of various impulse control disorders, including compulsive gambling, in the general population as reflected in the scientific literature." Although the experts had not offered "a more expansive background risk," the court found that such failure did "not present a 'serious methodological deficiency' or 'substantial weakness' in their general causation opinions" to prevent them from satisfying Rule 702 and *Daubert*.[709]

The district court, moreover, examined plaintiffs' experts' evidence of biological plausibility,[710] which it distinguished from "biological certainty."[711] The court found that [p]laintiffs' experts' biological plausibility opinions that Abilify can cause impulse control problems through its effects on dopamine neurotransmission in the brain to be scientifically reliable, based on current biochemistry and pharmacological knowledge," and to be "consistent with the FDA's assessment."[712] It also found that the experts had adequately supported "[e]ach element of this proposed mechanism of action" with "peer-reviewed, published scientific literature and sound scientific reasoning."[713] Citing *Milward*, the court ultimately held that such biological plausibility evidence could support "other, more substantial evidence" to establish general causation, by "'lend[ing] credence to an inference of causality' drawn from" such other evidence.[714]

## CONCLUSION

The majority of civil litigation today—from toxic tort and products liability to even run-of-the-mill contract disputes—requires judges to rule on the admissibility of expert evidence. Judges' keeping of the evidentiary gate not only affects the parties in any given case, but also the judicial branch's broader role in our constitutional republic. The establishment of a lower evidentiary bar and the consequent narrowing of courts' gatekeeper role for evaluating the reliability, and hence, admissibility of expert evidence at trial can allow and, in fact, has allowed for the injection of a European-style, precautionary *regulatory* approach into the adjudication of legal disputes. This phenomenon has both rewarded plaintiffs whose claims are suspect and has set *ex ante*, restrictions on enterprises that were not before the court.

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[708] *Id.* (italicized emphasis in original; underlined emphasis added.).
[709] *Id*. at 1332.
[710] *Id*. at 1332-44.
[711] *Id*. at 1344.
[712] *Id*.
[713] *Id*.
[714] *Id*., citing *Milward*, 639 F.3d at 25-26.

 

Arguably, these courts have become part of the U.S. administrative state, whose job is not to settle distinct disputes, but to protect the putative "public interest." Though administrative agencies' approach to science merits its own criticism,[715] federal regulators are at least nominally accountable to procedurally-focused laws such as the Information Quality Act and the Administrative Procedure Act, which, together, afford interested parties, respectively, the opportunity to judicially appeal final agency actions engendering Information Quality Act noncompliance[716] and to comment on regulatory proposals before they are finalized. The judiciary, by constitutional design, is not similarly accountable.

An approach to expert evidentiary gatekeeping embraced by the First Circuit in *Milward*, institutionalized by the Federal Judicial Center in its *Reference Manual on Scientific Evidence*, Third Edition, and spread by federal trial and appellate courts, undermines the scientific method. The scientific method is fundamentally a logical method of *deducing* conclusions and deriving enduring principles from rational hypotheses and validated assumptions with respect to single lines of evidence based on empirical observation and replication of cause-and-effect relationships.[717] A weight-of-the-evidence approach, by contrast, empowers scientific and technical experts to freely exercise their professional judgment and interpretation beyond the constraints of a defined methodological algorithm when employing the Bradford Hill guidelines to infer a general causal relationship between exposure to an agent and development of a disease after weighing different lines of evidence. It is highly problematic that the *Milward* court posited a presumption that scientists employing abductive reasoning to infer such causal relationships may come to different judgments about whether a causal inference is appropriate. This presumption, unfortunately, has since all but ensured that other federal courts applying the *Daubert* reliability test to an expert's subjective judgments will encounter difficulties confirming whether the expert's application of the methodologies undergirding those judgments can be deemed reliable by virtue of their having been scientifically validated or reproduced.

This WORKING PAPER documents a gradual drift, incited by *Milward* and the FJC's influential expert-evidence guidebook, away from an approach to judicial gatekeeping consistent with the Supreme Court's *Daubert* trilogy and Federal Rule of Evidence 702. Legal practitioners and policymakers should use the information presented here to carefully reconsider the legacy the FJC's support for the *Milward* decision has left on the rules of evidence, the rule of law overall, and the role of empirical science in regulating our daily affairs.

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[715] *See* Lawrence A. Kogan, *Revitalizing the Information Quality Act as a Procedural Cure for Unsound Regulatory Science: A Greenhouse Gas Rulemaking Case Study*, *supra* note 97, Secs. II-IV, 1-14

[716] *Id*. at Secs. VI-VII, 25-47.

[717] *See* A. Alan Moghissi, Betty R. Love, and Sorin R. Straja, *Peer Review and Scientific Assessment: A Handbook for Funding Organizations, Regulatory Agencies, and Editors* (Institute for Regulatory Science) (2013), at 39-40, https://nebula.wsimg.com/571cc7cacba816f0c69c60dea905cb36?AccessKeyId=39A2DC689E4CA87C906D&disposition=0&alloworigin=1.

 

The federal judiciary itself also must contemplate where this drift toward subjective, weight-of-evidence opinions is leading. Two options to address this drift are currently available. First, in drafting a *Fourth* Edition of its guidebook, the FJC could return to the principles embodied in its Second Edition. Second, the Judicial Conference's Advisory Committee on Evidence Rules could respond positively to stakeholders' requests that it amend FRE 702 in a manner that preserves the *Daubert* approach.

 

# WEIGHT OF THE EVIDENCE:
# A LOWER EXPERT EVIDENCE STANDARD
# METASTASIZES IN FEDERAL COURTS

# APPENDIX A

# "HONORABLE MENTION" COURT DECISIONS

(**Editor's Note**: This appendix supplements the WLF WORKING PAPER *Weight of the Evidence: A Lower Standard for Expert Evidence Metastasizes in Federal Courts*. Appendix A compiles federal court decisions that make only brief reference of the First Circuit's *Milward* decision.

## A. Traditional Tort Action Areas Receiving "Honorable Mention" (Toxic Torts, Products Liability, Negligence/Wrongful Death, Medical Malpractice)

Other tort cases that fall within the traditional tort areas, but which make only a brief reference ("honorable mention") of the *Milward* decision, are identified below by federal circuit and traditional tort area.

### First Circuit (Where *Milward* Is Binding Precedent)

**Products Liability**

*Bertrand v. General Electric Co.* (D. Mass. 2011)[1]

> "'Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky, but admissible evidence.'"[2]

*Pukt v. Nexgrill Industries, Inc.* (D.N.H. 2016)[3]

> "Generally, disputes about the factual bases of an expert's opinion affect the weight and credibility of the opinion but not its admissibility."[4] "Any weakness in the factual bases of the experts' opinions can be addressed through cross-examination."[5]

*Short v. Amerada Hess Corp. et al.* (D.N.H. 2019)[6]

> "A plaintiff in a personal-injury action of this variety generally must demonstrate two forms of causation: general and specific. ''General causation' exists when a substance is capable of causing a disease' and ''[s]pecific causation' exists when

[1] Civil No. 09-11948-RGS.

[2] *Id*., slip op. at 4, quoting *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 596 (1993), and citing *Milward v. Acuity Specialty Prods. Group, Inc.*, 639 F.3d 11, 15 (1st Cir. 2011).

[3] Civil No. 14-cv-215-JD (D.N.H. 2016).

[4] *Id*., slip op. at 3, citing *inter alia Milward*, 639 F.3d at 22.

[5] *Id*. at 7, citing *Milward*, 639 F.3d at 22.

[6] Civ. No. 16-cv-204-JL (D.N.H. 2019).

exposure to an agent caused a particular plaintiff's disease.'"[7]

**Medical Malpractice**

*Bradley v. Sugarbaker* (1st Cir. 2015)[8]

> "A district court['s…] decision to admit or exclude testimony is reviewed for an abuse of discretion […] But, '[t]he [abuse of discretion] standard is not monolithic: within it, embedded findings of fact are reviewed for clear effort, [and] questions of law are reviewed de novo.'"[9]
>
> "[…] Bradley's reliance on *Milward* is unavailing. There, this Court determined that, '[w]hen the factual underpinning of an expert's opinion is weak it is a matter affecting the weight and credibility of the testimony—a question to be resolved by the jury.' But *Milward* concerned the district court's extensive evaluation of the reliability of the scientific theories underscoring the expert's testimony, and not the threshold issue of factual relevance."[10]

*Guzman-Fonalledas v. Hospital Expanol Auxilio* (D.P.R. 2018)[11]

> "In *Daubert*, the Supreme Court listed four factors to determine an expert's testimony's reliability, but 'd[id] not presume to set out a definitive checklist or test.'[12] The First Circuit has held that the proponent of expert testimony does not need to prove that the expert is correct, but 'must show only that the expert's conclusion has been arrived at in a scientifically sound and methodologically reliable fashion.'"[13]

*Arrieta v. Hospital Del Maestro* (D.P.R. 2018)[14] (expert testimony not admitted)

> "In *Daubert*, the Supreme Court 'vested in trial judges a gatekeeper function, requiring that they assess proffered expert scientific testimony for reliability before admitting it.'[15] Moreover, the Supreme Court later 'clarified that courts have this function with respect to all expert testimony, not just scientific.'"[16]

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[7] *Id*., slip op. at 15, quoting *Milward*, 639 F.3d at 13 (quoting *Restatement (Third) of Torts: Liability for Physical and Emotional Harm* § 28 cmts. c(3), c(4) (2010)).

[8] 809 F.3d 8 (1st Cir. 2015).

[9] *Id*. at 17, quoting *Milward*, 639 F.3d at 13-14 (quoting *Ungar v. Palestine Liberation Org.*, 599 F.3d 79, 83 (1st Cir. 2010)).

[10] *Id*. at 20, n. 10, quoting *Milward*, 639 F.3d at 22.

[11] 308 F. Supp. 3d 604 (D.P.R. 2018).

[12] *Id*. at 609, quoting *Daubert*, 509 U.S. at 593.

[13] *Id*., quoting *Milward*, 639 F.3d at 15.

[14] Civil No. 15-3114 (MEL).

[15] *Id*., slip op. at 4, quoting *Milward*, 639 F.3d at 14.

[16] *Id*., quoting *Milward*, 639 F.3d at 14 n.1, (citing *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999)).

**Negligence**

*Situ v. O'Neill* (D.P.R. 2016)[17]

> "The *Daubert* Court identified four factors that may assist the trial court in determining whether or not scientific expert testimony was reliable: '(1) whether the theory or technique can be and has been tested; (2) whether the technique has been subject to peer review and publication; (3) the technique's known or potential rate of error; and (4) the level of the theory or technique's acceptance within the relevant discipline.'[18] The factors are not a checklist for the trial judge to follow, but rather the inquiry is a flexible one, allowing the trial judge to determine and adapt these factors to fit the particular case at bar."[19]

## Second Circuit

**Products Liability**

*In re Mirena IUS Levonorgestrel-Related Products Liability Litigation* (MDL No. II) (S.D.N.Y. 2018)[20]

> "As the Third Circuit has put the point: 'To ensure that the Bradford Hill/weight of the evidence criteria is truly a methodology, rather than a mere conclusion-oriented selection process … there must be a scientific method of weighting that is used and explained.'[21] And as the First Circuit has required, while the expert's bottom-line conclusion need not be independently supported by each of the nine Bradford Hill factors, in analyzing the factors, separately and together, the expert must employ 'the same level of intellectual rigor' that he employs in his academic work.'"[22]

## Fourth Circuit

**Products Liability**

*In re Lipitor (Atorvastatin Calcium) Marketing, Sales Practices and Products Liability Litigation* (D.S.C. 2016)[23]

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[17] Civil No. 11-1225 (GAG) (D.P.R. 2016).

[18] *Id*., slip op. at 5, n. 1, quoting *U.S. v. Mooney*, 315 F.3d 54, 62 (1st Cir. 2002) (citing *Daubert*, 509 U.S. at 593-94).

[19] *Id*. at 5, n. 1, citing *Kumho Tire Co., Ltd.*, 526 U.S. at 150; *Milward*, 639 F.3d at 15-16.

[20] 341 F. Supp. 3d 213 (S.D.N.Y. 2018).

[21] *Id*. at 247, quoting *In re Zoloft (Sertraline Hydrochloride) Prods. Liab. Litig.,* 858 F.3d 787, 796 (3d Cir. 2017); *Magistrini v. One Hour Martinizing Dry Cleaning*, 180 F. Supp. 2d 584, 607 (D.N.J. 2002) (same), *aff'd*, 68 F. App'x 356 (3d Cir. 2003).

[22] *Id*. at 247-48, quoting *Milward*, 639 F.3d at 26 (quoting *Kumho Tire*, 526 U.S. at 152).

[23] 174 F. Supp. 3d 911 (D.S.C. 2016).

"Whether an established association is causal is a matter of scientific judgment, and scientists appropriately employing this method 'may come to different judgments' about whether a causal inference is appropriate."[24]

"While a causation opinion need not be based on epidemiological studies, [], it is well established that the Bradford Hill method used by epidemiologists does require that an association be established through studies with statistically significant results.[12]" […] [12] *Milward v. Acuity Specialty Products Grp., Inc.*, 639 F.3d 11 (1st Cir. 2011), on which Plaintiffs rely, is no exception. There, the expert 'noted that *epidemiological studies have found a statistically significant increased incidence of AML in benzene-exposed workers* and have identified a dose-response relationship.' *Id*. at 19 (emphasis added)."[25]

## Fifth Circuit

### Toxic Tort

*Yarbrough v. Hunt Southern Group, LLC* (S.D. Miss. 2019)[26]

"Dr. Goldstein states that he applied the Bradford Hill Criteria of Causation to determine 'that the residents in the Yarbrough household were exposed to, and suffered from, toxins released by the presence of Aspergillus and Penicillium in their home.' (Goldstein Report 5, ECF No. 216-1.)

'Sir Bradford Hill was a world-renowned epidemiologist who articulated a nine-factor set of guidelines in his seminal methodological article on causality inferences.[27] […] Sir Bradford Hill's article explains that 'one should not conclude that an observed association between a disease and a feature of the environment (e.g., a chemical) is causal without first considering a variety of 'viewpoints' on the issue.'"[28]

[24] *Id*. at 916, citing *Milward,* 639 F.3d at 18.

[25] *Id*. at 936 and n. 12, citing *Milward*, 639 F.3d at 19.

[26] Cause No. 1:18cv51-LG-RHW (S.D. Miss. 2019).

[27] *Id*., slip op. at 4, quoting *Jones v. Novartis Pharm. Corp.*, 235 F. Supp. 3d 1244, 1267 (N.D. Ala. 2017), aff'd, 720 F. App' 1006 (11th Cir. 2018), quoting *Milward*, 639 F.3d at 17 (citing Arthur Bradford Hill, *The Environment and Disease: Association or Causation?*, 58 PROC. ROYAL SOC'Y MED. 295 (1965)).

[28] *Id*. at 4, quoting *Jones*, 235 F. Supp. 3d at 1267, aff'd, 720 F. App'x 1006 (11th Cir. 2018), quoting *Milward*, 639 F.3d at 17.

## Seventh Circuit

### Wrongful Death

*Ashley v. Schneider National Carriers, Inc.* (N.D. Ill. 2016)[29]

> "Defendants also uncovered that Mr. Hess lacked any factual basis supporting his assertion other than his own personal knowledge. That being said, '[w]hen the factual underpinning of an expert's opinion is weak, it is a matter affecting the weight and credibility of the testimony—a question to be resolved by the jury.'"[30]

## Eighth Circuit

### Products Liability

*Clinton v. Mentor Worldwide, LLC* (E.D. Mo. 2016)[31]

> "Plaintiff also points out that Dr. Skinner could not rule out necrotizing fasciitis as the cause of plaintiff's pain prior to her diagnosis. However, '[p]roponents of expert testimony need not demonstrate that the assessments of their experts are correct, and trial courts are not empowered to determine which of several competing scientific theories has the best provenance.'"[32]

### Personal Injury/Wrongful Death

*Crawford v. Safeway, Inc.* (D. Neb. 2016)[33]

> "'Proponents of expert testimony need not demonstrate that the assessments of their experts are correct, and trial courts are not empowered 'to determine which of several competing scientific theories has the best provenance.'"[34]

## Ninth Circuit

### Products Liability

*In Re Nexium Esomeprazole* (9th Cir. 2016)[35]

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[29] Case Nos. 12-cv-8309, 13-cv-3042 (N.D. Ill. 2016).

[30] *Id*., slip op. at 10, quoting *Milward*, 639 F.3d at 22.

[31] Civ. No. 4:16-CV-00319 (CEJ) (E.D. Mo. 2016).

[32] *Id*., slip op. at 8, quoting *Kuhn v. Wyeth, Inc.*, 686 F.3d 618, 625 (8th Cir. 2012) (quoting *Milward*, 639 F.3d at 15.

[33] Civ. No. 7:14CV5001 (D. Neb. 2016).

[34] *Id*., slip op. at 4, quoting *Kuhn*, 686 F.3d at 625 (quoting *Milward*, 639 F.3d at 15).

[35] 662 F. App'x 528 (9th Cir. 2016).

"At best, Dr. Bal analyzed three of the nine Bradford Hill factors that guide scientists in drawing causal conclusions from epidemiological studies.[36] We agree with the district court that Dr. Bal's analysis of the factors he did discuss was 'extremely thin.'"[37]

**Negligence/Strict Liability**

*Wendall v. GlaxoSmithKline, LLC* (9th Cir. 2017)[38]

"However, expert testimony may still be reliable and admissible without peer review and publication.[39] That is especially true when dealing with rare diseases that do not impel published studies."[40]

## B. Non-Traditional Tort and Other Cases Receiving "Honorable Mention" (Environment/Discrimination/Business/Criminal)

*Milward*'s has had such a broad influence that courts have also referenced it in federal cases implicating non-traditional torts and other areas. Those areas include environmental, discrimination (employment and enrollment-related age and racial), business (tort and contract), and criminal law. The cases below are identified by nontraditional tort or other area and sub-area, and by federal circuit.

### Environmental Cases

**Third Circuit**

*McMunn v. Babcock & Wilcox Power Generation Group, Inc.* (W.D. Pa. 2014)[41]

"Moreover, as the Court of Appeals for the First Circuit recognized, '[t]here is an important difference between what is unreliable support and what a trier of fact may conclude is insufficient support for an expert's conclusion.'"[42]

[36] *Id*. at 530, citing *Milward*, 639 F.3d at 17 (citing Arthur Bradford Hill, *supra* note 27).

[37] *Id*.

[38] 858 F.3d 1227 (9th Cir. 2017).

[39] *Id*. at 236, quoting *Clausen v. M/V New Carissa*, 339 F.3d 1049, 1056 (9th Cir. 2003).

[40] *Id*., citing *Milward*, 639 F.3d at 24 ("recognizing that the 'rarity' of a particular form of leukemia was one reason that it would be 'very difficult to perform an epidemiological study of the causes of [the disease] that would yield statistically significant results.'").

[41] Civ. No. 2:10cv143 (W.D. Pa. 2014).

[42] *Id*., slip op. at 7, quoting *Milward*, 639 F.3d at 22.

## Discrimination Cases

### First Circuit

*EEOC v. Texas Roadhouse, Inc.*, (D. Mass. 2016)[43] (Employment/Age)

> "As long as the expert's testimony is found to rest upon reliable grounds, 'the traditional and appropriate means of attacking shaky but admissible evidence' is through '[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof.'"[44]

> "[…] In addition, the parties' differing opinions as to which party the corrected PUMS data supports, D. 594 at 16; D. 621 at 8-10, can again be addressed in the course of direct and cross-examinations of both Saad and Crawford and, ultimately, will be resolved by the jury."[45]

> "[…] While the *Frye* standard of general acceptability is no longer the touchstone of admissibility of expert opinion under Fed. R. Evid. 702 post-*Daubert*, whether a methodology has been peer reviewed remains one factor for the Court to consider when addressing challenges to the admissibility of expert testimony."[46]

> "[…] any such limitations of his analysis are concerns to be raised on cross-examination and are a matter for the jury to consider and weigh."[47]

*Riley v. Massachusetts Department of State Police* (D. Mass. 2018)[48] (Employment/Racial)

> "If the Court determines that the expert's testimony is reliable and relevant, 'the traditional and appropriate means of attacking shaky but admissible evidence' is through '[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof.'" [49]

*Students for Fair Admissions, Inc. v. Harvard* (D. Mass. 2018)[50] (Enrollment/Racial)

> "'Even assuming, arguendo, that this Court were to conclude that 'the factual

[43] *EEOC v. Texas Roadhouse, Inc.*, Civ. No. 1-11732-DJC (D. Mass. 2016).

[44] *Id*., slip op. at 2, citing *Milward*, 639 F.3d at 15 (quoting *Daubert*, 590 U.S. at 590).

[45] *Id*. at 13, citing *Milward*, 639 F.3d at 15.

[46] *Id*. at 15, citing *Milward*, 639 F.3d at 14, 22.

[47] *Id*. at 16, citing and quoting *Milward*, 639 F.3d at 22 (explaining that '[w]hen the factual underpinning of an Expert's opinion is weak, [that] is a matter affecting the weight and credibility' of that expert's opinion), (quoting *United States v. Vargas*, 471 F.3d 255, 264 (1st Cir. 2006)).

[48] Civ. No. 15-14137 (D. Mass. 2018).

[49] *Id*., slip op. at 2, quoting *Milward*, 639 F.3d at 15 (quoting *Daubert*, 509 U.S. at 590).

[50] 346 F. Supp. 3d 174 (D. Mass. 2018).

> underpinning of [either party's] expert's opinion [was] weak,'' the challenges by SFFA and Harvard affect 'the weight and credibility of the testimony' to be evaluated at trial when the Court assumes its fact-finding role."[51]

**Fourth Circuit**

*Brown v. Nucor Corp.* (4th Cir. 2015)[52] (Employment/Racial)

> "'[T]rial judges may evaluate the data offered to support an expert's bottom-line opinions to determine if that data provides adequate support to mark the expert's testimony as reliable.'"[53]

*Equal Employment Opportunity Commission v. Freeman* (4th Cir. 2015)[54] (Employment/Racial)

> "Rather, courts widely agree that 'trial judges may evaluate the data offered to support an expert's bottom-line opinions to determine if that data provides adequate support to mark the expert's testimony as reliable.'"[55]

## General Business Cases

**First Circuit**

*In re Neurontin Marketing and Sales Practices Litigation* (1st Cir. 2013)[56] (Tort—Fraudulent Marketing)

> "Admissibility does not turn on a determination by the trial court of 'which of several competing scientific theories has the best provenance,' nor does it turn on convincing the trial court that the proffered expert is correct."[57]

*Keppler v. RBS Citizens N.A.* (D. Mass. 2014)[58] (Tort—Consumer Bank Fraud)

> "However, that is no reason to exclude her testimony. 'Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof [would be] the traditional and appropriate means of attacking'

[51] *Id*. at 193-94, quoting *Pac. Indem. Co. v. Dalla Pola*, 65 F. Supp. 3d 296, 304 (D. Mass. 2014) (quoting *Milward,* 639 F.3d at 22).

[52] 785 F. 3d 895 (4th Cir. 2015).

[53] *Id*. at 936, quoting *Milward*, 639 F.3d at 15.

[54] 778 F.3d 463 (4th Cir. 2015).

[55] *Id*. at 472, quoting *Milward*, 639 F.3d at 15.

[56] 712 F.3d 21 (1st Cir. 2013).

[57] *Id*. at 42, quoting *Milward*, 639 F.3d at 15 (quoting *Ruiz-Troche v. Pepsi Cola of P.R. Bottling Co.*, 161 F.3d 77, 85 (1st Cir. 1998)).

[58] *Keppler v. RBS Citizens N.A.*, Civ. No. 12-10768-FDS (D. Mass. 2014).

Kerr's opinion in those circumstances."[59]

*Pacific Indemnity Co. v. Dalla Pola* (D. Mass. 2014)[60] (Contract—Homeowner Insurance Subrogation)

> "Even assuming, arguendo, that this court were to conclude that 'the factual underpinning of [the] expert's opinion [was] weak,' the challenges by the defendant at most affect 'the weight and credibility of the testimony—a question to be resolved by the jury.'"[61]

> "[…] To the extent Dalla Pola wishes to expose any alleged flaws in Klem's expert analysis, he will have an ample opportunity to do so through cross-examination and the presentation of evidence at trial." (""Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.'"[62]

*Noveletsky v. Metropolitan Life Ins. Co., Inc.* (D. Me. 2014)[63] (Contract—Life Insurance Policy)

> "With regard to the sufficiency of the facts and data in particular, 'trial judges may evaluate the data offered to support an expert's bottom-line opinions to determine if that data provides adequate support.'"[64]

*Mass. Mutual Life Ins. Co. v. DB Structured Products, Inc.* (D. Mass. 2015)[65] (Tort—Securities Fraud & Misrepresentation)

> "The *Daubert* Court identified four factors which might assist a trial court in determining the admissibility of an expert's testimony: (1) whether the theory or technique can be and has been tested; (2) whether the technique has been subject to peer review and publication; (3) the technique's known or potential rate of error; and (4) the level of the theory's or technique's acceptance within the relevant discipline."[66]

> "'These factors, however, 'do not constitute a definitive checklist or test.'"[67] "'Given that 'there are many different kinds of experts, and many different kinds

[59] *Id*., slip op. at 8, quoting *Milward*, 639 F.3d at 15.
[60] *Pacific Indemnity Co. v. Dalla Pola*, 65 F. Supp. 3d 296 (D. Mass. 2014).
[61] *Id*., quoting *Milward*, 639 F.3d at 22.
[62] *Id*., citing and quoting *Milward*, 639 F.3d at 15.
[63] Civil No. 2:12-cv-00021-NT (D. Me. 2014).
[64] *Id*., slip op. at 11, quoting *Milward*, 639 F.3d at 15 (quoting *Ruiz-Troche*, 161 F.3d at 81).
[65] *Mass. Mutual Life Ins. Co. v. DB Structured Products, Inc.*, Civ. No. 11-30039-MGM (D. Mass. 2015).
[66] *Id*., slip op. at 7-8, citing *Milward*, 639 F.3d at 14.
[67] *Id*. at 8, quoting *Milward*, 639 F.3d at 14 (quoting *Kumho Tire Co.*, 526 U.S. at 150).

of expertise,' these factors 'may or may not be pertinent in assessing reliability, depending on the nature of the issue, the expert's particular expertise, and the subject of his testimony.'"[68]

"While expert testimony may be excluded if there is 'too great an analytical gap between the data and the opinion proffered,'[69] '[t]his does not mean that trial courts are empowered 'to determine which of several competing scientific theories has the best provenance.'"[70]

"'*Daubert* does not require that a party who proffers expert testimony carry the burden of proving to the judge that the expert's assessment of the situation is correct.'"[71]

"Rather, '[t]he proponent of the evidence must show only that 'the expert's conclusion has been arrived at in a scientifically sound and methodologically reliable fashion.''"[72]

"As long as an expert's scientific testimony rests upon 'good grounds, based on what is known,'[73] 'it should be tested by the adversarial process, rather than excluded for fear that jurors will not be able to handle the scientific complexities.'"[74]

"[…] First, contrary to Defendants' assertion, Dr. Kilpatrick does provide support for his 31 questions and the weight assigned to each. He points to the USPAP standards, commonly used appraisal forms, and his own knowledge and experience in the field."[75] "('In concluding that the weight of the evidence supported the conclusion that benzene can cause APL, Dr. Smith relied on his knowledge and experience in the field of toxicology and molecular epidemiology and considered five bodies of evidence drawn from the peer-reviewed scientific literature on benzene and leukemia.')."

"[…] Ultimately, the trier of fact will have to make that determination. But it is not a reason to exclude Mr. Butler's opinion."[76]

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[68] *Id*. quoting *Milward*, 639 F.3d at 14 (quoting *Kumho Tire Co.*, 526 U.S. at 150).
[69] *Id*. quoting *Milward*, 639 F.3d at 15 (quoting *Joiner*, 522 U.S. at 146).
[70] *Id.*, quoting *Milward*, 639 F.3d at 15 (quoting *Ruiz-Troche*, 161 F.3d at 85).
[71] *Id*.
[72] *Id*.
[73] *Id*., quoting *Milward*, 639 F.3d at 15 (quoting *Daubert*, 509 U.S. at 590).
[74] *Id*., quoting *Milward*, 639 F.3d at 15.
[75] *Id*. at 10-11, citing *Milward* 639 F.3d at 19.
[76] *Id*. at 13, citing *Milward*, 639 F.3d at 22 (quoting *U.S. v. Vargas*, 471 F.3d 255, 264 (1st Cir. 2006) ("'When the factual underpinning of an expert's opinion is weak, it is a matter affecting the weight and credibility of the testimony—a question to be resolved by the jury.'")).

> "[…] FN [17] Defendants' other arguments for exclusion, namely, the inconsistencies between some of the CAM questions, while no doubt bearing on the persuasiveness, or weight, of the analysis, do not render it inadmissible." ("'(There is an important difference between what is *unreliable* support and what a trier of fact may conclude is insufficient support for an expert's conclusion.'"). (emphasis in original).[77]

*Ferring Pharms., Inc. v. Braintree Labs, Inc.* (D. Mass. 2016)[78] (Tort—False Advertising/Unfair Trade Practices)

> "If expert testimony 'rests upon good grounds, based on what is known, it should be tested by the adversarial process.'"[79]

*Lawes v. Q.B. Construction* (D.P.R. 2016)[80] (Tort—Defective Construction-Related Traffic Management Plan)

> "Courts may exclude theories and conclusions when their sole connections to the data are the expert's own dogmatic statements."[81] ("'conclusions and methodology are not entirely distinct from one another' and 'nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert.')."
>
> "[…] Thus, the categorical assertion that a monitoring plan, which Aronberg admitted did not require nightly inspections under Section 6B of the MUTCD,23 would have detected a midblock crossing problem has little support in light of the random crossing and skirting patterns that the merchant marines testified to." ("'Expert testimony may be excluded if there is 'too great an analytical gap between the data and the opinion proffered.'")[82]
>
> "[…] Traditionally, '[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the . . . appropriate means of attacking shaky but admissible evidence.'"[83]

[77] *Id*. at 15-16, n. 17, citing and quoting *Milward*, 639 F.3d at 22.
[78] *Ferring Pharms., Inc. v. Braintree Labs, Inc.*, 210 F. Supp. 3d 252 (D. Mass. 2016).
[79] *Id*. at 257, quoting *Milward*, 639 F.3d at 15.
[80] *Lawes v. Q.B. Construction*, Civ. No. 12-1473 (DRD) (D.P.R. 2016).
[81] *Id*., slip op. at 23, citing and quoting *Milward*, 639 F.3d at 15.
[82] *Id*. at 29, citing and quoting *Milward*, 639 3d. at 15
[83] *Id*. at 40, quoting *Milward*, 639 F.3d at 15 (quoting *Daubert*).

*Packgen v. Berry Plastics Corporation* (1st Cir. 2017)[84] (Tort—Breach of Implied Warranties/Negligence)

> "'Exactly what is involved in 'reliability'. . . must be tied to the facts of a particular case.'"[85] "'So long as an expert's scientific testimony rests upon good grounds, based on what is known, it should be tested by the adversarial process, rather than excluded for fear that jurors will not be able to handle the scientific complexities.'"[86]

*Iconics, Inc. v. Massaro* (D. Mass. 2017)[87] (Tort—Software Copyright and Trade Secret Infringement)

> "Once it is established that an expert's testimony 'rests upon good grounds based on what is known,' however, I should allow the evidence to be presented to the jury and 'be tested by the adversarial process.'"[88]

> "[…] Ultimately, however, it is the factfinder's role to evaluate the credibility of an expert's testimony, which may include a consideration of the data underlying the testimony." ("'When the factual underpinning of an expert's opinion is weak, it is a matter affecting the weight and credibility of the testimony—a question to be resolved by the jury.'").[89]

> "[…] As discussed above, the strength of the factual underpinning of an expert's opinion is a matter of weight and credibility."[90]

*In re Asacol Antitrust Litigation* (D. Mass. 2017)[91] (Tort—Antitrust)

> "The standard for admissibility is not whether Clark's methodology is the best; only whether it is 'methodologically reliable' and rests on 'good grounds,' which the Court concludes it does."[92]

*In re: Dial Complete Marketing and Sales Practices Litigation* (D.N.H. 2017)[93] (Tort—Consumer Fraud, False and Misrepresentative Marketing)

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[84] Civ. No. No. 16-1348 (1st Cir. 2017).

[85] *Id*., slip op. at 3, quoting *Milward*, 639 F.3d at 14-15 (quoting *Beaudette v. Louisville Ladder, Inc.*, 462 F.3d 22, 25-26 (1st Cir. 2006)).

[86] *Id*. at 3, quoting *Milward*, 639 F.3d at 15 (quoting *Daubert*, 509 U.S. at 590).

[87] 266 F. Supp. 3d 461 (D. Mass. 2017).

[88] *Id*. at 466, citing and quoting *Milward*, 639 F.3d at 15.

[89] *Id*. at 470, citing and quoting *Milward*, 639 F.3d at 22.

[90] *Id*. at 475, citing *Milward*, 639 F.3d at 22.

[91] Civil Action No. 15-cv-12730-DJC (D. Mass. 2017).

[92] *Id*., slip op. at 16, citing and quoting *Milward*, 639 F.3d at 15.

[93] *In re: Dial Complete Marketing and Sales Practices Litigation*, MDL Case No. 11-md-2263-SM (D.N.H. 2017).

"As our court of appeals noted in *Milward v. Acuity Specialty Prod. Grp., Inc.*:

'*Daubert* does not require that a party who proffers expert testimony carry the burden of proving to the judge that the expert's assessment of the situation is correct.'[94] 'The proponent of the evidence must show only that 'the expert's conclusion has been arrived at in a scientifically sound and methodologically reliable fashion.''[95] The object of *Daubert* is 'to make certain that an expert, whether basing testimony on professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.'"[96]
"[…] However, '[t]here is an important difference between what is unreliable support and what a trier of fact may conclude is insufficient support for an expert's conclusion.'"[97]

*Janssen Biotech, Inc. v. Celltrion Healthcare Co., Ltd.* (D. Mass. 2017)[98] (Tort—Patent Infringement)

"The parties shall particularly be prepared to discuss whether Dr. Wurm's test results provide Dr. Butler and him with a reliable basis from which to conclude that the ingredients of the accused powders, in their allegedly equivalent concentrations, perform substantially the same function in the accused powders as they do in the patented invention."[99] […] More specifically, they shall be prepared to address whether Drs. Wurm and Butler employed scientifically sound and methodologically reliable methods in reaching their conclusions that the 29 ingredients that Dr. Wurm added to the claimed powders did not mask[] large differences in Dr. Wurm's comparisons by performing overlapping functions with the 12 allegedly equivalent ingredients."[100]

**Fifth Circuit**

*Gil Ramirez Grp., LLC v. Houston Indep. Sch. Dist.* (S.D. Tex. 2016)[101] (Civil RICO)

"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. … When the factual underpinning of an expert's opinion is weak, it is a matter affecting the weight and credibility of the

[94] *Id*., slip op. at 12, quoting *Milward*, 639 F.3d at 15 (quoting *Ruiz–Troche*, 161 F.3d at 81).
[95] *Id*., quoting *Milward*, 639 F.3d at 15 (citing *United States v. Vargas*, 471 F.3d 255, 265 (1st Cir. 2006)).
[96] *Id*. at 12, quoting *Milward*, 639 F.3d at 15 (quoting *Kumho Tire Co.*, 526 U.S. at 152).
[97] *Id*. at 17, quoting *Milward*, 639 F.3d at 22.
[98] Civil Action No. 15-10698-MLW (D. Mass. 2017).
[99] *Id*., slip op. at 3, n. 1, citing *Milward*, 639 F.3d at 15.
[100] *Id*.
[101] Civ. No. 4:10-CV-04872 (S.D. Tex. 2016).

testimony—a question to be resolved by the jury.'"[102]

**Ninth Circuit**

*Johns v. Bayer Corporation* (S.D. Cal. 2013)[103] (Tort—False and Deceptive Advertising (Class Action))

> "Taking all the evidence into consideration, the Court finds Plaintiffs' arguments go to the weight rather than the admissibility of Dr. Blumberg's testimony." ("'There is an important difference between what is unreliable support and what a trier of fact may conclude is insufficient support for an expert's conclusion.'").[104] […] "Thus, Plaintiffs' request for piecemeal exclusion of selected studies based solely on their allegations that such studies, taken in isolation, are unreliable, is an inappropriate ground for exclusion and exceeds the court's gatekeeping function under Rule 702." […] "('In this, the court overstepped the authorized bounds of its role as gatekeeper.')."[105]

*Townsend v. Monster Beverage Corp.* (C.D. Cal. 2018)[106] (Tort—Antitrust/Anti-competition/Unfair Competition (Class Action))

> "('There is an important difference between what is *unreliable* support and what a trier of fact may conclude is insufficient support for an expert's conclusion.')."[107]

**Tenth Circuit**

*White v. Town of Hurley* (D.N.M. 2019)[108] (Tort—Discrimination (Employment/Age))

> "'[T]he soundness of the factual underpinnings of the expert's analysis and the correctness of the expert's conclusions based on that analysis are factual matters to be determined by the trier of fact.'"[109]

[102] *Id*., slip op. at 6, quoting *Milward*, 639 F.3d at 22.
[103] Civ. No. 09cv1935 AJB (DHB) (S.D. Cal. 2013).
[104] *Id*., slip op. at 20, citing and quoting *Milward*, 639 F.3d at 22.
[105] *Id.*
[106] 303 F. Supp. 3d 1010 (C.D. Cal. 2018).
[107] *Id*, quoting *Milward*, 639 F.3d at 22 (emphasis in original).
[108] Civ. No. 17-0983JB\KRS (D.N.M. 2019).
[109] *Id*., slip op. at 54, n. 54, quoting *Milward*, 639 F.3d at 22 (quoted in David E. Bernstein & Eric G. Lasker, *Defending Daubert: It's Time to Amend Federal Rule of Evidence* 702, 57 WM. & MARY L. REV. 1, 33 (2015)).

## Criminal Cases

### First Circuit

*United States v. Candelario-Santana* (D.P.R. 2013)[110]

> "To the contrary, Dr. Greenspan's testimony before *this* court failed to meet the high standards of scientific reliability and evidence demanded in his field."[111]

*US v. Tavares* (1st Cir. 2016)[112]

> "To say more on this point would be to paint the lily. In the circumstances here, we think that any question about the factual underpinnings of Auclair's opinion goes to its weight, not to its admissibility."[113]

[110] Crim. No. 09-427 (JAF) (D.P.R. 2013).
[111] *Id*., slip at 10-11, citing *Milward*, 639 F.3d at 26 (emphasis in original).
[112] 843 F.3d 1 (1st Cir. 2016).
[113] *Id*., citing *Milward*, 639 F.3d at 22.

# WEIGHT OF THE EVIDENCE:
## A LOWER EXPERT EVIDENCE STANDARD
## METASTASIZES IN FEDERAL COURTS

# APPENDIX B

# TABLE OF CASES

## WORKING PAPER TEXT
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| TABLE OF CASES<br>HONORABLE MENTION<br>TRADITIONAL FEDERAL TORT ACTION AREAS | | | | |
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| | | Lawes v. Q.B. Construction (D.P.R. 2016) | | 1st Circuit |

| | | | | |
|---|---|---|---|---|
| | | Packgen v. Berry Plastics Corporation (1st Cir. 2017) | | 1st Circuit |
| | | Iconics, Inc. v. Massaro (D. Mass. 2017) | | 1st Circuit |
| | | In re Asacol Antitrust Litigation (D. Mass. 2017) | | 1st Circuit |
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| | | Janssen Biotech, Inc. v. Celltrion Healthcare Co., Ltd. (D. Mass. 2017) | | 1st Circuit |
| | | In re Asacol Antitrust Litig. (D. Mass. 2017) | | 1st Circuit |
| | | | United States v. Candelario-Santana (D.P.R. 2013) | 1st Circuit |
| | | | US v. Tavares, (1st Cir. 2016) | 1st Circuit |
| McMunn v. Babcock & Wilcox Power Generation Group, Inc. (W.D. Pa. 2014) | | | | 3rd Circuit |
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| | | Gil Ramirez Grp., LLC v. Houston Indep. Sch. Dist. (S.D. Tex. 2016) | | 5th Circuit |
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| **1 case** | **5 cases** | **17 cases** | **2 cases** | **25 cases** ======= |

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Critical Legal Issues: WORKING PAPER SERIES

# INCONSISTENT GATEKEEPING UNDERCUTS THE CONTINUING PROMISE OF *DAUBERT*

By

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*Hollingsworth LLP*

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# ABOUT THE AUTHORS

**Joe G. Hollingsworth** is a nationally renowned courtroom advocate. He specializes in trials and appeals on behalf of corporate defendants and leads a practice group of eighty-five attorneys at Hollingsworth LLP in Washington, DC. He has conducted more than twenty-five jury trials, and more than one hundred opinions arising from his cases are published in the federal and state reporters. *The National Law Journal* has honored him three times in its annual recognition of the year's Top Ten Defense Wins.

Mr. Hollingsworth and his firm have pioneered and advanced developments in the law critical to corporate tort defendants, including securing four leading U.S. Circuit Court *Daubert* decisions, which have been cited thousands of times and are taught and broadly discussed in legal scholarship. He argued the 6th Circuit's first post-*Daubert* case while *Daubert* itself was still pending before the Supreme Court, and he first published on *Daubert* in 1993. He appears frequently as a lecturer and is consulted by media interests about the importance of sound science in the courtroom.

Mr. Hollingsworth represents major manufacturers in the defense of serial products liability claims involving tens of thousands of litigants and an array of pharmaceutical, medical device, chemical, and consumer products. These matters include MDLs, serial litigations, and mass torts, such as the Roundup® herbicide litigation (Monsanto/Bayer), the Omniscan™ contrast dye litigation (General Electric), and the Zometa®/Aredia® bisphosphonate litigation (Novartis). He has relied on science in the successful defense of atypical tort suits as well, such as the defense of claims brought by thousands of Ecuadorians in connection with the joint U.S-Colombia war-on-drugs initiatives (DynCorp International) and the defense of catastrophic loss following a major train derailment and chlorine release in South Carolina (Norfolk Southern).

Mr. Hollingsworth serves on the Georgetown University Law Center Board of Visitors, the board of Atlantic Legal Foundation, and the board of Chesapeake Legal Alliance (a non-profit using the law to improve the quality of the Chesapeake Bay). He is named annually to *Super Lawyers, Best Lawyers*, and as an AV Preeminent® Lawyer by Martindale-Hubbell™. He is a graduate of the Georgetown University Law Center and DePauw University.

**Mark A. Miller** is a partner at the Washington, D.C. law firm Hollingsworth LLP. Mr. Miller's complex litigation practice emphasizes the defenses of pharmaceutical

 

products, toxic torts, products liability, and environmental claims. He has defended corporate clients in serial mass tort and class action litigation, including both state and federal multidistrict litigation. In 2014, he was part of a trial team that successfully tried a case on remand from one of the most active federal MDLs for a large pharmaceutical company, achieving the first defense verdict in Florida after the jury deliberated for less than 45 minutes following a three week trial. In that same litigation, he has also obtained summary judgment on various grounds including adequacy of the drug's warning, secured *Daubert* rulings excluding plaintiffs' expert testimony, and won a motion to preclude punitive damages under preemption principles.

In the environmental context, Mr. Miller has successfully defended clients in mass toxic tort cases in state and federal courts in which the plaintiffs alleged personal injuries and property damages from exposures to chemicals including PCBs, dioxins, nuclear by-products, lead, arsenic, and TCE. He successfully represented a Fortune 500 public utility in a CERCLA cost recovery mediation against the United States in a "war plants" case. He has represented an aluminum manufacturer in a remediation cost-recovery action, defended a power plant in a citizen suit alleging violations of the PSD and NNSR provisions of the Clean Air Act, represented a pesticide manufacturer in litigation related to a cancellation proceeding under FIFRA, and represented a Fortune 500 chemical manufacturer in a NEPA case concerning genetically-modified alfalfa. Mr. Miller has also advised large chemical companies, manufacturers, public utilities, and other corporations on litigation risk assessment and compliance with statutory and regulatory schemes including CERCLA, the PSD and NNSR provisions of the Clean Air Act, FIFRA, and NEPA.

Mr. Miller's product liability experience includes successfully defending a Fortune 500 automobile parts manufacturer in a federal consumer class action alleging defective product design, false advertising, and consumer fraud by defeating class certification through a preemptive motion to strike the class allegations and obtaining summary judgment on all counts. In addition, he has defended large corporations in the context of serial and multidistrict litigation against personal injury allegations stemming from the use of prescription pharmaceuticals.

 

# INCONSISTENT GATEKEEPING UNDERCUTS THE CONTINUING PROMISE OF *DAUBERT*

More than 25 years have now elapsed since the Supreme Court decided *Daubert v. Merrell-Dow Pharmaceuticals*, 509 U.S. 579 (1993), its seminal decision interpreting Federal Rule of Evidence 702 as a mandate instructing courts to act as gatekeepers to prevent junk science from reaching juries. At the time, *Daubert* was a "revolution in the criteria for the admissibility of scientific testimony" and "evolutionary in scope."[1] Some predicted *Daubert* would "substantially reduce[] the likelihood that the sellers of expert opinion will be able to take control of the process by which their own testimony is admitted."[2]

*Daubert* remains the law in federal (and in the majority of state) courts. But in the time since *Daubert* was first issued, courts have taken different approaches to how it is applied. Some courts have embraced the *Daubert* view of Rule 702, rejecting junk science and forestalling the burden on the judicial system caused by protracted litigation of claims with little if any scientific merit. Other courts interpret *Daubert* in a way that has regressed from the Supreme Court's mandates on gatekeeping. A recent decision from the *In re Roundup Products Liability Litigation* multidistrict litigation ("MDL") highlights an example of the implications when a court, more

[1] William J. Blanton, *Reducing the Value of Plaintiff's Litigation Option in Federal Court: Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 2 GEO. MASON U. L. REV. 159, 159 (1995).

[2] *Id.* at 190.

 

specifically the U.S. Court of Appeals for the Ninth Circuit, lowers the Supreme Court's bar for what is considered admissible scientific evidence.

In *In re Roundup*, the defendant challenged the plaintiffs' experts' specific causation evidence for a variety of reasons, including that the experts failed to rule out idiopathic causes in a differential diagnosis that concluded the defendant's glyphosate product allegedly caused non-Hodgkins lymphoma ("NHL").[3] The experts even admitted there is no scientific way to prove that "NHL presents differently when caused by exposure to glyphosate."[4] The trial court recognized that, "[u]nder a strict interpretation of *Daubert*, perhaps that would be the end of the line for the plaintiffs and their experts (at least without much stronger epidemiological evidence). But in the Ninth Circuit, that is clearly not the case."[5] The court continued that "the Ninth Circuit's recent decisions reflect a view that district courts should typically admit specific causation opinions that lean strongly toward the 'art' side of the spectrum" and the Ninth Circuit's "opinions are impossible to read without concluding that district courts in the Ninth Circuit must be more tolerant of borderline expert opinions than in other circuits."[6] Thus, the trial court was compelled to admit expert evidence

[3] *In re Roundup Prod. Liab. Litig.*, No. 16-MD-02741-VC, 2019 WL 917058, at *2 (N.D. Cal. Feb. 24, 2019).

[4] *Id.*

[5] *Id.* (citing *Wendell v. GlaxoSmithKline LLC*, 858 F.3d 1227, 1233–37 (9th Cir. 2017); *Messick v. Novartis Pharms. Corp.*, 747 F.3d 1193, 1198–99 (9th Cir. 2014)).

[6] *Id.*

 

that, in its view, "barely inched over the line" of the lower admissibility bar for expert testimony in the Ninth Circuit.[7]

## I. *DAUBERT* BACKGROUND

*Daubert* has been the subject of much scholarly writing since it was first announced.[8] To summarize, *Daubert* rejected the "general acceptance" test, established in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). Under *Daubert*, courts now evaluate the scientific reliability of an expert's theory or technique, including whether it (1) can be and has been tested; (2) has been subjected to peer-review and publication; (3) has a known or potential error rate; and (4) has general acceptance within a relevant scientific community. The Supreme Court gave ample further guidance on the application of its evidentiary test in two other cases,[9] and in

[7] *Id.* at *1; *see also In re Roundup Prod. Liab. Litig.*, No. 16-MD-02741-VC, 2018 WL 3368534, at *2 (N.D. Cal. July 10, 2018) (declining to exclude questionable general causation evidence from plaintiffs' experts, because "the case law—particularly Ninth Circuit case law—emphasizes that a trial judge should not exclude an expert opinion merely because he thinks it's shaky, or because he thinks the jury will have cause to question the expert's credibility.").

[8] *See*, *e.g.*, Joe Hollingsworth & Eric Lasker, *Daubert in Toxic Tort Litigation*, https://www.hollingsworthllp.com/uploads/23/doc/media.379.pdf (part 1), https://www.hollingsworthllp.com/uploads/23/doc/media.376.pdf (part 2), and https://www.hollingsworthllp.com/uploads/23/doc/media.777.pdf (part 3); Eric G. Lasker, *It is Time to Amend Federal Rule of Evidence 702*, IADC Civil Justice Response & Toxic & Hazardous Substances Litig. Joint Newsletter (Apr. 2016), https://www.hollingsworthllp.com/uploads/1353/doc/EGL&Bernstein_Time_to_Amend_Fed_Rule_Evidence_702_IADC_Newsletter_April2016.pdf.

[9] *General Electric Co. v. Joiner*, 522 U.S. 136 (1997) (courts may exclude expert testimony when the evidence relied on by the evidence does not support the expert's conclusion); *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999) (the gatekeeping obligation applies to "non-scientific" and "scientific" experts alike).

 

December 2000, the Federal Judicial Conference amended Rule 702 to incorporate *Daubert*'s standards, mandating "a rigorous exercise requiring the trial court to scrutinize, in detail, the expert's basis, methods, and application."[10]

Following *Daubert* and Rule 702's amendment, courts began to exclude "junk science." In a string of cases known as the "Parlodel® Trilogy,"[11] *Daubert* was used to end what would have been massive serial litigation. Parlodel® is an FDA-approved drug that doctors still prescribe today for a variety of uses. But in 1995 the FDA withdrew its approval for the prevention of postpartum lactation based on the conclusion that the possible risks outweighed the drug's utility. Numerous lawsuits followed in which the plaintiffs' experts claimed that Parlodel® caused a narrowing of blood vessels, which can result in stroke, seizures, myocardial infarction, and death. District judges nationwide excluded this expert testimony and instead required affirmative and reliable scientific support for the hypotheses expressed. These decisions closely examined the testimony of the proffered experts, holding, among other things, that reliance on regulatory standards as proof of causation was not sound science and hence inadmissible, and focusing on the importance of

[10] Mem. from Dan Capra, Reporter to Advisory Comm. on Evidence Rules at 47 (Mar. 1, 1999), www.uscourts.gov/sites/default/files/fr_import/EV1999-04.pdf.

[11] The Parlodel® Trilogy, cited more than 2,500 times in cases, articles and other court documents, consists of *Glastetter v. Novartis Pharmaceuticals Corp.*, 252 F.3d 986 (8th Cir. 2001), *Hollander v. Sandoz Pharmaceutical Corp.*, 289 F.3d 1193 (10th Cir. 2002), and *Rider v. Sandoz Pharmaceutical Corp.*, 295 F.3d 1194 (11th Cir. 2002).

 

epidemiology.[12]

*Daubert* continues to be an important tool in challenging questionable expert evidence, at least in some courts, and the decision in *In re Mirena IUD Prod. Liab. Litig.*, 169 F. Supp. 3d 396 (S.D.N.Y. 2016), is such an outcome. *In re Mirena* was a products liability MDL litigation filed against the manufacturers of intrauterine devices ("IUDs") alleging that, after implantation, the IUDs caused patients to develop uterine perforation. The defendants moved to exclude the plaintiffs' general causation experts under *Daubert*, and the court granted the motion. The court held that the plaintiffs' experts, among other things, (1) were first given the preferred conclusion by the plaintiffs' lawyers, and worked backwards to find support for that conclusion, a process lacking any scientific methodology; (2) reached speculative conclusions from studies exceeding the limitations the study authors placed on the studies; and (3) relied upon admittedly flawed studies without explaining how those studies could be used to support the experts' opinions.[13] The plaintiffs' lack of reliable general causation evidence, "doom[ed] hundreds of cases," and the court then granted the

[12] *Glastetter* held that regulatory decisions are based on lesser, prophylactic causation standards than required in courts, 252 F.3d at 991, and differential diagnoses are flawed if they fail to rule out other known potential causes, *id.* at 989–91. *Rider* held that epidemiological evidence is highly persuasive to causation questions, 295 F.3d at 1198, and causation evidence for one drug in a class is not evidence of causation for another drug, *id.* at 1201–02. *Hollander* opined that merely criticizing another expert's scientific evidence does not meet the burden to show reliability. 289 F.3d at 1213.

[13] 169 F.3d at 429–34.

 

defendants summary judgment, ending the MDL.[14]

There are more examples of courts exercising proper gatekeeping duties as well. In 2018, the Eleventh Circuit affirmed the exclusion of the plaintiff's general causation expert in the bisphosphonate litigation, finding that he had no epidemiological evidence regarding the drug at issue but instead improperly relied on evidence pertaining to the drug class to extrapolate causation.[15] The Fourth Circuit also has continued to apply *Daubert* strictly to causation evidence. In affirming an MDL-ending summary judgment motion, the court held in 2018 that "[t]o hand to the jury the [expert] evidence here and ask it to reach a conclusion as to causation with any amount of certainty would be farcical and would likely result in a verdict steeped in speculation."[16] Other recent decisions have also excluded unreliable science and noted the continued importance of a court's gatekeeper role.[17]

## II. THE REGRESSION OF *DAUBERT*'S PRINCIPLES

Ninth Circuit courts are unfortunately not the only federal courts that do not meet the standard the Supreme Court set for admission of expert evidence in

[14] *In re Mirena IUD Prod. Liab. Litig.*, 202 F. Supp. 3d 304, 328 (S.D.N.Y. 2016), *aff'd*, 713 F. App'x 11 (2d Cir. 2017).

[15] *Jones v. Novartis Pharms. Corp.*, 720 F. App'x 1006, 1008 (11th Cir. 2018).

[16] *In re Lipitor Mktg., Sales Practices & Prod. Liab. Litig. (No II) MDL 2502*, 892 F.3d 624, 647 (4th Cir. 2018).

[17] *See, e.g.*, *Glenn v. B & R Plastics, Inc.*, No. 1:16-CV-00508-MWB, 2018 WL 3448212, at *9 (D. Idaho July 16, 2018) (courts have an "active role as a gatekeeper to prevent[ ] shoddy expert testimony and junk science from reaching the jury" (quotations omitted; alteration in original)).

 

*Daubert*. In *Canary v. Medtronic, Inc.*, No. 16-11742, 2018 WL 5921327 (E.D. Mich. Nov. 13, 2018), the plaintiff alleged that she suffered severe allergic reactions after being implanted with the defendant's spinal cord stimulator. The plaintiff did not retain any general or specific causation experts, and instead chose to rely on the causation opinion of her treating physician.[18] The physician testified that it was possible and plausible that the implant could have caused the allergic reaction, but did not otherwise conduct a differential diagnosis or testify to a reasonable degree of medical certainty.[19] The court allowed the physician's testimony, and did not consider the defendant's *Daubert* challenge because, in the Sixth Circuit, the "general rule . . . is that 'a treating physician may provide expert testimony regarding a patient's illness, the appropriate diagnosis for that illness, and the cause of that illness.'"[20] While true that a treating physician is permitted to opine on causation, "a treating physician's testimony remains subject to the requirement set forth in *Daubert* that an expert's opinion testimony must have a reliable basis in the knowledge and experience of his discipline."[21] Had the *Canary* court conducted a proper *Daubert* analysis, it should

[18] 2018 WL 5921327, at *2.

[19] *Id.* at *2–3.

[20] *Id.* at *5 (quoting *Gass v. Marriott Hotel Servs., Inc.*, 558 F.3d 419, 426 (6th Cir. 2009)).

[21] *In re Aredia & Zometa Prod. Liab. Litig.*, No. 3:06-MD-1760, 2009 WL 2496921, at *1 (M.D. Tenn. Aug. 13, 2009) (citing *Gass*, 558 F.3d at 426).

 

have excluded the treating physician's expert testimony, because, at the very least, it was not stated to a reasonable degree of medical certainty.[22]

The decision in *In re Abilify (Aripiprazole) Products Liability Litigation*, 299 F. Supp. 3d 1291 (N.D. Fla. 2018), is another instance of a court ignoring the Supreme Court's *Daubert* gatekeeping mandate. In this MDL litigation, the plaintiffs allege that the defendant's atypical antipsychotic drug caused them to develop "impulsive and irrepressible urges to engage in certain harmful behaviors, including impulsive gambling, eating, shopping, and sex."[23] The defendants challenged the opinions of the plaintiffs' general causation experts because, among other things, the experts "failed to provide *reliable* scientific evidence demonstrating a statistically significant association between Abilify and impulsive behaviors," but the court nonetheless admitted the evidence.[24]

The court's analysis began by identifying the types of general causation evidence typically deemed valid under Eleventh Circuit precedent: "epidemiological studies, dose-response relationship, and background risk of disease."[25] The plaintiffs

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[22] *See id.* at *3–4 ("Plaintiff has not carried her burden of showing that [the treating physician] is qualified to offer expert causation testimony," because he could not testify to a reasonable degree of medical certainty that the defendant's medications caused the alleged injury).

[23] *In re Abilify (Aripiprazole) Products Liability Litigation*, 299 F. Supp. 3d 1291, 1300 (N.D. Fla. 2018).

[24] *Id.* at 1304 (emphasis in original).

[25] *Id.* at 1306 (citing *Chapman v. Procter & Gamble Distributing, LLC*, 766 F.3d 1296, 1308 (11th Cir. 2014)).

 

did not have—as the court should have determined—valid epidemiological evidence, because the "epidemiological" study the experts relied upon was prepared by an ophthalmologist who had contacted plaintiffs' counsel for their input *before* he developed the research protocol for his study and considered as "adverse events" conditions the drug was designed to treat. The ophthalmologist further failed to obtain the study patients' medical records to determine how much of the defendant's drug they ingested, if any.[26]

The court allowed the plaintiffs to rely on such questionable evidence under a "weight of the evidence" approach.[27] While the court cited the Supreme Court's *Joiner* opinion,[28] had the court faithfully applied *Joiner* and *Daubert*, it would have come to a different conclusion. In *Joiner*, the Supreme Court affirmed a trial court opinion rejecting a "weight of the evidence" analysis as scientifically unacceptable. Like the experts in *In re Abilify*, the plaintiffs' expert in *Joiner* could not show "that any one study provided adequate support for their conclusions."[29] Instead, the plaintiffs' "weight of the evidence" was based upon the "substantial judgment on the part of the expert."[30] While exercising "substantial judgment" may be appropriate for a scientist

[26] *Id.* at 1317–25.

[27] *Id.* at 1311–12.

[28] *See, e.g.*, *id.* at 1310.

[29] 522 U.S. at 152–53.

[30] *In re Abilify (Aripiprazole) Prod. Liab. Litig.*, 299 F. Supp. 3d at 1311.

 

postulating new theories or a regulatory agency setting exposure limits, establishing legal causation requires more.[31]

Certain courts have also taken a more relaxed view on the importance of statistical significance. Statistical significance eliminates chance results by measuring how likely it is that repeated data sets of similar size would yield similar outcomes. Statistical significance is inherent in the "known or potential rate of error" *Daubert* factor, and *Joiner* held that, without it, a "court may conclude that there is simply too great an analytical gap between the data and the opinion proffered."[32] In 2017, however, the Third Circuit refused to establish a bright-line rule requiring statistical significance to prove causation in an MDL alleging that a prescription antidepressant caused birth defects.[33] The plaintiffs' experts did not rely upon statistically significant studies showing a causal association. Despite *Joiner*, the Third Circuit viewed statistical significance as not required in the *Daubert* reliability analysis and indicated that causation can be proven through a variety of means, including "weight of the evidence" (rejected in *Joiner*), the "Bradford Hill criteria," or a "differential diagnosis."[34] The court's *Daubert* inquiry thus focused not on the reliability of the

[31] *See, e.g.*, *Glastetter*, 252 F.3d at 991 (regulatory decisions are based on lesser, prophylactic causation standards than required in courts).

[32] 522 U.S. at 145–46.

[33] *In re Zoloft Prods. Liab. Litig.*, 858 F.3d 787 (3d Cir. 2017).

[34] *Id.* at 795.

 

expert's opinion, but rather on whether the expert consistently applied the methodology he chose. Ultimately the court excluded the expert's methods as inconsistently applied under any of these approaches, but the opinion provides ways in which otherwise questionable expert evidence could be admitted despite the mandates in *Daubert* and its progeny.

Courts even have split on whether it is permissible under *Daubert* for an expert to rely on favorable data while ignoring contrary data, a process called "cherry-picking," even though the need for exclusion of such testimony should be obvious.[35] There are numerous other recent opinions highlighting how some courts and appellate circuits have not strictly applied *Daubert*, in favor of letting a jury decide whether an expert's testimony is credible.[36]

The Ninth Circuit provides the best illustration of the departure from *Daubert*'s gatekeeping requirements, constraining the courts within the Circuit on what evidence can be excluded. In *In re Roundup*, Ninth Circuit precedent compelled the trial court was required to admit a differential diagnosis that failed to rule out

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[35] *Compare, e.g.*, *In re Lipitor (Atorvastatin Calcium) Mktg., Sales Practices & Prod. Liab. Litig. (No II) MDL 2502*, 892 F.3d 624, 634 (4th Cir. 2018) ("Result-driven analysis, or *cherry-picking, undermines principles of the scientific method* and is a quintessential example of applying methodologies (valid or otherwise) in an unreliable fashion." (emphasis added)), *with, e.g.*, *Kim v. Crocs, Inc.*, No. CV 16-00460 JAO-KJM, 2019 WL 923879, at *8 (D. Haw. Feb. 25, 2019) ("any questions about the weight of this [expert] opinion [based on cherry-picked data] should be resolved by a jury").

[36] *E.g.*, *Adams v. Toyota Motor Corp.*, 867 F.3d 903, 916 (8th Cir. 2017) (affirming admission of expert testimony, reiterating the flexibility of the *Daubert* inquiry and emphasizing that defendant's concerns could all be addressed with "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof").

 

idiopathic causes of the alleged NHL.[37] In other words, the expert was permitted to say the defendant's product caused the injury, even though the expert could not exclude the fact that some people get cancer and there is no known cause of their cancer. The *In re Roundup* court had to admit this evidence because of Ninth Circuit precedent allowing "shaky" expert testimony that falls on the "'art' side of the spectrum."[38] In other circuits more closely following *Daubert*, an expert's failure to rule-out idiopathic causes in rendering a specific causation opinion would require the exclusion of that opinion.[39]

## III. POTENTIAL SOLUTIONS TO BRING BACK STRICTER *DAUBERT* ANALYSES

Several reasons may explain the growing split within the federal judiciary's approach to *Daubert* and Rule 702. Less rigorous *Daubert* opinions could be the result of an improper understanding of the gatekeeping function. To that extent, the issue can be rectified through better advocacy. Defendants favoring sound science in the courtroom should encourage counsel to take the time to learn the science, to develop

[37] *In re Roundup Prod. Liab. Litig.*, 2019 WL 917058, at *2.

[38] *Id.*; *In re Roundup Prod. Liab. Litig.*, 2018 WL 3368534, at *2 ("the case law—particularly Ninth Circuit case law—emphasizes that a trial judge should not exclude an expert opinion merely because he thinks it's shaky . . . .").

[39] *Hall v. ConocoPhillips*, 248 F. Supp. 3d 1177, 1190–91 (W.D. Okla. 2017) (Excluding specific causation opinion, because the expert "did not consider 'idiopathic causes [for plaintiff's AML], additionally rendering his differential diagnosis unreliable. Although idiopathic or de novo is not a cause, per se, courts have repeatedly faulted experts for their failure to consider idiopathic or unknown causes for diseases when rendering their differential diagnoses." (citing *Milward v. Rust–Oleum Corp.*, 820 F.3d 469, 475–76 (1st Cir. 2016); *Chapman v. Procter & Gamble Distrib., LLC*, 766 F.3d 1296, 1311 (11th Cir. 2014))), *aff'd sub nom. Hall v. Conoco Inc.*, 886 F.3d 1308 (10th Cir. 2018).

 

a detailed record exposing an expert's methodological flaws, and then to educate the judge about what a proper *Daubert* analysis entails.

Less strict views on *Daubert* may also reflect philosophical leanings against gatekeeping. If so, advocating not just in courts, but in a jurisdiction's legislative arena may be required. There are current discussions on amending Rule 702 to clarify the courts' obligations when conducting *Daubert* inquiries.[40] The Advisory Committee on the Federal Rules of Evidence can consider amendments to make clear how courts should conduct the required assessment of reliability, instead of courts viewing disputes over expert testimony as a question of weight rather than admissibility.[41]

Altering *Daubert* views at the state level may be more complicated. Progress has occurred, with a number of state legislatures adopting *Daubert*'s standards. *Daubert* has been adopted to varying degrees by 43 of the states, most recently by the District of Columbia in October 2016, Missouri in March 2017, New Jersey (to a degree) in August 2018, and Florida on May 23, 2019 following several battles between the state's legislature and supreme court.[42] Some of the remaining *Frye*

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[40] *See* Lasker, *supra* n.3, *It is Time to Amend Federal Rule of Evidence 702*. Perhaps the more difficult question is why, at the federal level, amending Rule 702 is necessary. The existing Rule incorporates *Daubert*'s standards, as it has for almost 20 years. Pursuant to Federal Rule of Evidence 101, federal courts are supposed to follow that rule as well as the decisions of the Supreme Court interpreting the Rules of Evidence. As discussed above, however, that is not always the case.

[41] *See, e.g.*, *Liquid Dynamics Corp. v. Vaughan Corp.*, 449 F.3d 1209, 1221 (Fed. Cir. 2006) ("The identification of such flaws in generally reliable scientific evidence is precisely the role of cross-examination." (quotations omitted)).

[42] *See In re Amendments to Fla. Evidence Code*, No. SC19-107, 2019 WL 2219714, at *3 (Fla.

 

states, which have a historically "liberal" bent like California, may not be receptive to *Daubert*, which critics may view as part of the "conservative" agenda.

Sound science is neither conservative nor liberal. Advocates of *Daubert* and the admissibility of appropriate scientific evidence should thus continue to pursue requirements for such evidence in the appropriate legislative or judicial arenas.

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May 23, 2019) ("in accordance with this Court's exclusive rule-making authority and longstanding practice of adopting provisions of the Florida Evidence Code as they are enacted or amended by the Legislature, we adopt the [*Daubert*] amendments"); *In re Accutane Litig.*, 234 N.J. 340, 399 (2018) ("In adopting use of the *Daubert* factors, we stop short of declaring ourselves a '*Daubert* jurisdiction.' Like several other states, we find the factors useful, but hesitate to embrace the full body of *Daubert* case law as applied by state and federal courts."); Michael Morgenstern, *Daubert v. Frye – A State-by-State Comparison*, The Expert Inst. (Apr. 3, 2017), https://www.theexpertinstitute.com/daubert-v-frye-a-state-by-state-comparison/.

 

**Washington Legal Foundation**
2009 Massachusetts Avenue, NW
Washington, DC 20036

May 6, 2020

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

Re: Amending Federal Rule of Evidence 702 to Clarify Courts' "Gatekeeping" Obligation

Dear Ms. Womeldorf:

Washington Legal Foundation (WLF) writes to share with you a just-published WLF Legal Studies Division publication that is relevant to the work of the Advisory Committee on Evidence Rules.

*Gatekeeping Reorientation: A Rule 702 Amendment Can Correct Judicial Misunderstandings about Expert Evidence* was written for WLF by Lee Mickus of Evans Fears & Schuttert LLP. The paper provides examples of court decisions in which the presiding judge or panel of judges misapplied Rule 702 in such a way that the decision reversed the burden of proof or allowed the jury to weigh the reliability and relevance of the expert evidence, a task that Rule 702 clearly assigns to the court. Mr. Mickus concludes that judicial intervention, in the form of circuit-court rulings or a U.S. Supreme Court decision, is unlikely, leaving the task of clarifying the requirements of Rule 702 in the hands of the Advisory Committee.

We encourage the Advisory Committee on Evidence Rules to take the information and analysis in this educational paper into consideration when weighing whether to formally amend Rule 702.

Thank you for your consideration.

Sincerely,

Glenn G. Lammi
Chief Counsel, Legal Studies Division

Attachment

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Critical Legal Issues: WORKING PAPER SERIES

# GATEKEEPING REORIENTATION:
## AMEND RULE 702 TO CORRECT JUDICIAL MISUNDERSTANDING ABOUT EXPERT EVIDENCE

By

**Lee Mickus**
*Evans Fears & Schuttert LLP*

**Washington Legal Foundation**
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## ABOUT THE AUTHOR

**Lee Mickus** is a Partner in the Denver, CO office of Evans Fears & Schuttert LLP. He defends manufacturers and other business interests nationally in product liability and tort lawsuits. He has successfully tried cases to juries in jurisdictions across the country. Mr. Mickus works with a wide range of products and industries, including automobiles, pharmaceuticals, medical devices and recreational equipment. In his practice, Mr. Mickus often develops strategies for addressing expert testimony, including challenging the admissibility of expert opinions that fall short of the Rule 702 standard. Mr. Mickus is also active in rulemaking and legislative reform efforts. He has given presentations and submitted comments to the Advisory Committee on Civil Rules and has testified before several state legislatures on bills affecting a wide range of civil justice issues.

 

# GATEKEEPING REORIENTATION:
## A RULE 702 AMENDMENT CAN CORRECT JUDICIAL MISUNDERSTANDINGS ABOUT EXPERT EVIDENCE

Federal Rule of Evidence 702 needs attention. The language of the rule articulates courts' gatekeeping responsibilities and the extensive Committee Note explains the rule's elements and proper application, but courts nonetheless fail to carry out Rule 702's requirements.[1] Some courts discard the burden of production that Rule 702 places on an expert's proponent in favor of a "presumption of admissibility"[2] or an understanding that exclusion is "the exception rather than the rule."[3] Despite Rule 702's direction that the judge must determine if an expert's factual basis and application of methodology are reliable, some courts see such

[1] *See* Memorandum from Daniel J. Capra, Reporter, Advisory Comm. on Evidence Rules, to Advisory Comm. on Evidence Rules, *Forensic Evidence, Daubert and Rule 702* (Apr. 1, 2018) at 50 *in* ADVISORY COMMITTEE ON EVIDENCE RULES APRIL 2018 AGENDA BOOK 49 (2018), https://www.uscourts.gov/rules-policies/archives/agenda-books/advisory-committee-rules-evidence-april-2018:

> It does not appear to be a matter of vague language. The wayward courts simply don't follow the rule. They have a different, less stringent view of the gatekeeper function.

[2] *See*, *e.g.*, *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.").

[3] *See*, *e.g.*, *Wright v. Stern*, 450 F. Supp. 2d 335, 359–60 (S.D.N.Y. 2006)("Rejection of expert testimony, however, is still 'the exception rather than the rule,' Fed.R.Evid. 702 advisory committee's note (2000 Amendments)[.] . . . Thus, in a close case the testimony should be allowed for the jury's consideration.")(quotation omitted).

 

questions addressing merely the weight and not the admissibility of opinion testimony.[4] Some courts even go so far as to state that the Rule 702 gatekeeping responsibility exists to achieve a mission of only minimal significance:

- "The aim is to exclude expert testimony based merely on subjective belief or unsupported speculation."[5]
- "[T]he gatekeeping function is meant to 'screen the jury from unreliable nonsense opinions[.]'"[6]
- "Ultimately, a trial judge should exclude expert testimony if it is speculative or conjectural or based on assumptions that are so unrealistic and contradictory as to suggest bad faith or to be in essence an apples and oranges comparison."[7]
- "The expert's opinion thus should be excluded only when it is so fundamentally unreliable that it can offer no assistance to the jury."[8]

Rule 702 would hardly be necessary if it were intended to preclude only such deeply flawed and problematic testimony as these courts describe.

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[4] *See*, *e.g.*, *Alvarez v. State Farm Lloyds*, No. SA-18-CV-01191-XR, 2020 WL 734482, at *3 (W.D. Tex. Feb. 13, 2020)("To the extent State Farm wishes to attack the 'bases and sources' of Dr. Hall's opinion, such questions affect the weight to be assigned to that opinion rather than its admissibility and should also be left for the jury's consideration.")(quotation omitted).

[5] *Imperial Trading Co. v. Travelers Prop. Cas. Co. of Am.*, No. CIV.A. 06-4262, 2009 WL 2356292, at *2 (E.D. La. July 28, 2009).

[6] *In re Viagra (Sildenafil Citrate) and Cialis (Tadalafil) Products Liability Litigation*, 424 F. Supp. 3d 781, 790 (N.D. Cal. 2020)(quoting *Alaska Rent-A-Car, Inc. v. Avis Budget Group, Inc.*, 738 F.3d 960, 969 (9th Cir. 2013)).

[7] *Hulett v. City of Syracuse*, 253 F. Supp. 3d 462, 507 (N.D.N.Y. 2017)(quotations omitted). *See also Berman v. Mobil Shipping & Trans. Co*., No. 14 CIV. 10025 (GBD), 2019 WL 1510941, at *9 (S.D.N.Y. Mar. 27, 2019)(similar statement).

[8] *Paul Beverage Co. v. American Bottling Co*., No. 4:17CV2672 JCH, 2019 WL 1044057, at *2 (E.D. Mo. Mar. 5, 2019). *See also Sandoe v. Boston Sci. Corp.*, 333 F.R.D. 4, 10 (D. Mass. 2019)("Expert testimony should be excluded only if it is so 'fundamentally unsupported that it can offer no assistance to the jury.'")(quotation omitted).

 

The 2000 amendments to Rule 702 sought to establish a uniform approach to scrutinizing the admissibility of proffered opinion testimony: "The trial judge in *all* cases of proffered expert testimony *must find* that it is properly grounded, well-reasoned, and not speculative *before* it can be admitted."[9] This critical goal of uniformity has gotten lost, and now courts operating in different circuits apply quite divergent standards. As one court recently recognized, for example, district judges in the Ninth Circuit "must account for the fact that a wider range of expert opinions (arguably much wider) will be admissible in this circuit."[10]

This WORKING PAPER will address how Rule 702 was intended to function, the misunderstandings courts have embraced that produce striking departures from this intent, and available avenues for clarifying the rule's requirements to restore substance and consistency to court applications of Rule 702. Section I discusses the Advisory Committee's proceedings in the period leading up to adoption of the 2000 amendments to Rule 702 and its recent activities considering possible amendments. Review of the Advisory Committee's work reveals that Rule 702 was intended to incorporate three key elements: (1) rigorous judicial scrutiny of the expert's methodology, factual basis, and application to the issues of the case undertaken before determining that the opinion testimony may be admitted; (2) a burden of

[9] Advisory Committee Note to 2000 Amendments to Rule 702 (emphasis added).

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

 

production placed on the sponsor to establish admissibility of the opinion testimony; and (3) uniformity of approach in analyzing the admissibility of opinion testimony.[11]

Considering the intent motivating the 2000 amendment, Section II reviews current court practices to find that failures to comprehend Rule 702 have effectively re-written the rule in ways that significantly change the nature and rigor of the gatekeeping function. First, courts rely on outcome-oriented characterizations of the admissibility standard. These conceptions tilt the admissibility analysis and displace the sponsor's burden of establishing by a preponderance of the evidence that the opinion testimony is admissible. Also, courts misunderstand the rule's requirement that the court must assess an expert's factual basis and application of the methodology to the issues at hand. Instead, they hold that the rule makes those steps pertinent only to the weight of the opinion testimony which the jury alone must determine. Courts that include these common missteps in their admissibility analysis simply fail to understand the requirements of Rule 702.

With these patterns of Rule 702 departures in mind, Section III examines the need for reform to clarify its requirements in order to address these recognized

[11] The full name of the "Advisory Committee" is the Judicial Conference Advisory Committee on Evidence Rules. Its agenda books contain minutes of previous meetings, as well as memoranda prepared by the Reporter on topics of concern and other references and materials considered by the members. Additionally, the Advisory Committee has conducted conferences and symposia to address questions and issues about current practice and contemplated amendments. These materials provide considerable insight regarding the intent of Rule 702 and the extent to which courts have departed from the course charted by the Advisory Committee.

 

deviations from Rule 702 as the Advisory Committee intended the rule to be applied. The WORKING PAPER concludes that rulemaking is needed to overcome the influence of previous court mischaracterizations and ongoing misapprehensions of the expert admissibility standard.

## I. THE ADVISORY COMMITTEE INTENDED RULE 702 TO ESTABLISH A UNIFORM STANDARD COURTS WOULD USE TO SCRUTINIZE AN EXPERT'S BASIS, METHODOLOGY, AND APPLICATION

The Advisory Committee intended Rule 702 in its current form to bring a consistent thoroughness to courts' assessment of opinion testimony. The Supreme Court's 1993 ruling in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[12] had produced waves of disruption among the lower courts. Courts were initially unclear if the gatekeeping function applied broadly to all opinion testimony, or only to the narrow category of experts offering opinions about "scientific" knowledge.[13] More fundamentally, they disagreed about the depth of analysis that a court must undertake before concluding that opinion testimony could be admitted.[14]

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[12] 509 U.S. 579 (1993).

[13] The Supreme Court in *Kumho Tire Co. v. Carmichael* resolved this issue, recognizing the incompatibility of decisions finding that *Daubert* does not reach "technical" or "other specialized" knowledge, such as *Compton v. Subaru of America, Inc.,* 82 F.3d 1513, 1518–19 (10th Cir.), *cert. denied*, 519 U.S. 1042 (1996), with cases holding that *Daubert* applies broadly to all expert testimony, as held by *Watkins v. Telsmith, Inc.,* 121 F.3d 984, 990–91 (5th Cir. 1997). *See Kumho Tire*, 526 U.S. 137, 147 (1999).

[14] *See* Draft Minutes of the Meeting of April 12-13, 1999, Advisory Comm. on Evidence Rules at 6, *in* ADVISORY COMMITTEE ON EVIDENCE RULES OCTOBER 1999 AGENDA BOOK 10 (1999), https://www.uscourts.gov/rules-policies/archives/agenda-books/advisory-committee-rules-evidence-october-1999 ("[T]here are a number of *Daubert* questions on which the courts disagree, including

 

The Advisory Committee on Evidence Rules recognized that courts had widely differing perspectives on *Daubert*'s requirements:

> Some courts approach *Daubert* as a rigorous exercise requiring the trial court to scrutinize in detail the expert's basis, methods, and application. Other courts hold that *Daubert* requires only that the trial court assure itself that the expert's opinion is something more than unfounded speculation.[15]

Confronting this cacophony, the Advisory Committee sought to reform Rule 702 so that it would both provide "a uniform structure for assessing expert testimony"[16] and establish a standard mandating courts to assess, as a matter of admissibility, opinion testimony's factual foundation, methodological underpinnings, and application to the issues in dispute.[17]

The Advisory Committee started from the position that the analytical

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the appropriate standard of proof and the rigor with which expert testimony should be scrutinized."). *See also* May 1, 1998 Report of the Advisory Committee on Evidence Rules, *in* Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure and Evidence: Request for Comment, 181 F.R.D. 18, 132 (1998)(indicating that the proposed amendment to Rule 702 "attempts to address the conflict in the courts about the meaning of *Daubert*.").

[15] Hon. Fern M. Smith, Report of the Advisory Committee on Evidence Rules (May 1, 1999) at 7, *in* ADVISORY COMMITTEE ON EVIDENCE RULES OCTOBER 1999 AGENDA BOOK 52 (1999), https://www.uscourts.gov/rules-policies/archives/agenda-books/advisory-committee-rules-evidence-october-1999.

[16] Apr. 1, 2018 Memorandum from Daniel J. Capra, Reporter, *supra* n.1, at 44 n.6.

[17] *See* May 1, 1998 Report of the Advisory Committee on Evidence Rules, *supra* n. 14, 181 F.R.D. at 131 ("The proposed amendment specifically extends the trial court's *Daubert* gatekeeping function to all expert testimony; requires a showing of reliable methodology and sufficient basis; and provides that the expert's methodology must be applied properly to the facts of the case.").

 

framework set forth by the U.S. Supreme Court should define the standard.[18] The complexity of the *Daubert* holding, however, posed difficulties for rulemaking. The Advisory Committee's Reporter, Professor Daniel J. Capra, has colorfully observed that the *Daubert* ruling can be seen as "a schizophrenic opinion."[19] On the one hand, *Daubert* directs trial courts to evaluate proffered expert opinions to ensure that they arise from a reliable methodology that is properly applied to the facts at issue.[20] On the other hand, the opinion stresses the value of cross-examination and the

[18] The Advisory Committee understood that it was empowered to alter the admissibility standard, but determined that it should not change from the direction taken in *Daubert* and clarified by the *Kumho Tire* ruling:

> Judge Shadur opened the discussion on Rule 702 by noting that in deciding how to amend the Rule, the Committee was not technically bound by the Supreme Court's interpretation of the existing Rule 702 in *Daubert* and in the recent case of *Kumho Tire v. Carmichael*. However, all members of the Committee were in agreement that the approach taken by the Supreme Court – an approach that is followed in the proposal issued for public comment – provided an excellent and definitive means of regulating unreliable expert testimony. There was unanimous agreement that if the Rule is to be amended, it should stick as closely as possible to the Supreme Court's teachings in *Daubert* and *Kumho*.

Draft Minutes of the Meeting of April 12-13, 1999, Advisory Comm. on Evidence Rules, *supra* n. 14, at 2.

[19] Daniel J. Capra, *Symposium on Forensic Expert Testimony,* Daubert*, and Rule 702*, 86 FORDHAM L. REV. 1463, 1528 (2018). *See also United States v. McCluskey*, 954 F. Supp. 2d 1224, 1254 (D.N.M. 2013)(observing that "the extent of the trial judge's gatekeeping function" is '[p]erhaps *Daubert's* most serious ambiguity.'")(quoting 29 Charles Alan Wright & Victor James Gold, *Federal Practice and Procedure* § 6266, at 287 (1997 & Supp.2012)).

[20] *See Daubert*, 509 at 592-93 (indicating that trial judges must make "a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue.").

 

adversarial process to drive the appropriate outcome of a trial.[21]

The key to reconciling these divergent strands of the *Daubert* holding is the recognition that cross-examination simply is not capable of safeguarding the trial process against the misleading influence of unreliable expert testimony.[22] Because the foundations of expert testimony lay beyond the experience and instincts of jurors, courts cannot expect them to recognize when opinions are formed from flawed methodological analysis or inadequate facts.[23] Accordingly, the judge must protect the integrity of trials by policing opinion testimony to ensure that unreliable analyses do not reach the jury. The Advisory Committee sought to produce a rule that

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[21] *Id*. at 596 ("Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.").

[22] *See* Minutes of the Meeting of May 3, 2019, Advisory Comm. on Evidence Rules at 23, *in* ADVISORY COMMITTEE ON EVIDENCE RULES OCTOBER 2019 AGENDA BOOK 73 (2019), https://www.uscourts.gov/rules-policies/archives/agenda-books/advisory-committee-rules-evidence-october-2019**:**

> The key to *Daubert* is that cross-examination alone is ineffective in revealing nuanced defects in expert opinion testimony and that the trial judge must act as a gatekeeper to ensure that unreliable opinions don't get to the jury in the first place.

[23] *See* Memorandum from Daniel J. Capra, Reporter, Advisory Comm. on Evidence Rules, to Advisory Comm. on Evidence Rules, *Possible Amendment to Rule 702* (Oct. 1, 2019) at 11 *in* ADVISORY COMMITTEE ON EVIDENCE RULES OCTOBER 2019 AGENDA BOOK 131 (2019), https://www.uscourts.gov/rules-policies/archives/agenda-books/advisory-committee-rules-evidence-october-2019:

> The premise [in *Daubert*] is that cross-examination cannot undo the damage that has been done by the expert who has power over the jury. This is because, for the very reason that an expert is needed (because lay jurors need assistance) the jury may well be unable to figure out whether the expert is providing real information or junk.

 

remained true to the expert admissibility standard the Supreme Court had articulated, and so it incorporated this distillation of the *Daubert* holding into Rule 702.[24]

The Advisory Committee understood that the expert admissibility standard it set forth in amended Rule 702 "clearly envision[s] a more rigorous and structured approach than some courts are currently employing."[25] Displacing softer interpretations of the admissibility standard that depend on jurors to identify and reject unreliable opinion testimony was an intended result of amending Rule 702, as the Advisory Committee sought to produce "uniformity in the *approach* to *Daubert* questions."[26] The pre-amendment perspectives and practices of some courts would therefore need to change in order to meet the directives of amended Rule 702.

The Advisory Committee used the Committee Note as well as the language of the rule itself to convey to courts that they must scrutinize expert opinions in a manner consistent with the amended rule's scope before allowing presentation of the

[24] Draft Minutes of the Meeting of April 12-13, 1999, Advisory Comm. on Evidence Rules, *supra* n. 14, at 2. ("There was unanimous agreement that [the amendment to Rule 702] should stick as closely as possible to the Supreme Court's teachings in *Daubert* and *Kumho*."). *See also* Apr. 1, 2018 Memorandum from Daniel J. Capra, Reporter, *supra* n.1, at 42 n.5 ("the amendment was intended to codify and expand upon, not depart from, *Daubert*."). After the Advisory Committee had begun its rulemaking efforts, the Supreme Court issued its *Kumho Tire* holding. The Advisory Committee found that ruling to be in line with the Committee's understanding of the standard previously articulated by the Court and the approach taken in the Committee's existing proposals for modifying the rule. *See* Draft Minutes of the Meeting of April 12-13, 1999, Advisory Comm. on Evidence Rules, *supra* n. 14, at 8 ("The sense of the Committee was that the analysis in *Kumho* is completely consistent with and supportive of, the approach taken in the proposed amendment and Committee Note[.]").

[25] May 1, 1999 Report of the Advisory Committee on Evidence Rules, *supra* n. 15, at 7 (emphasis original).

[26] *Id*.

 

testimony to a jury.[27] Issuing the lengthy Committee Note itself has been described as a "goal" of the rulemaking process.[28] The extensive Note was meant to be a resource that would

> provide substantial and detailed guidance into the meaning of *Daubert* and its progeny; that would instruct on how to use the *Daubert* factors; and that would assist courts and litigants in determining which questions about experts would go to weight and which to admissibility.[29]

Considering the weight that the Advisory Committee attached to the Committee Note as an authority articulating the proper understanding of Rule 702, its contents warrant considerable attention.

The Committee Note discusses the critical elements of Rule 702. First, the proponent of the opinion testimony "has the burden of establishing that the pertinent admissibility requirements are met by a preponderance of the evidence."[30] That burden specifically includes showing that the expert employed a reliable methodology, based each opinion on sufficient facts or data, and applied the

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[27] *Id.* (identifying the Committee Note along with the amended rule as collectively signaling "a more rigorous and structured approach than some courts are currently employing" and that were expected "to provide uniformity" in the manner in which courts approached admissibility challenges). *See also* May 1, 1998 Report of the Advisory Committee on Evidence Rules, *supra* n. 14, 181 F.R.D. at 131 ("The Committee has prepared an extensive Committee Note that will provide guidance for courts and litigants in determining whether expert testimony is sufficiently reliable to be admissible.").

[28] Apr. 1, 2018 Memorandum from Daniel J. Capra, Reporter, *supra* n.1, at 42 n.5. Professor Capra has explained that "[b]ecause a Committee Note cannot be freestanding, an amendment was necessary[.]"

[29] *Id*.

[30] Advisory Committee Note to 2000 Amendments to Rule 702.

 

methodology to the facts of the case in a reliable way.[31] Put another way, the sponsor must satisfy the court that *all steps* employed in the development of the expert's opinions are sound.[32] In evaluating these underpinnings of the opinion testimony, the reviewing court must apply "exacting"[33] scrutiny. As Justice Scalia observed in his *Kumho Tire* concurring opinion, trial courts do not have the discretion "to perform the [gatekeeping] function inadequately."[34] Notably, the barometer initially suggested in the Advisory Committee's 1998 draft Committee Note—that in testifying an expert must adhere to the same standards of intellectual rigor demanded in the expert's

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[31] *See* May 1, 1999 Report of the Advisory Committee on Evidence Rules, *supra* n. 15, at 5 ("The proposed amendment to Evidence Rule 702 . . . requires a showing of reliable methodology and sufficient basis, and provides that the expert's methodology must be applied properly to the facts of the case."). *See also* Memorandum from Daniel J. Capra, Reporter, Advisory Comm. on Evidence Rules, to Advisory Comm. on Evidence Rules, *Possible Amendments to Rule 702* (Apr. 1, 2019) at 23 *in* ADVISORY COMMITTEE ON EVIDENCE RULES MAY 2019 AGENDA BOOK 95 (2019), https://www.uscourts.gov/rules-policies/archives/meeting-minutes/advisory-committee-rules-evidence-may-2019 ("The Rule provides that the requirements of sufficient basis and reliable application must be treated as questions of admissibility, and so must be established by a preponderance of the evidence under Rule 104(a)."); Apr. 1, 2018 Memorandum from Daniel J. Capra, Reporter, *supra* n.1, at 43 ("In sum, the 2000 amendment specifies that sufficient basis and application of method are admissibility requirements – the judge must be satisfied by a preponderance of the evidence that the expert has relied on sufficient facts or data, and that the expert has reliably applied the methods.").

[32] *See* Advisory Committee Note to 2000 Amendments ("As the court noted in *In re Paoli R.R. Yard PCB Litig*., 35 F.3d 717, 745 (3d Cir. 1994), '*any* step that renders the analysis unreliable . . . renders the expert's testimony inadmissible. *This is true whether the step completely changes a reliable methodology or merely misapplies that methodology*.'")(emphasis original).

[33] *Weisgram v. Marley Co.*, 528 U.S. 440, 455 (2000)("Since *Daubert,* moreover, parties relying on expert evidence have had notice of the exacting standards of reliability such evidence must meet."). *See also* Advisory Committee Note to 2000 Amendments to Rule 702 ("The amendment specifically provides that the trial court must scrutinize not only the principles and methods used by the expert, but also whether those principles and methods have been properly applied to the facts of the case."). Of course, the content of Rule 702 itself also directs that each of these three requirements must be established. *See* Fed. R. Evid. 702(b)-(d).

[34] *Kumho Tire*, 526 U.S. at 159 (Scalia, J., concurring).

 

professional field—was adopted in the Supreme Court's *Kumho Tire* holding.[35]

Critically, these reliability components are admissibility questions that the court must decide, not credibility issues for the jury to weigh:[36]

> 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.[37]

Thus, only *after* the sponsor has demonstrated that the expert satisfies all Rule 702 requirements may the court defer to the jury regarding the expert's basis, application, or method.

Finally, *all* opinion testimony must receive scrutiny. Rule 702 "specifically extends the trial court's *Daubert* gatekeeping function to all expert testimony[.]"[38] The jury should only hear opinions that have been fully considered and determined meet Rule 702's admissibility requirements.

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[35] May 1, 1999 Report of the Advisory Committee on Evidence Rules, *supra* n.15, at 6 ("The Court in *Kumho* emphasized the same overriding standard as that set forth in the Committee Note to the proposed amendment, i.e., that an expert must employ the same degree of intellectual rigor in testifying as he would be expected to employ in his professional life"). *See also Kumho Tire*, 526 U.S. at 152 ("The objective of [the gatekeeping] requirement . . . is to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field."); Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure and Evidence: Request for Comment, 181 F.R.D. at 147.

[36] *Id*. *See also* Oct. 1, 2019 Memorandum from Daniel J. Capra, Reporter, *supra* n.23, at 1 (Rule 702 "already establishes that the reliability requirements are questions for the court, to be decided by a preponderance of the evidence.").

[37] Apr. 1, 2018 Memorandum from Daniel J. Capra, Reporter, *supra* n.1, at 43 (emphasis original).

[38] May 1, 1999 Report of the Advisory Committee on Evidence Rules, *supra* n. 15, at 7.

 

## II. COURTS HAVE RE-WRITTEN THE EXPERT ADMISSIBILITY STANDARD IN WAYS THAT EVADE THE INTENT OF RULE 702

During the twenty years that have passed since the 2000 amendment, courts have departed so substantially from Rule 702's intended approach for evaluating the admissibility of opinion testimony that today's court assessments often bear little resemblance to the analytical process described by the Committee Note. Patterns have emerged in which trial courts consider proffered expert testimony in ways that negate critical aspects of Rule 702. These include ignoring the sponsor's burden of establishing admissibility and deferring to the jury determinations that the court must make. These departures from the analytical approach directed by Rule 702 and the Committee Note create confusion about the admissibility standard, undermine the goal of uniformity, and expose juries to the misleading influence of unreliable opinion testimony that should not have been admitted.

### A. Many Courts Read Rule 702 to Presume Admissibility Rather than to Require the Proponent to Satisfy the Burden of Production

Some courts overlay the Rule 702 analysis with outcome-focused characterizations that turn the standard upside-down. Although the Committee Note declares that an expert's proponent bears the burden of demonstrating that the

 

admissibility requirements are met,[39] courts have decided that the rule includes a "presumption of admissibility."[40] In certain instances, this mistaken presumption has even been juxtaposed against a recitation of Rule 702's burden of production, with no apparent recognition of these statements' incompatibility. For example:

> The party seeking to introduce the expert testimony bears the burden of establishing by a preponderance of the evidence that the proffered testimony is admissible. There is a presumption that expert testimony is admissible[.][41]

This notion that courts should place a thumb on the scale in favor of admitting expert testimony seems to stem from a misinterpretation of the *Daubert* holding that pre-dates the 2000 amendment to Rule 702, but which courts continue to cite.[42]

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[39] In addition to the Committee Note, *see supra* n. 30, the Supreme Court has indicated that the proponent of evidence bears the burden of establishing its admissibility under Rule 104(a). *See Bourjaily v. United States*, 483 U.S. 171, 175-76 (1987).

[40] *See*, *e.g.*, *Price v. General Motors, LLC*, No. CIV-17-156-R, 2018 WL 8333415, at *1 (W.D. Okla. Oct. 3, 2018)("[T]here is a presumption under the Rules that expert testimony is admissible.")(quotation omitted); *Powell*, 2015 WL 7720460, at *2 ("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 that there should be a presumption of admissibility of evidence."); *AFT Trust*, 2015 WL 1472015, at *20 ("In assuming this [gatekeeper] role, the Court applies a presumption of admissibility."); *Crawford v. Franklin Credit Mgt. Corp.,* 08-CV-6293 (KMW), 2015 WL 13703301, at *2 (S.D.N.Y. Jan. 22, 2015)("[T]he court should apply 'a presumption of admissibility' of evidence" in carrying out the gatekeeper function.); *Martinez v. Porta*, 598 F. Supp. 2d 807, 812 (N.D. Tex. 2009)("Expert testimony is presumed admissible").

[41] *S.E.C. v. Yorkville Advisors, LLC*, 305 F. Supp. 3d 486, 503-04 (S.D.N.Y. 2018). *See also Cates v. Trustees of Columbia Univ. in City of New York*, No. 16CIV6524GBDSDA, 2020 WL 1528124, at *6 (S.D.N.Y. Mar. 30, 2020)(similar statement).

[42] The source usually identified as the origin for this problematic characterization is a decision from the Second Circuit, *Borawick v. Shay*, 68 F.3d 597, 610 (2d Cir. 1995), *cert. denied*, 517 U.S. 1229 (1996). *See*, *e.g.*, *Yorkville Advisors, LLC*, 305 F. Supp. 3d at 503-04; *Powell*, 2015 WL 7720460, at *2. The *Borawick* decision explicitly states it did not address a challenge to the reliability of expert testimony offered. *Borawick*, 68 F.3d at 610 ("We do not believe that *Daubert* is directly applicable to the issue here"). Nonetheless, the opinion in *dicta* offered the view that, "by loosening the strictures

 

A second misunderstanding that courts frequently raise to tip the balance in the direction of admitting opinion testimony arises from a line in the Committee Note stating that "the rejection of expert testimony is the exception rather than the rule."[43] Some courts imagine this statement to indicate that admission of opinion testimony is Rule 702's preferred outcome:

> Any doubts regarding the admissibility of an expert's testimony should be resolved in favor of admissibility. Fed. R. Evid. 702 Advisory Committee's Notes ('[A] review of the case law ... shows that rejection of the expert testimony is the exception rather than the rule.')[.][44]

When read in context, however, this statement in the Committee Note is simply an empirical observation that, during the first few years following publication of the *Daubert* ruling, courts did not exclude opinion testimony with great regularity.[45] The Committee Note's statement is descriptive, not normative, and does not authorize or encourage courts to admit opinion testimony without confirming that the evidence

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on scientific evidence set by *Frye* [*v. United States*, 293 F. 1013 (D.C.Cir.1923)], *Daubert* reinforces the idea that there should be a presumption of admissibility of evidence." *Id*.

[43] Advisory Committee Note to 2000 Amendments to Rule 702.

[44] *In re E. I. du Pont de Nemours & Co. C-8 Pers. Injury Litig.*, No. 2:18-CV-00136, 2019 WL 6894069, at *2 (S.D. Ohio Dec. 18, 2019). *See also*, *e.g.*, *In re Scrap Metal Antitrust Litig.*, 527 F.3d 517, 530 (6th Cir. 2008)("'[R]ejection 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 Advisory Committee Note to 2000 Amendments to Rule 702); *Wright*, 450 F. Supp. 2d at 359–60 ("Rejection of expert testimony, however, is still 'the exception rather than the rule,' Fed.R.Evid. 702 advisory committee's note (2000 Amendments)[.] . . . Thus, in a close case the testimony should be allowed for the jury's consideration.")(quotation omitted).

[45] The complete sentence reads as follows: "A review of the caselaw after *Daubert* shows that the rejection of expert testimony is the exception rather than the rule." Advisory Committee Note to 2000 Amendments to Rule 702.

 

satisfies the requirements of Rule 702.

Another outcome-oriented characterization is based on the impression that Rule 702 embodies a "liberal standard," at least in comparison to the *Frye* test discarded by the *Daubert* Court. Some courts bootstrap this perspective of the rule into a policy favoring admissibility: "Since Rule 702 embodies a liberal standard of admissibility for expert opinions, the assumption the court starts with is that a well-qualified expert's testimony is admissible."[46] Similarly, in an approach akin to sandlot baseball's rule that a "tie goes to the runner," some courts read the rule to favor admission when a court's evaluation of opinion testimony seemingly presents a "close call" under Rule 702.[47]

Rulings that view Rule 702 as preferring admission of opinion testimony over exclusion present several serious inconsistencies with the rule's intended application.

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[46] *In re Zyprexa Prod. Liab. Litig.*, 489 F. Supp. 2d 230, 282 (E.D.N.Y. 2007). *See also In re ResCap Liquidating Tr. Litig.*, No. 13-CV-3451 (SRN/HB), 2020 WL 209790, at *3 (D. Minn. Jan. 14, 2020)("Courts generally support an attempt to liberalize the rules governing the admission of expert testimony, and favor admissibility over exclusion.")(quotation omitted); *Collie v. Wal-Mart Stores E., L.P.*, No. 1:16-CV-227, 2017 WL 2264351, at *1 (M.D. Pa. May 24, 2017)("Rule 702 embraces a 'liberal policy of admissibility,' under which it is preferable to admit any evidence that may assist the factfinder[.]"); *Billone v. Sulzer Orthopedics, Inc.*, No. 99-CV-6132, 2005 WL 2044554, at *3 (W.D.N.Y. Aug. 25, 2005)("[T]he Supreme Court has emphasized the 'liberal thrust' of Rule 702, favoring the admissibility of expert testimony.").

[47] *See*, *e.g.*, *United States v. Ameren Missouri*, No. 4:11 CV 77 RWS, 2019 WL 1384580, at *3 (E.D. Mo. Mar. 27, 2019); *Holloway v. Winkler, Inc.*, No. 4:17CV2208 RLW, 2019 WL 330872, at *3 (E.D. Mo. Jan. 25, 2019); *Conner v. W W Indus. Corp.*, No. 4:16-CV-1539 RLW, 2018 WL 2744978, at *4 (E.D. Mo. June 7, 2018). Rulings that apply this "close case" presumption of admissibility usually cite to *Lauzon v. Senco Prod., Inc.*, 270 F.3d 681, 695 (8th Cir. 2001), in which the court declared that "[i]t is far better where, in the mind of the district court, there exists a close case on relevancy of the expert testimony in light of the plaintiff's testimony to allow the expert opinion and if the court remains unconvinced, allow the jury to pass on the evidence."

 

First, these cases invert the burden of production that Rule 702 places on the sponsor of the opinion testimony.[48] Decisions applying the view that "exclusion is disfavored" fail to hold the proponent responsible for establishing by a preponderance of the evidence that the expert's analysis meets all the Rule 702 requirements.[49] Courts reading Rule 702 to presume admissibility thus misunderstand the very essence of Rule 702: unless an expert's analysis is shown to relay actual scientific or other knowledge, the court must exclude it.[50] Next, courts that presume the admissibility of

[48] *See*, *e.g.*, *Frankenmuth Mut. Ins. Co. v. Ohio Edison Co.*, No. 5:17CV2013, 2018 WL 9870044, at *2 (N.D. Ohio Oct. 9, 2018)(quoting Advisory Committee Note to 2000 Amendments to Rule 702 that "rejection of expert testimony is the exception, rather than the rule" and concluding "[a]lthough it is a very close call, the Court declines to exclude Churchwell's expert opinions under Rule 702."); *Crawford*, 2015 WL 13703301, at *6 ("In light of the 'presumption of admissibility of evidence,' that opportunity [for cross-examination] is sufficient to ensure that the jury receives testimony that is both relevant and reliable.")(quoting *Borawick*, 68 F.3d at 610).

[49] *See*, *e.g.*, *Orion Drilling Co., LLC v. EQT Prod. Co.,* No. CV 16-1516, 2019 WL 4273861, at *34 (W.D. Pa. Sept. 10, 2019)(after declaring that "[e]xclusion is disfavored" under Rule 702, the court flipped the burden of production and declared the opinion testimony admissible, stating "Orion has not established that incorporation of the data renders Ray's opinion unreliable."). *See also Citizens State Bank v. Leslie*, No. 6-18-CV-00237-ADA, 2020 WL 1065723, at *4 (W.D. Tex. Mar. 5, 2020)(rejecting challenge that opinion was "not based on sufficient facts" without assessing the expert's factual basis after stating "the rejection of expert testimony is the exception rather than the rule."); *Mason v. CVS Health*, 384 F. Supp. 3d 882, 891 (S.D. Ohio 2019)("Any doubts regarding the admissibility of an expert's testimony should be resolved in favor of admissibility.").

[50] For example, in *Rovid v. Graco Children's Prod. Inc.*, No. 17-CV-01506-PJH, 2018 WL 5906075, at *13 (N.D. Cal. Nov. 9, 2018), *appeal dismissed*, No. 19-15033, 2019 WL 1522786 (9th Cir. Mar. 7, 2019), the court demonstrated how the burden of establishing admissibility should operate to exclude opinion testimony when the court cannot ascertain if the expert's methodology, basis and application are reliable:

> Because Tres' report is devoid of, *inter alia*, his findings and his methodology, the court cannot determine whether his testimony reflects scientific knowledge or whether it is the product of 'good science.' Similarly, because Tres makes no attempt to tie his general background to the facts of this action or to any relevant issue in this action, the court cannot determine whether his testimony is 'relevant

expert testimony rely too heavily on the power of cross-examination to convince jurors of the defects present in unreliable testimony.[51] As discussed above, *Daubert* and Rule 702 direct trial judges to scrutinize proffered opinion testimony for reliability precisely *because* "cross-examination alone is ineffective in revealing nuanced defects in expert opinion testimony" and the jury needs protection against the misleading influence of dubious opinion evidence addressing complicated or unfamiliar subjects.[52] Finally, use of an outcome-oriented Rule 702 characterization inaccurately suggests that courts can reach a proper assessment of a particular expert's testimony without undertaking the analysis Rule 702 directs. Rule 702 allows no short cuts.[53]

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> to the task at hand,' as required by the second part of the *Daubert* analysis. *Id*. at 597. Accordingly, Tres must be excluded under Rule 702 and *Daubert*.

[51] *See*, *e.g*., *Powell*, 2015 WL 7720460, at *2 ("To the extent Defendant argues that Mr. McPartland's conclusions are unreliable, it may attack his report through cross examination."); *Wright*, 450 F. Supp. 2d at 360 ("In a close case, a court should permit the testimony to be presented at trial, where it can be tested by cross-examination and measured against the other evidence in the case.")(quotation omitted).

[52] Minutes of the Meeting of May 3, 2019, Advisory Comm. on Evidence Rules, *supra* n. 22, at 23.

[53] *See* Advisory Committee Note to 2000 Amendments to Rule 702:

> Under the amendment, as under *Daubert*, 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. The amendment specifically provides that the trial court must scrutinize not only the principles and methods used by the expert, but also whether those principles and methods have been properly applied to the facts of the case. (citation omitted).

 

### B. Treating an Expert's Basis and Application as Credibility Considerations for the Jury, rather than Admissibility Questions for the Court, Shows Deep Confusion about the Requirements of Rule 702

Despite the explicit directives of Rule 702(b)[54] and Rule 702(d)[55] that the court must rule on the sufficiency of the expert's basis and the reliability with which the expert has applied the methodology to the matters at issue, many courts misunderstand such challenges as bearing only on the weight of the testimony.[56] These rulings fail to fulfill the courts' Rule 702 gatekeeping responsibilities and place demands on jurors that they are ill-equipped to manage.[57]

The recent case law is full of courts' incorrect statements that questions concerning the sufficiency of an expert's factual basis bear only on the weight to be afforded the testimony.[58] Examples of such misreadings of the rule include:

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[54] Rule 702(b) requires consideration of whether "the testimony is based on sufficient facts or data[.]"

[55] Rule 702(d) directs determination if "the expert has reliably applied the principles and methods to the facts of the case."

[56] *See*, *e.g.*, *United States v. Hodge*, 933 F.3d 468, 478 (5th Cir. 2019)("As a general rule, questions relating to the bases and sources of an expert's opinion affect the weight to be assigned that opinion rather than its admissibility and should be left for the jury's consideration."); *Katzenmeier v. Blackpowder Prods., Inc.*, 628 F.3d 948, 952 (8th Cir. 2010)("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.").

[57] *See* Minutes of the Meeting of May 3, 2019, Advisory Comm. on Evidence Rules, *supra* n. 22, at 23. *See also United States v. Glynn*, 578 F. Supp. 2d 567, 574 (S.D.N.Y. 2008)("[T]he explicit premise of *Daubert* and *Kumho Tire* is that, when it comes to expert testimony, cross-examination is inherently handicapped by the jury's own lack of background knowledge."), quoted in Oct. 1, 2019 Memorandum from Daniel J. Capra, Reporter, *supra* n.23, at 11.

[58] *See* Apr. 1, 2019 Memorandum from Daniel J. Capra, Reporter, *supra* n.31, at 23 (indicating that broad statements such as such as "challenges to the sufficiency of an expert's basis raise

 

- "As a general rule, questions relating to the bases and sources of an expert's opinion affect the weight to be assigned that opinion rather than its admissibility."[59]

- "More fundamentally, each of these arguments goes to the factual basis of the report, . . . , and it is well settled that the factual basis for an expert opinion generally goes to weight, not admissibility."[60]

- "[T]he court will not exclude expert testimony merely because the factual bases for an expert's opinion are weak."[61]

- "[W]hen the adequacy of the foundation for the expert testimony is at issue, the law favors vigorous cross-examination over exclusion."[62]

Courts have similarly dismissed challenges to the reliability of an expert's application of his or her methodology to the issues at hand:

- "[O]bjections [that the expert could not link her experienced-based methodology to her conclusions] are better left for cross examination, not a basis for exclusion."[63]

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questions of weight and not admissibility" are "misstatement[s] made by circuit courts in a disturbing number of cases[.]").

[59] *Puga v. RCX Sols., Inc.*, 922 F.3d 285, 294 (5th Cir. 2019).

[60] *Patenaude v. Dick's Sporting Goods, Inc.*, No. 9:18-CV-3151-RMG, 2019 WL 5288077, at *2 (D.S.C. Oct. 18, 2019).

[61] *Wischermann Partners, Inc. v. Nashville Hosp. Capital LLC*, No. 3:17-CV-00849, 2019 WL 3802121, at *1 (M.D. Tenn. Aug. 13, 2019)(quotation omitted). *See also id*. at *3 ("[A]rguments that Pinkowski's opinions are unreliable because he failed to review other relevant information and ignored certain facts bear on the factual basis for Pinkowski's opinions, and, therefore, go to the weight, rather than the admissibility, of Pinkowski's testimony.").

[62] *Carmichael v. Verso Paper, LLC*, 679 F. Supp. 2d 109, 119 (D. Me. 2010). Numerous additional examples of courts dismissing Rule 702(b) challenges as fodder only for cross-examination are described in the Apr. 1, 2018 Memorandum from Daniel J. Capra, Reporter, *supra* n.1, at 44-45.

[63] *AmGuard Ins. Co. v. Lone Star Legal Aid*, No. CV H-18-2139, 2020 WL 60247, at *8 (S.D. Tex. Jan. 6, 2020).

 

- "Concerns surrounding the proper application of the methodology typically go to the weight and not admissibility[.]"[64]

Broad assertions such as these do not simply reject the particular challenges to a specific expert, but rather project a deep misunderstanding of Rule 702 and the primary role it intends for the court to play in evaluating an expert's factual basis and application. The fact that some courts "routinely state the misguided notion that arguments about sufficiency of basis and reliability of application almost always go to weight and not admissibility"[65] indicates a failure in the content of the rule to communicate the judge's intended role.

Under Rule 702, criticisms of an expert's basis and application may eventually become credibility considerations for the jury to weigh, but only *after* the court first concludes that the proponent of the testimony has established by a preponderance of the evidence that the Rule 702(b) and 702(d) standards are met.[66] Courts that dismiss attacks on an expert's factual basis and application as addressing only the weight of

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[64] *Murphy-Sims v. Owners Ins. Co.*, No. 16-CV-0759-CMA-MLC, 2018 WL 8838811, at *7 (D. Colo. Feb. 27, 2018). Additional cases taking a similar view are discussed in the Apr. 1, 2018 Memorandum from Daniel J. Capra, Reporter, *supra* n.1, at 45-46. Such rulings present a sharp contrast to the instruction set forth in the Advisory Committee Note to 2000 Amendments to Rule 702: "*any* step that renders the analysis unreliable . . . renders the expert's testimony inadmissible. *This is true whether the step completely changes a reliable methodology or merely misapplies that methodology*.")(quoting *In re Paoli R.R. Yard PCB Litig*., 35 F.3d 717, 745 (3d Cir. 1994))(emphasis original).

[65] Oct. 1, 2019 Memorandum from Daniel J. Capra, Reporter, *supra* n.23, at 30.

[66] *See supra* n.38. *See also* Apr. 1, 2019 Memorandum from Daniel J. Capra, Reporter, *supra* n.31, at 23 (noting that the expert's factual basis and application of methodology can be credibility considerations, but only after the court has found that the opinion testimony meets the Rule 702 burden of establishing admissibility by a preponderance of the evidence.).

 

the testimony therefore leave out a necessary step in the analysis. Rule 702 directs that the court must *first* decide whether the expert has been shown by a preponderance of the evidence to have employed a sufficient factual basis, used a reliable methodology, and reliably applied that methodology to the issues in dispute.[67]

Rejecting challenges to an expert's basis and application as bearing only on the weight of the evidence effectively casts the jury in the role of gatekeeper. Once the court determines it will not assess the factual basis and application underlying the opinions before they are presented at trial,[68] the jury must consider the testimony and decide whether to accept or reject the expert's conclusion.[69] Doing so ignores the central premise of Rule 702, namely that jurors are not capable of adequately performing that function:

> The whole point of Rule 702 – and the *Daubert*-Rule 104(a) gatekeeping function – is that these issues *cannot* be left to cross-examination. The underpinning of *Daubert* is that an expert's opinion could be unreliable and the jury could not figure that out, even given cross-examination and

[67] *See*, *e.g.*, *Alsadi v. Intel Corp.*, No. CV-16-03738-PHX-DGC, 2019 WL 4849482, at *4 -*5 (D. Ariz. Sept. 30, 2019)(Excluding opinion testimony because "Plaintiffs have not shown by a preponderance of the evidence that Dr. Garcia's causation opinions are based on sufficient facts or data to which reliable principles and methods have been applied reliably" and noting that these issues reflect "conditions for admissibility" and not credibility considerations). Judge David G. Campbell, author of the *Alsadi* ruling, chairs the Standing Committee on Rules of Practice and Procedure and has participated in the Advisory Committee's discussions of Rule 702 and the intent for its operation. *See*, *e.g.*, 86 FORDHAM L. REV., *supra* n.19, at 1464.

[68] *See*, *e.g.*, *Citizens State Bank*, 2020 WL 1065723, at *4.

[69] *See Nease v. Ford Motor Co*., 848 F.3d 219, 231 (4th Cir. 2017)("For the district court to conclude that Ford's reliability arguments simply 'go to the weight the jury should afford Mr. Sero's testimony' is to delegate the court's gatekeeping responsibility to the jury.").

 

> argument, because the jurors are deferent to a qualified expert (i.e., the white lab coat effect).[70]

Based on this conclusion that jurors lack the capability to recognize inadequate expert practices, Rule 702 extends courts' gatekeeping responsibility to all aspects of the expert's analysis and directs courts to assess the expert's factual basis and application to the issues in the case, as well as the expert's methodology.[71] This position is not an Advisory Committee invention, but stems directly from the Supreme Court's holdings.[72] In fact, the opinion testimony at issue in *Kumho Tire* was excluded because of insufficiencies in that expert's factual basis and the application of his methodology to the specific issues in that case.[73]

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[70] Oct. 1, 2019 Memorandum from Daniel J. Capra, Reporter, *supra* n.23, at 11 (emphasis original).

[71] Apr. 1, 2018 Memorandum from Daniel J. Capra, Reporter, *supra* n.1, at 50 ("The same 'white lab coat' problem – that the jury will not be able to figure out the expert's missteps – would seem to apply equally to basis, methodology and application.").

[72] *See* Apr. 1, 2018 Memorandum from Daniel J. Capra, Reporter, *supra* n.1, at 49:

> [T]here are a number of lower court decisions that do not comply with Rule 702(b) or (d). . . . [S]ome 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.

[73] *See Kumho Tire*, 526 U.S. at 153-54:

> [T]he specific issue before the court was not the reasonableness *in general* of a tire expert's use of a visual and tactile inspection to determine whether overdeflection had caused the tire's tread to separate from its steel-belted carcass. Rather, it was the reasonableness of using such an approach, along with Carlson's particular method of analyzing the data thereby obtained, to draw a

Courts that mistakenly believe Rule 702 identifies an expert's factual basis or the application of methodology as matters of weight, not admissibility, are carrying forward pre-*Daubert* approaches to opinion testimony that amended Rule 702 should have displaced. To take just one example, courts frequently reiterate the following statement as consistent with Rule 702: "As a general rule, questions relating to the bases and sources of an expert's opinion affect the weight to be assigned that opinion rather than its admissibility and should be left for the jury's consideration."[74] This passage actually originates in a case decided in 1987, six years before *Daubert* was handed down, and so cannot possibly reflect the Rule 702 admissibility standard.[75] Citations to such anachronisms show that at least some courts fail to appreciate that Rule 702 has expanded the courts' gatekeeping considerations beyond what many courts employed before *Daubert*.[76] Courts that rely on these outdated statements of

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> conclusion regarding *the particular matter to which the expert testimony was directly relevant.* That matter concerned the likelihood that a defect in the tire at issue caused its tread to separate from its carcass. The tire in question, the expert conceded, had traveled far enough so that some of the tread had been worn bald; it should have been taken out of service; it had been repaired (inadequately) for punctures; and it bore some of the very marks that the expert said indicated, not a defect, but abuse through overdeflection. The relevant issue was whether the expert could reliably determine the cause of *this* tire's separation. (emphasis original; citation omitted).

[74] *See*, *e.g., MCI Communications Service Inc. v. KC Trucking & Equip. LLC*, 403 F. Supp. 3d 548, 556 (W.D. La. 2019); *Coleman v. United States*, No. SA-16-CA-00817-DAE, 2017 WL 9360840, at *4 (W.D. Tex. Aug. 16, 2017).

[75] *Viterbo v. Dow Chem. Co*., 826 F.2d 420, 422 (5th Cir. 1987).

[76] The statement in the Committee Note that "*Daubert* did not work a seachange over federal

 

law have thus trapped themselves in a loop that repeats a discarded approach to opinion testimony, and they have not allowed the language of amended Rule 702 to interrupt this pattern.[77] At bottom, archaic conceptions of the admissibility standard recycled for more than two decades in some circuits have produced confusion about what the rule requires, with the result that some courts fail to recognize that Rule 702 now directs a "more rigorous and structured approach" than these pre-*Daubert* cases were willing to accept.[78] As members of the Advisory Committee have suggested, breaking this pattern will require action demonstrating to courts that "it is incorrect to make broad statements that sufficiency of basis and reliable application are questions of weight and not admissibility."[79]

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evidence law" may unwittingly suggest to some courts that pre-*Daubert* interpretations of the court's gatekeeping role remain in force after adoption of the 2000 amendments to Rule 702. *See*, *e.g.*, *More, JC, Inc. v. Nutone Inc.*, No. A-05-CA-338 LY, 2007 WL 4754173, at *7 (W.D. Tex. Mar. 21, 2007)(quoting referenced passage from the Committee Note and proceeding to ignore Rule 702(b) and instead draw upon the Fifth Circuit's 1987 decision in *Viterbo*, 826 F.2d at 422, for the proposition that "[q]uestions relating to the bases and sources of an expert's opinion, rather than its admissibility, should be left for the jury's consideration.").

[77] Pronouncements that challenges to an expert's factual basis or application of the methodology bear only on the weight of the testimony, not its admissibility, consistently stem from pre-*Daubert* decisions. *Katzenmeier*, 628 F.3d at 952, discussed *supra* n. 56, cites to *Hose v. Chicago Nw. Transp. Co.,* 70 F.3d 968, 974 (8th Cir. 1995), which in turn quotes *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."). *Carmichael*, 679 F. Supp. 2d at 119, discussed *supra* n. 62, likewise quotes *Loudermill* and also *Viterbo*, 826 F.2d at 422. *Wischermann Partners*, 2019 WL 3802121, at *1, discussed *supra* n. 61, references *McLean v. Ontario Ltd.*, 224 F.3d 797, 801 (6th Cir. 2000), which itself quotes from *United States v. L.E. Cooke Co.,* 991 F.2d 336, 342 (6th Cir. 1993)("[W]eaknesses in the factual basis of an expert witness' opinion ... bear on the weight of the evidence rather than on its admissibility.").

[78] *See* May 1, 1999 Report of the Advisory Committee on Evidence Rules, *supra* n. 15, at 7.

[79] Apr. 1, 2019 Memorandum from Daniel J. Capra, Reporter, *supra* n.31, at 24.

 

## III. CLARIFICATION IS NECESSARY FOR RULE 702 TO FUNCTION AS INTENDED AND SAFEGUARD THE TRIAL PROCESS AGAINST MISLEADING OPINION TESTIMONY

The intended aims of Rule 702, including establishment of a uniform approach[80] and protection of jurors against deception by influential but unreliable opinions as *Daubert* directs,[81] remain essential for a properly functioning national rule to govern expert admissibility. Twenty years of inconsistency, however, have turned Rule 702 into a mosaic of standards in which the same testimony that one court excludes would be admissible in a sister court.[82] Misunderstanding Rule 702 is no matter of small consequence: litigation outcomes change depending on the court's

[80] In light of the increasing proportion of federal civil cases assigned to multidistrict litigation matters, in which the presiding court that tries a case may sit in a different circuit than the transferor court in which the matter was originally filed, a uniform standard for admitting expert testimony is now even more important than it was in 2000. *See* Daniel S. Wittenberg, MULTIDISTRICT LITIGATION: DOMINATING THE FEDERAL DOCKET AMERICAN BAR ASSOCIATION (2020), https://www.americanbar.org/groups/litigation/publications/litigation-news/business-litigation/multidistrict-litigation-dominating-federal-docket / (last visited Feb 28, 2020)(describing rise of MDL case proportion such that "MDLs accounted for 51.9 percent of all pending federal civil cases at the end of 2018.").

[81] *See In re Zurn Pex Plumbing Prods. Liab. Litig.*, 644 F.3d 604, 613 (8th Cir. 2011)("The main purpose of *Daubert* exclusion is to protect juries from being swayed by dubious scientific testimony."). *See also* Minutes of the Meeting of May 3, 2019, Advisory Comm. on Evidence Rules, *supra* n. 22, at 23.

[82] *See*, *e.g.*, *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."). *See also 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); *McCluskey*, 954 F. Supp. 2d at 1255 (recognizing that "the approach of the Eighth and Third Circuits is somewhat more restrictive than the approach of the First and other Circuits.").

 

conception of the admissibility standard.[83]

The Advisory Committee's acknowledgement that courts neglect or misapply critical aspects of Rule 702[84] leads to the conclusion that courts have become confused about what the rule requires, and so steps must be taken to halt ongoing misunderstanding of the law. Amending Rule 702 is necessary to restore a common understanding of the standard. Just as in 2000, the widespread inconsistency among the courts cries out for amendments to clarify the rule, with an accompanying Committee Note to eliminate any precedential value from off-the-mark prior rulings and to solidify a single approach to the expert admissibility question.[85] Although Rule 702 currently contains language describing the scope of the gatekeeping responsibility, that language has failed to guide courts in understanding that an expert's factual basis and methodology application only become credibility matters for the jury to decide after the court initially determines that the proponent has met

[83] *Compare*, *e.g.*, *Adams*, 867 F.3d at 915-16 (affirming admission of engineer's causation opinion in which hypothesis derived from exemplar testing was applied to the facts at issue by "rul[ing] out pedal misapplication," in unintended acceleration case that resulted in partial jury verdict for plaintiff) *with Nease*, 848 F.3d at 230-32 (reversing jury verdict in plaintiffs' favor and directing entry of judgment for defendant in unintended acceleration case where district court improperly dismissed challenges to engineer's application of methodology to case facts in forming causation opinion as "go[ing] to the weight, not admissibility, of [the expert's] testimony.").

[84] *See* Apr. 1, 2018 Memorandum from Daniel J. Capra, Reporter, *supra* n.1, at 52 ("[T]he fact remains that some courts are ignoring the requirements of Rule 702(b) and (d). That is frustrating.").

[85] *See* Apr. 1, 2018 Memorandum from Daniel J. Capra, Reporter, *supra* n.1, at 53 (indicating that "it may be possible to tweak the existing language [of Rule 702] 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.").

 

the burden of establishing by a preponderance of the evidence that the expert meets the standard of admissibility. Similarly, courts need new direction that Rule 702 does not incorporate a presumption of admissibility or otherwise prefer admitting over excluding proffered opinion testimony, but instead requires the sponsor to fulfill the burden of production. Amending Rule 702's language on these issues and publishing a detailed Committee Note that identifies common misstatements of law and describes erroneous practices would create a new understanding of the rule's requirements and disrupt the pattern of recycled citations to outmoded conceptions of the court's role.

Although concerns have been voiced that wayward judges who already disregard the requirements of Rule 702 may not respond to renewed exhortations to apply Rule 702 as written,[86] this speculation should not deter the Advisory Committee from clarifying the rule for the great majority of judges and practitioners who read the rule and do their best to follow it. Doing nothing in the face of demonstrated judicial misunderstanding amounts to tacit acceptance of a different rule of expert admissibility—a rule the Advisory Committee never wrote. Without new direction, courts will continue to carry forward errors that effectively dilute the standard of admissibility, such as a court determining it "will err on the side of admissibility" [87] or

[86] *See* Apr. 1, 2018 Memorandum from Daniel J. Capra, Reporter, *supra* n.1, at 52 ("[I]t is hard to conclude that the problem of courts straying from the text will be solved by more text.").

[87] *See*, *e.g.*, *Lombardo v. Saint Louis*, No. 4:16-CV-01637-NCC, 2019 WL 414773, at *12 (E.D. Mo. Feb. 1, 2019)("[T]he Court will err on the side of admissibility."). *See also* cases cited at n.40, n.44, and n.47, *supra*.

 

demanding that a party seeking exclusion show that an "expert's opinion is so fundamentally unsupported that it can offer no assistance to the jury,"[88] into future generations of misguided decisions.[89]

Until the Advisory Committee amends Rule 702 to clarify its meaning, litigants should appeal rulings that fail to follow Rule 702's mandates, including when courts rely on nonexistent presumptions or defer admissibility questions to the jury. Such practices involve errors of law[90] in determining the admissibility of evidence, which "is

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[88] *See*, *e.g.*, *Pacific Indem. Co. v. Dalla Pola*, 65 F. Supp. 3d 296, 302 (D. Mass. 2014):

> The defendant has not shown that [the expert's] testimony falls within this exception [for opinion testimony so fundamentally unsupported that it can offer no assistance to the jury], and that his expert opinion is inadmissible. Therefore, the weight of that testimony must be evaluated by the finder of fact at trial.

[89] *See*, *e.g.*, *Paul Beverage*, 2019 WL 1044057, at *2 (admitting challenged opinion testimony without addressing the expert's basis or application, following Eighth Circuit's incorrect statement in *Nebraska Plastics, Inc. v. Holland Colors Americas, Inc.*, 408 F.3d 410, 416 (8th Cir. 2005) that "[a]s 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[,]" which traces to *Loudermill*, 863 F.2d at 570); *Powell*, 2015 WL 7720460, at *2 (2015 decision quoting *MacDermid Printing Sols., Inc. v. Cortron Corp.*, No. 3:08-cv-1649 MPS, 2014 WL 2615361, at *2 (D. Conn. June 12, 2014), which in turn cites to *Borawick*, 68 F.3d at 610, for the proposition that the Second Circuit embraces the idea that there should be a presumption of admissibility of evidence.).

[90] *See* Advisory Committee Note to 2000 Amendments to Rule 702 (the proponent of the expert's testimony "has the burden of establishing that the pertinent admissibility requirements are met by a preponderance of the evidence."); May 1, 1999 Report of the Advisory Committee on Evidence Rules, *supra* n. 15, at 5 ("The proposed amendment to Evidence Rule 702 . . . requires a showing of reliable methodology and sufficient basis, and provides that the expert's methodology must be applied properly to the facts of the case."); Oct. 1, 2019 Memorandum from Daniel J. Capra, Reporter, *supra* n.23, at 30 ("[Some courts] routinely state the misguided notion that arguments about sufficiency of basis and reliability of application almost always go to weight and not admissibility"); Apr. 1, 2018 Memorandum from Daniel J. Capra, Reporter, *supra* n.1, at 52 ("[T]he fact remains that some courts are ignoring the requirements of Rule 702(b) and (d).").

 

by definition an abuse of discretion."[91] The recognized fact that courts are not applying Rule 702 as written, and are instead assessing admissibility using different considerations and divergent standards across the circuits[92] presents a situation that warrants appellate redress.[93]

In light of the developed patterns of Rule 702 misunderstanding, maintaining the *status quo* amounts to resignation that the rule no longer demands what the 2000 amendments intended it to require. The lower courts need the Advisory Committee's direction to understand that approaches commonly taken in the gatekeeping process rely on misunderstandings of Rule 702. Unless these patterns are displaced with a new amendment, courts will continue addressing the admissibility of opinion testimony in ways that depart from the intent of Rule 702.[94] Rulemaking action is

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[91] *Nease*, 848 F.3d at 228 (quoting *Anderson v. Westinghouse Savannah River Co*., 406 F.3d 248, 260 (4th Cir. 2005)).

[92] *See supra* n. 1, n.72 & n.82.

[93] Notably, the Supreme Court granted *certiorari* in *Kumho Tire* to rectify inconsistency among the lower courts in applying the *Daubert* standard to technical experts. 526 U.S. at 146-47; ("We granted certiorari in light of uncertainty among the lower courts about whether, or how, *Daubert* applies to expert testimony that might be characterized as based not upon 'scientific' knowledge, but rather upon 'technical' or 'other specialized' knowledge."). Similarly, the Court granted *certiorari* in *Weisgram* to resolve a split among the circuits regarding whether "Federal Rule of Civil Procedure 50 permits an appellate court to direct the entry of judgment as a matter of law when it determines that [expert] evidence [critical for establishing a prima face case] was erroneously admitted at trial[.]" 528 U.S. at 446.

[94] *See*, *e.g.*, *Citizens State Bank*, 2020 WL 1065723, at *4 (dismissing argument that opinion was "not based on sufficient facts" without assessing the expert's factual basis, following Fifth Circuit's pre-*Daubert* statement in *Viterbo*, 826 F.2d at 422, that "[q]uestions relating to the bases and sources of an expert's opinion affect the weight to be assigned that opinion rather than its admissibility"); *Orion Drilling*, 2019 WL 4273861, at *34 (shifting burden to party challenging admissibility to show the proffered opinion testimony is unreliable, following Third Circuit's

 

necessary to re-orient courts to the expert admissibility standard envisioned for Rule 702.

misleading characterization of Rule 702 in *Pineda v. Ford Motor Co.*, 520 F.3d 237, 244 (3d Cir. 2008) as embodying "a liberal policy of admissibility[.]").

 

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

June 9, 2020

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

Dear Ms. Womeldorf:

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

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

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

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

## I. THE MDL PERSPECTIVE ON RULE 702.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### A. Overview and Background.

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

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

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

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

104(a).[15] They believed "[t]he amendment makes clear that the sufficiency of the basis of an expert's testimony is to be decided under Rule 702."[16] And they noted that "[t]he amendment specifically provides that the trial court must scrutinize not only the principles and methods used by the expert, but also whether those principles and methods have been properly applied to the facts of the case."[17]

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

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

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

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

**B. MDL Decisions Frequently Misstate the Rule 702 Standard.**

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

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[21] Bernstein & Lasker, *supra* note 1, at 48. Other scholars have reached the same conclusion. *See, e.g.*, Brandon L. Garret & M. Chris Fabricant, *The Myth of the Reliability Test*, 86 FORDHAM L. REV. 1559, 1564 (2018) (noting the "reliability language" of Rule 702 "has largely been ignored by state and federal judges" and that "[m]ore forceful language might make the importance of assessing reliability more salient to judges, perhaps with more detailed accompanying guidance in Advisory Committee notes").
[22] *Elsayed Mukhtar v. Cal. State Univ., Hayward*, 299 F.3d 1053, 1063-64 (9th Cir. 2002), *amended*, 319 F.3d 1073 (9th Cir. 2003).
[23] *United States v. Frazier*, 387 F.3d 1244, 1263 (11th Cir. 2004).
[24] Daniel J. Capra, *Memorandum to Advisory Committee on Evidence Rules re: Possible Amendment to Rule 702*, at 11 (Oct. 1, 2019) (Agenda Book, Advisory Committee on Evidence Rules (Oct. 25, 2019, meeting) at 131).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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[79] *See In re Testosterone Replacement Therapy*, 2018 WL 4030585, at *3 (allowing an expert to rely on observational studies that "show only 'trends'"); *In re Prempro*, 2012 WL 13033298, at *3 (permitting testimony from an expert who "explained that the studies that lacked statistical significance still revealed a 'trend for association'").
[80] *In re Zoloft*, 26 F. Supp. 3d at 465; *see also In re Abilify*, 299 F. Supp. 3d at 1367 (holding an expert's "five statistically insignificant findings from the clinical trials, and also his characterization of those findings as a trend, must be excluded as unreliable").
[81] *In re Lipitor*, 892 F.3d at 642; *see also In re Mirena (No. II)*, 341 F. Supp. 3d at 265 ("[A]bsent [a demonstrated epidemiological] association, there is no basis to apply the Bradford Hill criteria.").
[82] *See In re Zoloft*, 858 F.3d at 794 n.35 (emphasizing that the lower court declined to hold that "the Bradford-Hill criteria should only be applied after an association is well established"); *In re Testosterone Replacement Therapy*, 2017 WL 1833173, at *9 (rejecting defendant's argument that application of the Bradford Hill criteria requires "an association between the drug at issue and the alleged injury, based on epidemiological studies showing an association that is statistically significant").

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

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

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

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

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

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

### C. Lack of Uniformity Among MDL Courts is Problematic.

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

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

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

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

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

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

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

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

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

## IV. THE ADVISORY COMMITTEE SHOULD AMEND RULE 702.

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

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

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

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

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

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

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

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

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

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

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

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

Sincerely,

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

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


June 30, 2020

*Submitted via Email:* RulesCommittee_Secretary@ao.uscourts.gov

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Attention: Rebecca A. Womeldorf, Secretary

***Re: Comment on Potential Amendment to Federal Rule of Evidence 702***

The Federation of Defense & Corporate Counsel (FDCC) is advised that the Advisory Committee on Evidence Rules is considering potential amendment to Federal Rule of Evidence 702 and a Committee Note on that rule. The purpose of this correspondence is to provide the FDCC's comments on the specific need for such amendments and Committee Notes to Rule 702.

## Introduction

The FDCC is comprised of over 1,400 members who work in private practice, as in-house counsel, and as insurance-claims professionals and executives. Membership is limited to attorneys and insurance professionals nominated and then vetted by their peers for having achieved professional distinction and demonstrated leadership in their respective fields. The FDCC is committed to promoting knowledge and professionalism in its ranks and has organized itself to that end. The FDCC constantly strives to provide access to and protect the American system of justice and to improve its efficiency. Its members have established a strong legacy of leadership in representing the interests of civil defendants.

FDCC members are some of the most-experienced litigators in America. They are on the front lines of complex and multi-district litigation (MDL) defending businesses and individuals in civil actions. As a result, FDCC members are intimately familiar with Rule 702 and its real-world applications and varying interpretations by the Courts. They know its strengths and weaknesses and bring a practical perspective on improving the Rule in manner consistent with the rule of law. Based upon that perspective, the FDCC believes that two aspects of Rule 702, and its existing committee notes, should be clarified by amendment.

## I. Rule 702 Should Provide that the Proponent of Expert Testimony Bears the Burden of Establishing Admissibility.

Rule 702 is silent on the burden for establishing admissibility of expert testimony. This absence of guidance has led to the unfortunate circumstance of inconsistent interpretation and application of the Rule, as well as the resulting unsettled framework of varying opinions in which expert testimony has been either admitted or excluded. Admittedly, the Advisory Committee Notes on the 2000 amendments recognize that admissibility is governed by Rule 104(a). And, it is well-established under Rule 104(a) that the proponent of any evidence "has the burden of establishing that the pertinent admissibility requirements are met by a preponderance of the evidence."[1] Nevertheless, in the experience of FDCC members, trial courts considering the admissibility of expert testimony regularly overlook the weight and significance of that burden.

Many decisions recognize the burden, but immediately lighten it with statements that are unsupported by the law. For example, trial courts throughout the country espouse the principle that there is a "presumption of admissibility" for expert opinions.[2] A related proposition is the maxim that "rejection of expert testimony is the exception and not the rule."[3] Yet, presuming admissibility is a "paradoxical position" in light of the burden placed on the offeror of expert testimony.[4] Under *Daubert* and Rule 702, trial judges are charged "with the responsibility of acting as gatekeepers to *exclude* unreliable expert testimony …."[5]

This unfounded presumption achieves the exact opposite result -- encouraging trial courts to throw-open the gates of admissibility. The dangers of this were properly stated by the Reporter to the Advisory Committee on Evidence Rules in 2019, "…the key to *Daubert* is that cross-examination alone is ineffective in revealing nuanced defects in expert opinion testimony and that the trial judge must act as a gatekeeper to ensure that unreliable opinions don't get to the jury in the first place."[6]

Trial courts trumpeting a presumption of admissibility frequently buttress that presumption by claiming that Rule 702 has a "liberal standard of admissibility."[7] That standard is not grounded in the reality of any facts or justification. Nothing in Rule 702, its comments, *Daubert*, *Kuhmo*

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[1]Rule 702 advisory committee's notes, 2000 amend.

[2]*See*, *e.g.*, *Cates v. Trustees of Univ. of Columbia*, No. 16 Civ. 6524 (GBD) (SDA), 2020 WL 1528124 at *6 (S.D.N.Y. Mar. 30, 2020); *Maes v. Lowe's Home Ctrs.*, LLC, EP-17-CV-00107-FM, 2018 WL 3603114 at *4 (W.D. Tx. May 25, 2018); *Metro Sales, Inc. v. Core Consult. Group, LLC*, 275 F.Supp.3d 1023, 1053 (D. Mn. 2017) (finding rule 702 "favors admissibility over exclusion"); *Chapman v. Tristar Products, Inc.* No. 1:16–CV–1114, 2017 WL 1718423 at * 1 (N.D. Ohio Apr. 28, 2017); *Ass Armour, LLC v. Under Armour, Inc.*, No. 15-cv-20853-Civ-COOKE/TORRES, 2016 WL 7156092 at * 2 (S.D. Fla. Dec. 8, 2016).

[3]*Finch v. City of Wichita*, No. 18-1018-JWB, 2020 WL 3403121 at *21 (D. Kan. Jun. 19, 2020)In *re: Niaspan Antitrust Litigation*, MDL NO. 2460, 2020 WL 2933824 at *5 (E.D. Pa. Jun. 2, 2020); *Koenig v. Johnson*, . No. 2:18-cv-3599-DCN, 2020 WL 2308305 at *2 (D.S.C. May 8, 2020).

[4]5 Mod. Sci. Evidence § 37:5 (2019-2020 Edition).

[5]Rule 702 advisory committee's notes, 2000 amend. (emphasis added).

[6] Minutes of the Judicial Conference Advisory Committee on the Federal Rules of Evidence, May 3, 2019, p.23.

[7]*See*, *e.g.*, *United States v. Napout*, No. 18-2750 (L), 2020 WL 3406620 at *18 (8th Cir. Jun. 22, 2020); *United States v. Fernandez*, 795 Fed.Appx. 153, 155 (3d Cir. 2020).

*Tire* or other Supreme Court precedent endorses liberal admission of expert testimony.[8] To the contrary, the only presumption that should exist is exclusion of unreliable expert testimony under the trial court's gatekeeping function.

From a practical standpoint, these newfound rules improperly shift the burden of proof under Rule 702. The proponent no longer bears the burden of demonstrating by a preponderance of the evidence that expert evidence and testimony should be admitted. Instead, the opponent must overcome "presumptions" and "liberal standards" to show that the evidence ought to be excluded. This standard is, in our humble view, the antithesis of what the drafters of Rule 702 had intended.

Accordingly, the FDCC endorses any action by the Committee that will provide explicit direction to litigants, counsel and trial courts that: (a) the proponent of expert testimony bears the burden of proving each subsection within Rule 702 (including the basis and reliability requirements) by a preponderance of the evidence; and, (b) there is no presumption or other standard that favors admissibility. That direction can be accomplished by an amendment to Rule 702 and a Committee Note. The rule itself should define the admissibility burden:

> 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 of the testimony establishes by a preponderance of the evidence…:***[9]

Thus, an amendment to the rule will plainly establish that admissibility must be proven by a preponderance of the evidence. In conjunction with that amendment, a Committee Note will dispel any thoughts of a "liberal" admissibility standard. The FDCC suggests the following addition to the draft Committee Note submitted by the Committee's reporter on October 1, 2019:

> A requirement of an accurate conclusion derived from the methodology is integrally related to the admissibility requirements of Rule 702(b)-(d), all of which are intended to assure that an expert's opinion is helpful. Those admissibility requirements, like the requirement of an accurately stated conclusion, are evaluated by the court under Rule 104(a), so the proponent must establish that the admissibility standards are met by a preponderance of the evidence. *See Bourjaily v. United States*, 483 U.S. 171 (1987). Unfortunately many courts have held or declared that***: (a) Rule 702 adopts a "liberal standard" requiring a presumption of admissibility; or, (b)*** the critical questions of the sufficiency of an expert's basis, and the application of the expert's methodology, are generally questions of

[8] *Daubert* recognizes that the basic standard of relevance under Rule 401 is a "liberal one," but does not attribute any such liberality to Rule 702. *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 587 (1993).
[9] *Cf.* Fed. R. Evid. 702 (suggested addition ***emphasized***).

> weight and not admissibility. These rulings are an incorrect application of Rules 702 and 104(a).[10]

These two additions to Rule 702 will help focus litigants and trial courts on the appropriate and more uniform standards for admission of expert testimony.

## II. The FDCC Supports the Proposed Committee Note Regarding Weight/Admissibility under Rule 702.

In "a disturbing number of cases," courts make the broad misstatement that "challenges to the sufficiency of an expert's basis raise questions of weight and not admissibility."[11] That misstatement is equivalent to a punt on third down – conceding a result when confronted with difficult circumstances. Yet, the difficult task of determining expert validity is unquestionably the role of the trial court and not the jury. And, experienced federal judges are in a far better position to accomplish that task than lay jurors.

These trial courts effectively shift *Daubert*'s gatekeeping requirement to counsel opposing the expert testimony. Any failure by the court to conduct a thorough Rule 702 analysis can supposedly be remedied by vigorous cross-examination.[12] Yet, once the expert is allowed to testify, the horse is out of the barn. Indeed, there are at least two instances where cross-examination of an expert will be insufficient to remedy a failure to conduct a comprehensive Rule 702 analysis.[13]

- First, the significance of cross-examination might "go over the heads" of jurors where expert testimony deals with complex and difficult subject matter.[14] This is the very reason for *Daubert*'s gatekeeping requirement.[15]
- Second, even successful cross-examination of an expert can be ineffective if the expert's opinion is unfairly prejudicial, touching upon sensitive or emotion-laden subjects.[16]

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[10] *Cf.* Daniel Capra, *Memorandum to Advisory Committee on Evidence Rules re: Possible Amendment to Rule 702*, (Oct. 1, 2019)(Agenda Book, Advisory Committee on Evidence Rules (Oct. 25, 2019 meeting) at 163-64)(suggested addition ***emphasized***).

[11] *Id.* at 160.

[12] *Johanessohn v. Polaris Indust., Inc.*, No. 16-CV-3348 (NEB/LIB), 2020 WL 1536416 (D. Minn. Mar. 31, 2020)(finding that criticisms of expert's methodology are matters for cross-examination); *United States v. Symantec Corp.*, No. 12-800 (RC), 2020 WL 1508904 at *10 n.5 (D.D.C. Mar. 30, 2020)("expert testimony with a weak basis in fact can be addressed through cross-examination."); *Clark v. Travelers Comps., Inc.*, No. 2:16-cv-02503 (ADS)(SIL), 2020 WL 473616 at * 5 (E.D.N.Y. Jan. 29, 2020).

[13] *See* 29 WRIGHT & GOLD, Federal Practice & Procedure § 6294. Wright & Gold discuss Rule 705 and the general weaknesses in cross-examining experts. Rule 702 is woven throughout that discussion.

[14] *Id.*

[15] *Id.*

[16] *Id.*

Such an opinion should be inadmissible in the first instance because it does not help the trier of fact under Rule 702(a).[17] "The whole point of Rule 702 – and the *Daubert*-Rule 104(a) gatekeeping function – is that these issues *cannot* be left to cross-examination."[18]

The FDCC knows that the Committee has been wrestling with its considerations pertaining to the weight/admissibility dilemma.[19] It appears that the Committee is "receptive" to a Committee Note addressing the issue and the Committee's Reporter has supplied a proposed note.[20] The FDCC fully supports that Committee Note so far as it addresses the weight/admissibility issue and urges its adoption in order to provide greater clarity and consistent interpretation of Rule 702 by the Courts. As succinctly noted in the Washington Legal Foundation's recent Working Paper, the intent of Rule702 was – and remains – to establish rather than evade a uniform standard courts will use to scrutinize an expert's basis, methodology and application.[21] The Committee must now issue necessary clarification so that the Rule can function as intended and safeguard the trial process against misleading and unqualified opinion testimony.

**Conclusion**

Thank you very much for your time and valuable consideration on these important issues. We stand ready to provide any further advice or input and look forward to the opportunities to further engage with the committees regarding the importance of Rule 702. We also respectfully endorse and adopt the Comments advanced on this issue by the Lawyers for Civil Justice, as though set forth fully herein.

Respectfully submitted,

Elizabeth Lorell
FDCC President

[17] *See id.*
[18] Capra, *supra* note 9 at 141.
[19] *Id.* at 159-161.
[20] *Id.* at 161, 163-164.
[21] Mickus, G*atekeeping Reorientation: Amend Rule 702 to Correct Judicial Misunderstanding About Expert Evidence,* Washington Legal Foundation, Critical Legal Issues Working Paper Series, Number 217 (May 2020).

July 29, 2020

Rebecca A. Womeldorf, Secretary
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Re: **Amending Federal of Evidence 702 – Comments from the Coalition of Litigation Justice, Inc. Supporting Stronger Gatekeeping in Federal Courts**

Dear Ms. Womeldorf:

The members of the Coalition for Litigation Justice, Inc. (the "Coalition") have an interest in ensuring that the rules and legal obligations applied in asbestos and other toxic tort litigation are consistently applied in conformity with sound science and public policy.[1] The Coalition regularly files *amicus* briefs that address legal and scientific issues in toxic tort litigation. The Coalition submits these comments in regard to proposed amendments to Rule 702. We urge the Committee to consider the dramatic impact on the rule of law when judges do not apply the strictures of Rule 702 correctly or with sufficient vigor. We further urge the Committee to modify the Rule and its comments to ensure full and effective application of the gatekeeping obligations by all federal court judges.

## INTRODUCTION

The Coalition's members regularly submit *amicus* briefs urging courts to apply expert gatekeeping rules in a manner that prevents unsupported and speculative expert testimony to influence jury decisions. Many of those cases are decided under federal Rule 702. The Coalition's efforts to ensure that courts are utilizing reliable science depends heavily upon the manner in which federal courts interpret and apply Rule 702.

## I. The Committee Should Direct Trial Judges to Investigate the Underlying Bases for the Opinion as a Mandatory Element of Rule 702 Review

The Coalition's experience in the last ten years in regard to the application of Rule 702 has been decidedly mixed. Many federal court judges have applied the Rule with sufficient rigor to look behind the expert's claims and statements by reviewing the scientific articles and other

[1] The Coalition consists of its members Century Indemnity Company; Allianz Reinsurance America, Inc.; Great American Insurance Company; Nationwide Indemnity Company; Resolute Management, Inc. a third-party administrator for numerous insurers; and TIG Insurance Company.

claimed support for the opinions. In many instances, as a result of that review, these courts have found that the expert's statements are often unsupported in the literature, or in some cases are outright misrepresentations of the science.

At the same time, there are federal court judges whose inclination is to "let it all in," despite the codification of *Daubert* in Rule 702. These judges studiously avoid examining the expert record other than to cite to the expert's own statements in support of their opinions. This shallow approach to gatekeeping has a predictable outcome – every such opinion allows the expert to testify. These opinions stand in sharp contrast to those by more rigorous judges, who frequently read the cited studies, examine the underlying scientific data, and challenge the expert's logic and overstatements – and then where necessary find that the experts are out of step with the science they claim to rely on.

To illustrate one such instance, the federal MDL judge overseeing a large docket of asbestos cases, despite performing an enormous benefit by dismissing many cases and clearing out that docket, allowed plaintiff experts to testify repeatedly that each and every exposure to asbestos, regardless of degree or dose, is a cause of disease. This "every exposure" theory has been rejected repeatedly by many courts.[2] The MDL court's rulings illustrate the problem – the opinions contain references to the experts' testimony – "Dr. Hammar opines…", "Dr. Hammar relies on…", Dr. Hammar notes …", etc. – with no investigation into the validity of those statements.[3] After remand of one of these cases to its home court in Utah, the Utah federal judge excluded the same experts, finding in part that the experts' statements were not supported by the cited studies.[4]

In a state court example, the intermediate Ohio appellate court decision in *Schwartz v. Honeywell Int'l., Inc.,* 66 N.E.3d 118, 125-128 (Ohio Ct. App. 2016), repeatedly referred to statements made by plaintiffs' experts as support for the reliability of their own testimony. Over *forty times* in the *Schwartz* opinion, the panel simply restated the expert's testimony by noting that the expert "testified," "opined," "found," "discussed," "considered," or "stated" certain opinions. *Id*. at 125-128. Not once did the court actually examine the basis for those statements or decide whether they were credible and derived from a scientific methodology. The Ohio Supreme Court reversed the ruling after determining that the expert testimony was in fact unsupported and unreliable. *Schwartz v. Honeywell Int'l, Inc.,* 102 N.E.2d 477 (Ohio 2018).

[2] For a discussion of the court rulings on the "every exposure" theory, as well as a discussion of the rigor needed for judicial review of low dose cases, *see* William Anderson & Kieran Tuckley, *How Much Is Enough? A Judicial Roadmap to Low Dose Causation Testimony in Asbestos and Tort Litigation,* 42 Am. J. Trial Advoc. 39 (2018).

[3] *See e.g., Anderson v. Saberhagen Holdings, Inc*., 2011 WL 605801 (E.D. Pa. Feb. 16, 2011).

[4] *Anderson v. Ford Motor Co*., 950 F. Supp. 2d 1217, 1223 (D. Utah 2013) ("Plaintiff's experts are unable to point to any studies showing that "any exposure" to asbestos above the background level of asbestos in the ambient air is causal of mesothelioma.").

Virtually every court that has admitted similar "every exposure" forms of testimony has made the same error – accepting the *ipse dixit* of the expert to self-qualify the expert's reliability.[5] If the court declines to pull back the curtain, the serious problem goes unchecked. In sharp contrast stand the many federal court opinions rejecting "every exposure" testimony, and every one of them includes significant discussion of the bases of the opinions – i.e., the complete lack of support in the cited studies, logic, and literature.[6]

The Coalition supports an amendment to the comments of Rule 702 instructing trial judges that a review under Rule 702(b) is insufficient if it merely cites to the experts' self-serving testimony as a basis for letting the expert testify. Examples of courts that perform the analysis correctly – including a review of cited scientific support – should be included in the comment to provide illustrations of a proper application of Rule 702 gatekeeping.

## II. The Review Requirements of *Daubert* and Rule 702 Must Be Strengthened and Consistently Enforced in Federal Courts in Light of the Dramatic Increase in Trial Verdict Damages

In the last few years, plaintiffs have sought, and often received, enormously high damages awards in product liability and tort cases. This escalation creates massive pressure on the court's Rule 702 review – any error by the judge in letting in nonscientific evidence is far more damaging today than it was a few years ago. The Committee must not allow trial judges to relax their guard over "shaky" or insufficient science.

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[5] *See, e.g., Neureuther v. Atlas Copco Compressors, L.L.C.*, 2015 WL 4978448, at *4 (S.D. Ill. Aug. 20, 2015) (citing only to expert's own statements before finding "nothing invalid" about the testimony); *Waite v. AII Acquisition Corp.*, 194 F. Supp. 3d 1298, 1314-17 (S.D. Fla. 2016), *aff'd on other grounds*, 901 F.3d 1307 (11thh Cir. 2018), *cert. denied*, 139 S. Ct. 1384 (2019) (repeated references to expert's own testimony); *Davis v. Honeywell Int'l Inc.*, 245 Cal. App. 4th 477, 487 (2016) (citing only to expert's own explanation).

[6] Federal and state decisions under Rule 702 or state equivalents include *Flores v. Borg-Warner*, 232 S.W.3d 765, 765 (Tex. 2007); *Georgia-Pacific Corp. v. Stephens*, 239 S.W.3d 304, 321 (Tex. Ct. App. 2007); *In re W.R. Grace & Co*., 355 B.R. 464, 476 (Bankr. D. Del. 2006); *Martin v. Cincinnati Gas & Elec. Co*., 561 F.3d 439, 443 (6th Cir. 2009); *Smith v. Kelly-Moore Paint Co., Inc.*, 307 S.W.3d 829, 834 (Tex. Ct. App. 2010); *Butler v. Union Carbide Corp.*, 712 S.E.2d 537, 552 (Ga. Ct. App. 2011); *Wannall v. Honeywell Int'l, Inc*., 292 F.R.D. 26, 43 (D.D.C. 2013), *aff'd*, 775 F.3d 425 (D.C. Cir. 2014); *Moeller v. Garlock Sealing Techs*., 660 F.3d 950, 950–55 (6th Cir. 2011); *Smith v. Ford Motor Co.*, 2013 WL 214378, at *5 (D. Utah Jan. 18, 2013); *Anderson v. Ford Motor Co*., 950 F. Supp. 2d 1217, 1225 (D. Utah 2013); *McIndoe v. Huntington Ingalls Inc.*, 817 F.3d 1170, 1177 (9th Cir. 2016); *Estate of Barabin v. AstenJohnson, Inc*., 740 F.3d 457 (9th Cir.), *cert denied*, 135 S. Ct. 55 (2014) (returning case for more stringent *Daubert* review); *Stallings v. Georgia-Pacific Corp.*, 675 F. App'x 548, 549 (6th Cir. 2017); *Scapa Dryer Fabrics, Inc. v. Knight*, 788 S.E.2d 421, 425 (Ga. 2016); *Bostic v. Georgia-Pacific Corp.*, 439 S.W.3d 332, 338 (Tex. 2014); *Comardelle v. Pennsylvania Gen. Ins. Co.,* 76 F. Supp. 3d 628, 634 (E.D. La. 2015); *Sclafani v. Air & Liquid Sys. Corp.*, 2013 WL 2477077, at *4 (C.D. Cal. May 9, 2013); *Yates v. Ford Motor Co.*, 113 F. Supp. 3d 841, 849 (E.D.N.C. 2015), *reconsideration denied*, 143 F. Supp. 3d 386 (E.D.N.C. 2015); *Vedros v. Northrup Grumman Shipbuilding, Inc.*, 119 F. Supp. 3d 556, 565 (E.D. La. 2015); *Davidson v. Georgia Pacific LLC,* 2014 WL 3510268, at *5 (W.D. La. July 14, 2014), *vacated and remanded on other grounds*, 819 F.3d 758 (5th Cir. 2016); *Crane Co. v. DeLisle*, 206 So. 3d 94, 106 (Fla. Ct. App. 2016); *Suoja v. Owens-Illinois, Inc.*, 211 F. Supp. 3d 1196, 1207-08 (W.D. Wis. 2016); *Doolin v. Ford Motor Co.*, 2018 WL 4599712, at *12 (M.D. Fla. Sept. 25, 2018); *Krik v. Exxon Mobil Corp.,* 870 F.3d 669, 677 (7th Cir. 2017).

A list of jury verdicts and damages since 2016 in talc and Roundup™ litigation alone demonstrates the escalation in verdict amounts (some were reversed on appeal or are on appeal):

- $80.27 million – *Hardeman* (Roundup™ MDL, reduced to $25 million post-trial)
- $289 million - *Johnson* (Roundup™, California), reduced to $78.5 million post-trial, then to $20.5 in intermediate court of appeal
- $2.055 billion - *Pilliod* (Roundup™, California), reduced to $86.7 million post-trial
- $37.2 million - *Barden* (talc, New Jersey, 4 plaintiffs)
- $70 million - *Giannecchini* (talc, Missouri)
- $29.4 million - *Leavitt* (talc, California)
- $4.69 billion – *Ingham* (talc, Missouri), 22 plaintiffs
- $25.75 million – *Anderson* (talc, California)
- $117 million – *Lanzo* (talc, New Jersey)
- $55 million – *Reistesund* (talc, Missouri)
- $72 million – *Fox* (talc, Missouri)

These verdicts are mostly in state court, but they illustrate the trend, and federal courts are not immune. The experience in the Roundup™ federal MDL trial noted above demonstrates the problem. Judge Chhabria, in his pretrial ruling on summary judgment and *Daubert* motions, found that the admissibility of the plaintiffs' expert evidence was "a very close question," and that the "evidence of a causal link between glyphosate exposure and NHL in the human population seems rather weak."[7] He further concluded that "[t]he evidence, viewed in its totality, seems too equivocal to support any firm conclusion that glyphosate causes NHL. This calls into question the credibility of some of the plaintiffs' experts, who have confidently identified a causal link."[8] In this opinion, the court characterized the plaintiffs' evidence as "shaky."[9] The judge then declared that "plaintiffs appear to face a daunting challenge at the next phase,"[10] and again found that "it is

[7] *In re Roundup Prods. Liab. Litig*., 390 F. Supp. 3d 1102, 1108 (N.D. Cal. 2018).

[8] *Id.* at 1109.

[9] *Id.* at 1151.

[10] *Id.* at 1109.

a close question whether to admit the expert opinions"[11] of even the best of plaintiff's five experts. In a later ruling, the judge found that the plaintiffs' experts "barely inched over the line."[12]

Despite these obvious problems, the court held that, under Ninth Circuit law, he was only allowed to exclude true "junk science," and thus he permitted four of the experts to testify. The result, as noted above, was an $80 million verdict based on "shaky" science. The case is on appeal.

Our system of justice can no longer afford to allow such marginal testimony under Rule 702. Verdicts in the hundreds of millions or even billions of dollars must be based on, if anything, significantly more reliable testimony than even *Daubert* itself would require today. For this reason, the Coalition urges the Committee to continue to enhance court gatekeeping authority under Rule 702, and to include any necessary provisions and comments to ensure that federal verdicts cannot be premised on "shaky" science that barely gets over an extremely low bar.

The Coalition thus supports the comments of Lawyers for Civil Justice and enhancements to increase judicial emphasis on Rule 702(b) and (d) as noted above and as submitted by other commenters.[13]

Respectfully submitted,

The Coalition for Litigation Justice, Inc.

[11] *Id.* at 1151.

[12] *In re Roundup Prods. Liab. Litig*., 358 F. Supp. 3d 956, 957 (N.D. Cal. 2019).

[13] *See* Lawyers for Civil Justice, Comment to the Advisory Committee on Evidence Rules and its Rule 702 Subcommittee, Clearing Up the Confusion: The Need for a Rule 702 Amendment to Address the Problems of Insufficient Basis and Overstatement (Sept. 6, 2019); Lawyers for Civil Justice, Comment to the Advisory Committee on Evidence Rules and its Subcommittee on Rule 702, In Support of Amending Rule 702 to Address the Problem of Insufficient Basis for Expert Testimony (Oct. 10, 2018); Federation of Defense & Corporate Counsel, Comment on Potential Amendment to Federal Rule of Evidence 702 (June 30, 2020); Letter from 50 General Counsel re Amending Federal Rule of Evidence 702 to Clarify Courts' "Gatekeeping" Obligation (Mar. 2, 2020).

**From:** Anderson, William
**To:** RulesCommittee Secretary
**Subject:** Comments on Rule 702 Amendment
**Date:** Wednesday, July 29, 2020 4:56:19 PM
**Attachments:** Coalition for LItigation Justice Rule 702 Comments.pdf

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Ms. Womeldorf, I represent the Coalition for Litigation Justice, Inc. Please find attached the comments of the Coalition for consideration by the Committee on possible amendments to Rule 702. Thank you for your attention.

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# COMMENT TO THE

# ADVISORY COMMITTEE ON EVIDENCE RULES AND ITS RULE 702 SUBCOMMITTEE

# IN SUPPORT OF AMENDING RULE 702 AND ITS COMMENTS TO ACHIEVE MORE ROBUST AND CONSISTENT GATEKEEPING

July 31, 2020

The International Association of Defense Counsel ("IADC") respectfully submits this Comment in support of amending Federal Rule of Evidence 702 and its comments to achieve more robust and consistent judicial gatekeeping.

The IADC is an invitation-only, peer-reviewed membership organization of approximately 2,500 of the world's leading corporate and insurance defense lawyers and insurance executives. The IADC has been serving its members for a century. Its core purpose is to enhance the development of skills and professionalism of its members to benefit the civil justice system, the legal profession, and society in general. IADC members handle cases in all federal jurisdictions and have been involved in many precedent-setting decisions and appeals.

Rule 702 is a rule more often misunderstood by some courts than followed over the last twenty years.[1] As the Advisory Committee notes to the 2000 Amendments to the Rule state clearly, "the admissibility of all expert testimony is governed by the principles of Rule 104(a). Under that Rule, the proponent has the burden of establishing that the pertinent admissibility requirements are met by a preponderance of the evidence."[2]

Too many courts misunderstand this clearly-articulated standard. In fact, at least two appellate circuits—the Eighth and the Ninth Circuits—have expressly adopted standards for admissibility that defy the Advisory Committee's 2000 Comment. In addition, numerous trial courts throughout the nation frequently admit flimsy expert evidence, usually by reasoning that challenges to an expert's methods are challenges to the weight the evidence should receive rather than its admissibility. The Standing Committee is aware of this specific problem, lamenting that "crafting an amendment that essentially tells federal courts to 'apply the rule' may be challenging."[3]

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[1] *See, e.g.*, Victor E. Schwartz & Cary Silverman, *The Draining of* Daubert *And The Recidivism of Junk Science in Federal and State Courts*, 35 Hofstra L. Rev. 127 (2006).

[2] Advisory Committee Notes on Rule 702—2000 Amendment (citing *Bourjaily v. United States,* 483 U.S. 171 (1987)).

[3] Agenda Book for June 12, 2018, Standing Committee Meeting, at 433.

## I. The Eighth Circuit Refuses Only "Fundamentally Unsupported" Expert Testimony

The Eighth Circuit has interpreted Rule 702 to admit evidence wherever possible rather than as a tool to exclude evidence that will not help the trier of fact.[4] As a result, the court has held that an expert's opinion should be excluded "only if it is so fundamentally unsupported that it can offer no assistance to the jury."[5] These standards originate in opinions that predate not only the 2000 Amendments to Rule 702, but the Supreme Court's announcement of new standards for admitting expert testimony in *Daubert.*[6]

To give an idea of the pernicious effects this legacy standard for admitting expert testimony has imposed, one need only look at the case that served as the origin point for mass litigation over talcum powder: a trial in the District of South Dakota in *Berg v. Johnson & Johnson.*[7] In *Berg,* the plaintiff sued Johnson & Johnson, alleging that its talc products had caused her ovarian cancer.

In preparing to move for summary judgment, Johnson & Johnson challenged the testimony of the various experts Ms. Berg had indicated she would employ, including an epidemiologist who had conducted a prior study of ovarian cancer, but whose methodology was severely flawed. Among other problems, the epidemiologist did not rule out alternative causes of ovarian cancer,[8] his testimony conflicted with the existing scientific literature,[9] his data was "'cherry-picked' … solely for purposes of litigation,"[10] and his conclusions conflicted with his non-litigation research and with each other internally.[11]

Despite conceding the existence of these problems, the trial court admitted the expert's testimony, relying heavily on the highly permissive standard the Eighth Circuit had articulated.[12]

Post-*Berg*, plaintiffs across the country filed nearly identical talc lawsuits against Johnson & Johnson and other defendants. Those copycat suits have produced dramatically different results.[13] At one extreme, a twenty-two plaintiff case in the City of St. Louis produced a $4.69 billion verdict, reduced to $2.12 billion by the Missouri Court of Appeals.[14] There have been several multi-million dollar verdicts in various jurisdictions, including California.[15] Despite these

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[4] *See, e.g., Sappington v. Skyjack, Inc.,* 512 F.3d 440, 448 (8th Cir. 2008); *Lauzon v. Senco Prods., Inc.,* 270 F.3d 681, 686 (8th Cir. 2001); *Arcoren v. United States,* 929 F.2d 1235, 1239 (8th Cir.), *cert. denied*, 502 U.S. 913 (1991).

[5] *Wood v. Minn. Mining & Mfg. Co.,* 112 F.3d 306, 309 (8th Cir. 1997).

[6] *Daubert v. Merrell Dow Pharms., Inc.*509 U.S. 579 (1993).

[7] 940 F. Supp. 2d 983 (D.S.D. 2013).

[8] *Id.* at 991.

[9] *Id.*

[10] *Id*.

[11] *Id.* at 992.

[12] *Id.* at 991-92.

[13] *See* Nicole Prefontaine, *Talcum Powder & Expert Power: Admissibility Standards of Scientific Testimony*, 59 Jurimetrics J. 341 (2019).

[14] *See Ingham v. Johnson & Johnson*, 2020 WL 3422114 (Mo. Ct. App. June 23, 2020). J&J has said it will appeal to the Missouri Supreme Court.

[15] *See* William L. Anderson & Kieran Tuckley, *How Much Is Enough? A Judicial Roadmap to Low Dose Causation Testimony in Asbestos & Tort Litigation,* 42 Am. J. Trial Advoc. 39 (2018).

verdicts, New Jersey courts have dismissed similar cases,[16] and Johnson & Johnson has won others at trial.[17]

In May 2020, Johnson & Johnson announced it was discontinuing North American sales of its talcum-based baby powder.[18] Among other reasons, the company attributed the decision to declining demand caused by misinformation from a "constant barrage of litigation advertising."[19]

In contrast to the inconsistent rulings in the courts, the scientific consensus supports Johnson & Johnson. For example, in January, the *Journal of the American Medical Association* published the results of an original investigation in which it announced that, after examining four cohort populations involving more than 250,000 women, "there was not a statistically significant association between use of [talcum] powder in the genital area and ovarian cancer."[20]

## II. The Ninth Circuit Admits Everything Short of "Unreliable Nonsense"

The Ninth Circuit has interpreted Rule 702 past the bounds of its text, impacting cases such as the litigation involving the popular herbicide Roundup™.[21] That litigation has taken a finding by the International Agency for Research on Cancer (a watchdog group tasked with identifying novel potential carcinogens for further study) that the active ingredient in Roundup™ (glyphosate) has the potential to cause cancer, and expanded it into a wholesale challenge to the sale of glyphosate in the United States.

The scientific consensus remains that glyphosate does not pose cancer risks at human-level doses.[22] Nonetheless, in the years preceding the Roundup™ litigation, the Ninth Circuit had decided a series of cases in which various panels of the appellate court had—in a series of admitted "close calls"—allowed the admission of "shaky" expert evidence to the jury, citing the "interests of justice" over those of accuracy.[23]

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[16] *See* Prefontaine, *supra* note 13, at 341.

[17] *See, e.g.*, Tina Bellon, *Jury Clears J&J of Liability in New Jersey Talc Cancer Case*, 41 No. 1 Westlaw J. Asbestos 5 (2018); Tina Bellon, *New Jersey Jury Finds J&J Not Liable in Talc Cancer Trial; Company Settles Three Other Cases*, 41 No. 13 Westlaw J. Asbestos 2 (2019); Nate Raymond, *Johnson & Johnson Wins California Lawsuit Claiming Asbestos in Talc Caused Cancer*, 28 No. 11 Westlaw J. Prod. Liab. 5 (2017); Nate Raymond, *Johnson & Johnson Wins Trial in Talc Product Liability Lawsuits*, 28 No. 2 Westlaw J. Prod. Liab. 4 (2017).

[18] *See* Tiffany Hsu & Roni Caryn Rabin, *Johnson & Johnson to End Talc-Based Baby Powder Sales in North America,* N.Y. Times, May 19, 2020, *at* https://www.nytimes.com/2020/05/19/business/johnson-baby-powder-sales-stopped.html.

[19] Amanda Bronstad, *Expert Ruling Was 'Tipping Point' for J&J's Talc Withdrawal, Lawyers Say*, Law.com, May 22, 2020, *at* https://www.law.com/2020/05/22/expert-ruling-was-tipping-point-for-jjs-talc-withdrawal-lawyers-say/?cmp=share_twitter.

[20] Katie M. O'Brien, *et al*., *Association of Powder Use in the Genital Area with Risk of Ovarian Cancer*, 323 JAMA 49, 49-59 (2020).

[21] *See In re Roundup Prods. Liab. Litig*., 390 F. Supp. 3d 1102, 1108 (N.D. Cal. 2018).

[22] *See Nat'l Ass'n of Wheat Growers v. Becerra*, 2020 WL 3412732, at *2 (E.D. Cal. June 22, 2020) (stating that, in contrast to IARC, "several other organizations, including the EPA, other agencies within the World Health Organization, and government regulators from multiple countries, have concluded that there is insufficient or no evidence that glyphosate causes cancer.").

[23] *See Wendell v. GlaxoSmithKline LLC,* 858 F.3d 1227, 1237-38 (9th Cir. 2017), *cert. denied sub nom. Teva Pharms. USA, Inc. v. Wendell*, 138 S. Ct. 1283 (2018) (reversing exclusion of expert evidence as abuse of discretion; "interests of justice favor leaving difficult issues in the hands of the jury," even when they involve "shaky" expert evidence);

In the Roundup™ litigation, the trial court admitted the testimony of an epidemiologist who testified that there was a specific relationship between exposure to glyphosate and non-Hodgkin's lymphoma, despite the admittedly "valid" critique that she did not adequately adjust her data to account for use of other pesticides,[24] and an outright admission that "this portion of her presentation calls her objectivity and credibility into question."[25]

The court ultimately admitted her testimony because—quoting the Ninth Circuit—it did "not rise to the level of an 'unreliable nonsense opinion.'"[26] The trial court conceded that the Ninth Circuit's permissive standard "has resulted in slightly more room for deference to experts in close cases than might be appropriate in other circuits," which is "a difference that could matter in close cases."[27]

That difference has mattered a great deal. There have been three trials in cases alleging that plaintiffs developed Non-Hodgkin's lymphoma from exposure to Roundup™, one in San Francisco federal court and two in Bay Area state courts.[28] The trials resulted in plaintiff verdicts totaling $2.4 billion before post-trial reductions and received national media attention because of their enormity.[29] The cases are on appeal and there are reports that Bayer may be working toward a resolution of the litigation at a cost of up to $9.6 billion for the current claims alone. The *Wall Street Journal* called the potential settlement "a shakedown for the history books,"[30] after describing "the entire Roundup litigation" as "a stickup."[31]

Like the talc litigation, the science in the courtroom in Roundup™ does not match the scientific consensus in the real world.

For example, EPA publicly reiterated in January 2020 that the agency had "thoroughly evaluated potential human health risk associated with exposure to glyphosate and determined that there are no risks to human health from the current registered uses of glyphosate and that

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*Messick v. Novartis Pharms. Corp.,* 747 F.3d 1193, 1198-99 (9th Cir. 2014) (reversing summary judgment; trial court erred in excluding expert testimony as scientifically unreliable, not recognizing that "[m]edicine partakes of art as well as science"); *Alaska Rent-a-Car, Inc. v. Avis Budget Group, Inc.,* 738 F.3d 960, 969 (9th Cir.), *cert. denied*, 571 U.S. 1024 (2013) (reversing exclusion of expert: "Basically, the judge is supposed to screen the jury from unreliable nonsense opinions, but not exclude opinions merely because they are impeachable.").

[24] *In re Roundup Prods. Liab. Litig.,* 390 F. Supp. 3d 1102, 1140 (N.D. Cal. 2018).

[25] *Id*. at 1109.

[26] *Id.* at 1113 (quoting *Alaska Rent-a-Car, Inc.,* 738 F.3d at 969); *see also In re Roundup Prods. Liab. Litig*., 358 F. Supp. 3d 956, 957 (N.D. Cal. 2019) (stating that plaintiffs' experts "barely inched over the line.").

[27] *In re Roundup Prods. Liab. Litig.,* 390 F. Supp. 3d at 1113.

[28] *See* Editorial, *The Roundup Settlement*, Wall St. J., June 29, 2020, at A14, *at* https://www.wsj.com/articles/the-roundup-settlement-11593212426.

[29] Sara Randazzo & Jacob Bunge, *Inside the Mass-Tort Machine That Powers Thousands of Roundup Lawsuits*, Wall St. J., Nov. 25, 2019, *at* https://www.wsj.com/articles/inside-the-mass-tort-machine-that-powers-thousands-of-roundup-lawsuits-11574700480; *see also Johnson v. Monsanto Co*., 2020 WL 4047332 (Cal. Ct. App. July 20, 2020).

[30] *See* Editorial, *The Roundup Settlement*, *supra* note 28.

[31] Editorial, *The Roundup Stickup,* Wall St. J., Dec. 25, 2019, *at* https://www.wsj.com/articles/the-roundup-stickup-11577299381. Bayer's CEO told Fox Business, "I would say that the country's in dire need of tort reform." *Werner Baumann, CEO of Bayer, is Interviewed on Fox Business*, CQ-Rollcall Pol. Transcriptions, 2020 WLNR 17711970 (June 25, 2020).

glyphosate is not likely to be carcinogenic to humans."[32] EPA's position is consistent with other international authorities, including the Canadian Pest Management Regulatory Agency, Australian Pesticide and Veterinary Medicines Authority, European Food Safety Authority, European Chemicals Agency, German Federal Institute for Occupational Safety and Health, New Zealand Environmental Protection Authority, and the Food Safety Commission of Japan.[33]

In June of 2020, a California federal district court permanently enjoined the state from requiring a "Proposition 65" cancer warning on glyphosate-based herbicides because "the great weight of evidence indicates that glyphosate is not known to cause cancer."[34]

## III. Other Courts Do the Same, Even Without Explicit Appellate Guidance

Other courts also misunderstand the rule's requirement that the plaintiff bears the burden of establishing admissibility. As a result, we see cases where courts push off valid questions about methodology—which is supposed to determine reliability—as questions of weight of the evidence. This allows the courts to avoid difficult decisions about whether scientific evidence is appropriate. But those decisions will be equally—if not more—difficult for juries to make, especially with the knowledge that the appointed gatekeeper found the evidence appropriate for them to hear. As several commentators have noted, courts conflate the concepts of sufficiency and weight in ways that keep scientifically dubious cases alive.[35]

- In *Zollicofer v. Gold Standard Baking, Inc.,*[36] the defendants challenged the admissibility of a rebuttal declaration by an economist purporting to show that certain policies were discriminatory in effect. The trial court admitted his testimony over objections about his failure to vet the data used, because questions of proper vetting of data went to the "weight" of testimony, not its admissibility.[37]
- In *Hospital Authority of Metropolitan Government of Nashville and Davidson County, Tenn. v. Momenta Pharmaceuticals, Inc.,*[38] the defendants challenged the admissibility of a report from an economist because it was unreliable given the expert's failure to perform the usually required statistical analysis. The trial court admitted the testimony anyway, holding that the use of statistical analysis (a methodological question) went to "weight," not admissibility.[39]

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[32] U.S. Envtl. Prot. Agency, Glyphosate Interim Registration Review Decision, Case No. 0178, at 10 (Jan. 2020), *at* https://www.epa.gov/sites/production/files/2020-01/documents/glyphosate-interim-reg-review-decision-case-num-0178.pdf.

[33] Letter from Michael L. Goodis, P.E., Dir., Registration Div., Office of Pesticide Programs, EPA to Glyphosate Registrants (Aug. 7, 2019), *at* https://www.epa.gov/sites/production/files/2019-08/documents/glyphosate_registrant_letter_-_8-7-19_-_signed.pdf.

[34] *See Nat'l Ass'n of Wheat Growers*, 2020 WL 3412732, at *8.

[35] *See, e.g.,* David L. Faigman, *et al., Gatekeeping Science: Using the Structure of Scientific Research to Distinguish Between Admissibility and Weight in Expert Testimony,* 110 Nw. U. L. Rev. 859, 862 (2016) (noting persistent confusion between admissibility and weight in federal courts).

[36] 2020 WL 1527903 (N.D. Ill. Mar. 31, 2020).

[37] *Id.* at *15.

[38] 333 F.R.D. 390, 400 (M.D. Tenn. 2019).

[39] *Id.* at 402.

- In *In re National Prescription Opiate Litigation,*[40] the court denied the defendant's Rule 702 challenge to an expert who had "failed to adequately consider econometrics concepts such as nonstationarity and endogeneity in her analysis."[41] The court held that "the significance of endogeneity goes to the weight, not the admissibility" of the testimony.[42]
- In *Taylor v. Trapeze Management, LLC,*[43] the court rejected a challenge to a proposed marketing research expert, holding that challenges to survey design and population went to weight, not admissibility.

Each of these opinions represents a judge's misunderstanding that a jury is the best arbiter of the methodology for difficult questions. Rule 702 should be clear that it is the court's responsibility to decide question such as the appropriate method of vetting data or the proper role of nonstationarity and endogeneity in econometrics research, to use examples from the cases mentioned above.

Leaving these questions to the jury is not just abdicating the judge's gatekeeping role, it is privileging persuasiveness—which can depend on a number of non-rational factors such as narrative framing, cognitive bias, and outright prejudice—over accuracy. These decisions do not meet the requirements of Rule 702. They also conflict with the purpose of the federal rules, which are meant to "ascertain[] the truth and secur[e] a just determination."[44]

## IV. Proposed Amendment

Reform does not require revolutionary changes to the Federal Rules of Evidence. Rule 702 already requires a preponderance of proof standard. Currently, the 2000 Committee Notes state that, consistent with Rule 104(a) "the proponent has the burden of establishing that the pertinent admissibility requirements are met by a preponderance of the evidence."[45]

Not all rulings admitting experts based on a preponderance of the available evidence will be free from criticism. However, each of the various holdings listed above—which defer questions of methodology to the jury or knowingly admit faulty findings—lacked any mention of this standard, or any finding which would meet it.[46]

Therefore, we propose the following amendment to Rule 702:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if, after findings consistent with Rule 104, the court determines:".

[40] 2019 WL 3934597, *10 (N.D. Ohio Aug. 20, 2019).

[41] *Id.* at *10.

[42] *Id.*

[43] 2019 WL 1977514, *3 (S.D. Fla. Feb. 28, 2019).

[44] *See* Fed. R. Evid. 102 ("These rules should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination.").

[45] Fed. R. Evid. 702, Committee Notes on Rules – 2000 Amendment.

[46] *See Zollicofer,* 2020 WL 1527903, at *15 (no mention of preponderance standard); *Hosp. Auth. of Nashville,* 333 F.R.D. at 402; *In re Nat'l Prescription Opiate Litig.,* 2019 WL 3934597, at *10; *Taylor,* 2019 WL 1977514, at *3.

Adding language to Rule 702 specifically referencing this standard, instead of leaving it in the Notes, should prevent courts from continuing to misunderstand the preponderance standard. It should also encourage both sides to brief the issues in terms of the preponderance of available evidence and encourage courts to make findings on each factor.

## V. Conclusion

The IADC appreciates the opportunity to share its views. We are particularly concerned about mass tort litigations in which the science in the courtroom seems increasingly divorced from the mainstream scientific consensus outside the courtroom. The rule of law and credibility of the civil justice system will suffer along with the nation's competitiveness if outcomes in the courts appear arbitrary. We encourage the Committee to adopt amendments to address this problem including the approach we have outlined here and those submitted by other commenters.[47]

[47] *See* Lawyers for Civil Justice, Comment to the Advisory Committee on Evidence Rules and its Rule 702 Subcommittee, Clearing Up the Confusion: The Need for a Rule 702 Amendment to Address the Problems of Insufficient Basis and Overstatement (Sept. 6, 2019); Lawyers for Civil Justice, Comment to the Advisory Committee on Evidence Rules and its Subcommittee on Rule 702, In Support of Amending Rule 702 to Address the Problem of Insufficient Basis for Expert Testimony (Oct. 10, 2018); Federation of Defense & Corporate Counsel, Comment on Potential Amendment to Federal Rule of Evidence 702 (June 30, 2020); Letter from 50 General Counsel re Amending Federal Rule of Evidence 702 to Clarify Courts' "Gatekeeping" Obligation (Mar. 2, 2020).

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March 2, 2020

Rebecca A. Womeldorf, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE
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**Re: Amending Federal Rule of Evidence 702 to Clarify Courts' "Gatekeeping" Obligation**

Dear Ms. Womeldorf:

The National Association of Mutual Insurance Companies ("NAMIC") respectfully offers these comments to the Advisory Committee on Evidence Rules ("Committee"), which is entrusted with the essential task of ensuring the Federal Rules of Evidence ("FRE") are fair, plainly understood, and uniformly applied.

NAMIC is the largest and most diverse national property/casualty insurance trade and political advocacy association in the United States. Its 1,400 member companies write all lines of property/ casualty insurance business and include small, single-state, regional, and national carriers accounting for 50 percent of the automobile/ homeowners' market and 31 percent of the business insurance market. NAMIC has been advocating for a strong and vibrant insurance industry since its inception in 1895.

In our own capacity and representing the legal officers of our member companies that are frequently engaged with the American civil justice system, we represent stakeholders who rely on the federal courts to be a fast forum for the resolution of legal disputes on the merits.

We compliment the Committee on its diligence in evaluating practices under Rule 702, but we are concerned that, contrary to the Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) and its progeny, some courts may not sufficiently fulfilled their obligation to fully execute or enforce their requirement to ensure the role of expert witnesses.

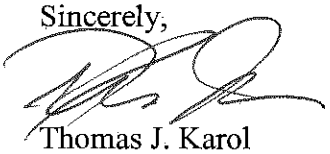
In a growing number of cases, there appear to be courts deferring their responsibility to determine that a proposed expert's opinions have the requisite scientific support by first ensuring that the testimony is the product of reliable principles and methods and is reliably applied. Other courts seem to presume, rather than require the establishment of, expert's qualifications, opinions and methodologies.

We support the Committee's general caution about amendments that clarify rather than change standards; address problems of adherence to, rather than understanding of, the rule; and affect the development of legal principles in a way perhaps better left to case law.

We do respectfully suggest that the Committee consider amendments to Rule 702 that would remedy the potential inconsistency in practice by clarifying that the proponent of an expert's testimony bears the burden of establishing its admissibility, by demonstrating to the presiding judge the sufficiency of the basis and reliability of the expert's methodology and its application. Further, the court should not permit an expert to assert a degree of confidence in an opinion that is not itself derived from sufficient facts and reliable methods.

Thank you for your consideration.

Sincerely,



Thomas J. Karol
General Counsel Federal
National Association of Mutual Insurance Companies.

August 31, 2020

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

Re: Amending Federal Rule of Evidence 702

Dear Ms. Womeldorf:

In 2015, we co-authored the article *Defending Daubert: It's Time to Amend Federal Rule of Evidence 702*, 57(1) William & Mary Law Review 1 (2015). In our article, we reviewed the drafting history of the 2000 amendments to Rule 702, the new language that resulted, and the many ways in which federal courts have either completely ignored or misinterpreted the standard for expert admissibility that was codified in the amended rule.

We have been gratified by the serious attention this article has garnered from the Advisory Committee on Evidence Rules ("Committee"), and we commend the Committee for the further analyses it has conducted on this issue, much of which is set forth in Judge Schroeder's recent article, *Toward a More Apparent Approach to Considering the Admission of Expert Testimony*, 95(5) Notre Dame Law Review 2039 (2020). While the Committee has focused on different proposed language for an amended Rule 702 than we proposed in our 2015 article, we believe that the language being considered by the Committee, along with further guidance in an accompanying Committee note, would address many of the more significant problems of judicial recalcitrance noted in our article.

We write now in response to arguments that – notwithstanding clear examples of judicial misapplication of Rule 702 – the Committee should forswear any amendment to the Rule and rely instead on judicial education in the hope that this will persuade recalcitrant courts to more faithfully fulfill their gatekeeping responsibility.

As the Committee may recall, similar arguments were made prior to the 2000 amendments. Now, as then, "[a] number of public commentators asserted that Rule 702 should not be amended because it is currently working well" and that "courts are reaching conformity over the meaning of *Daubert*."[1] In response, Committee Reporter, Professor Capra explained that opponents to a revised Rule "tend[ed] to overstate the existence of post-*Daubert* uniformity" and cited to cases that has misapplied the admissibility standard in the very same ways that many courts continue to misapply the standard today:

[1] *See* March 1, 1999 Memorandum from Dan Capra, Reporter, to Advisory Committee on Evidence Rules, re: *Public comments on, and possible revisions to, Proposed Amendments to Evidence Rule 702*, at 47 ("March 1, 1999 Memo"), available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Evidence/EV1999-04.pdf.

(1) improperly applying the Rule 104(b) standard to questions of expert admissibility,
(2) failing to follow the rule set forth in *In re Paoli Railroad Yard PCB Litigation*, 35 F.3d 717 (3d Cir. 1994) that requires courts to analyze each step in an expert's analysis including that the expert's methods are reliably applied to the facts of the case,
(3) drawing too strong a distinction between methodology and conclusions, and
(4) applying a non-rigorous approach to expert admissibility and improperly relegating the issue to a jury's consideration on the grounds that it can be subject to cross-examination and contrary proof."[2]

The persistence of these conflicting understandings of Rule 702 over the past 20 years speak strongly to the need for the Advisory Committee to amend the rule once more to secure uniformity and proper application of the expert admissibility standard. As Professor Capra recently noted: "[W]hen a conflict is long-standing, shows no signs of being resolved, and creates divergent standards for litigants operating within the same court system, *it is a drafting committee's responsibility to resolve the impasse*."[3] Professor Capra continued: "Indeed, one of the main reasons that the Advisory Committee was reconstituted in 1992 was to assist in the resolution of conflicts in the application of the Rules. In the context of damaging and unresolved conflicts, the benefits of uniformity and fairness outweigh the potential costs of dislocation and unintended consequences."[4]

Given these long-standing conflicts, it is sophistry to suggest that further efforts to educate the judiciary on the meaning of a rule that they have been applying for the past twenty years will somehow lead to an evolution in the views of recalcitrant judges. Moreover, such judicial training efforts will do little in the face of a large body of existing precedent misinterpreting amended Rule 702, nor will it address the confusion that this case law has engendered in attorneys and parties to disputes. Judges and litigators naturally rely on precedents from their own circuits, in the absence of a new rule superseding those precedents. Relevant decisions by all parties should be informed by an accurate and consistent application of the expert admissibility standards, not by erroneous precedents that ignored the clear wording and intent of a federal rule of evidence.

Similarly unpersuasive are two additional arguments that have been raised against the currently-proposed amendment to expressly incorporate the Rule 104(a) standard into Rule 702. First, opponents argue that the amendment is unnecessary because the 104(a) standard is referenced in *Daubert* itself and further set forth in the Committee's notes to the 2000 amendment to Rule 702. But with the 2000 Amendment, it is the language of Rule 702 that governs expert admissibility. As Judge Schroeder has recognized, "some courts have defaulted to [other language in *Daubert*] that Rule 702 is not meant to prohibit 'shaky but inadmissible' evidence" as grounds to improperly apply Rule 104(b)'s standard for admissibility.[5] Further, while the Committee's efforts to provide guidance with the Note to the 2000 amendment was admirable,[6] Committee notes are not legally binding and have often been ignored entirely in the context of interpreting Rule 702. .

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[2] *Id.* at 47-48; *compare Toward a More Apparent Approach*, at 2042-43 (noting similar problems with post-2000 opinions).
[3] Capra DJ & Richter LL, *Poetry in Motion: The Federal Rules of Evidence and Forward Progress as an Imperative*, 99 B.U. L. Rev. 1873, 1886 (2019) (emphasis added).
[4] *Id.* at 1886-87.
[5] *Toward a More Apparent Approach*, at 2042-43.
[6] *See Poetry in Motion*, at 1921-22

Second, considerable effort has been taken to reanalyze the record in some of the cases that misapplied Rule 702 to suggest that those cases might have been resolved similarly under the correct standard.[7] Respectfully, we believe this effort is fundamentally misguided. As none other than the Ninth Circuit recognized in response to a similar argument in the context of a flawed trial court expert admissibility decision, "A post-verdict analysis does not protect the purity of the trial, but instead creates an undue risk of post-hoc rationalization. This is hardly the gatekeeping role the Court envisioned in *Daubert* and its progeny."[8] In any event, speculation over whether a court would have reached the correct result if it had applied the right standard in an individual case is irrelevant to the legal hazard created by the continued entrenchment of the incorrect legal standard, which may be viewed as binding in subsequent cases.[9]

Finally, as we noted in our 2015 article and Judge Schroeder notes in his article as well, the courts that have been misapplying Rule 702 are not only misinterpreting the Rule's requirements, they are in many instances completely disregarding the work this Committee did in 2000 to more clearly define the expert admissibility standard. These courts repeatedly rely on case law pre-dating the 2000 revisions (and in some instances predating *Daubert* itself). They quote from the prior language of Rule 702. They blatantly contradict the guidance provided in the Advisory Committee note to the 2000 amendment. The Committee should not allow courts to rewrite federal rules to revert back to standards that this Committee and the Federal Rules have rejected. The rules drafted by the Committee – reviewed by the Standing Committee, adopted by the Judicial Conference, approved by the U.S. Supreme Court, and enacted by Congress – are the law, and they must be respected as such.

The proper application of Rule 702 should not depend on the happenstance of where an individual litigant lives or which federal court is called upon to preside over their claim. After twenty years of continued confusion, there is no realistic hope that this confusion will be resolved through developing precedent. As we stated in 2015, it is time to amend Rule 702.

Sincerely,

David E. Bernstein
University Professor
Antonin Scalia Law School
George Mason University

Eric G. Lasker
Partner
Hollingsworth LLP

[7] *See Towards a More Apparent Approach*, at 2044 ("A closer look at the facts of these cases suggests that some courts may be hewing closer to the Rule 7032 standard than the decisions suggest.")
[8] *Mukhtar v. Cal. State Univ.*, 319 F.3d 1073, 1074 (9th Cir. 2003)
[9] *See Towards a More Apparent Approach*, at 2050-51 & n. 85 (citing district court *Daubert* opinion that relied on what it concluded was binding 9th Circuit authority, despite the fact that the 9th Circuit's application of Rule 702 is "facially wrong").

BAKER WOTRING LLP

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September 3, 2020

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

Re: Amending Federal Rule of Evidence

Dear Ms. Womeldorf:

The Advisory Committee on Evidence Rules is considering an amendment to Federal Rule of Evidence 702 and a Committee Note to clarify that problems with the basis of an expert's opinion or the application of an expert's methodology are threshold issues of admissibility.[1] I write in support of that amendment and a clarifying Committee Note.

I am the managing partner in the Baker • Wotring LLP law firm in Houston, Texas. My firm primarily practices environmental litigation and complex commercial litigation, both of which involve extensive use of expert witnesses. My firm's experience with court application of the rules regarding expert witnesses leads me to believe that an amendment to Rule 702 and a clarifying Committee Note are essential to ensure that the trial court is the gatekeeper and that juries are not asked to consider expert evidence that is not supported by a proper factual basis and proper methodology.

My firm has been involved in various litigation in which a clarifying Committee Note and amendment to Rule 702 would have been relevant and helpful. For example, in cases where statistical methods are to be used in determining financial decisions and amounts in controversy, parties differ greatly in the determination of which statistical methodology should be used to determine the appropriate amounts. In some cases, trial courts have left it to the jury to decide which statistical methodology was proper. A clarification to the rules would clarify the court's gatekeeping responsibilities and what is appropriate for juries to consider.

The Advisory Committee has considered an amendment to the introductory language of Rule 702 clarifying that "the court must find the following requirements to be established by a preponderance of the evidence."[2] Based on our experience, we believe that such clarification is necessary. A specific amendment and an accompanying Committee Note detailing the rationale for the amendment would clarify the courts' gatekeeping responsibilities and encourage them to apply Rule 702 as intended. Similarly, including language specifying that Rule 702's requirements

[1] *See* Daniel Capra, *Memorandum to Rule 702 Subcommittee re: Rule 702(b) and (d) —Weight and Admissibility Questions*, at 1 (Oct. 1, 2018) (Agenda Book, Advisory Committee on Evidence Rules (Oct. 19, 2018, meeting) at 171) ("Capra").

[2] Capra at 26.

are mandatory and specifically identifying the preponderance standard will focus the courts on their gatekeeping role.

Thank you for your consideration and the opportunity to provide comments on this issue.

Sincerely,

Debra Tsuchiyama Baker

# FORD MOTOR COMPANY'S COMMENTS TO THE ADVISORY COMMITTEE ON EVIDENCE AND ITS RULE 702 SUBCOMMITTEE

September 26, 2020

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

Re: Amending Federal Rule of Evidence 702

Ford Motor Company ("Ford") appreciates the opportunity to submit its Comments to the Advisory Committee on Evidence and its Rule 702 Subcommittee ("Subcommittee") in support of amending Federal Rule of Evidence 702.

## INTRODUCTION

Ford urges the Subcommittee to recommend an amendment to Rule 702 that would add explicit direction that trial courts must determine, by a preponderance of the available evidence, whether each of the admissibility requirements set forth in Rule 702(b), (c) and (d) have been met before an expert's opinions may be presented to the jury. In concluding that Rule 702 needs to be amended, Ford draws on its extensive litigation experience. Over the past 20 years Ford has tried to verdict more than 1,000 cases, including product liability, personal injury, employment, class actions, intellectual property, commercial, and consumer warranty. Ford has seen that many judges fail to recognize the courts' obligation to determine if an expert's analysis meets all elements of Rule 702.

## FORD'S EXPERIENCE WITH RULE 702

Ford's experience shows that even appellate decisions giving strong direction about the courts' gatekeeping duties have been insufficient to impress upon trial judges what they must do to fulfill their role under Rule 702. *Nease v. Ford Motor Co*., a recent product liability lawsuit, illustrates the point. The plaintiffs in that case offered expert testimony that contaminants caused the subject vehicle's speed control cable to bind, leaving the throttle stuck in the open position and causing a crash.[1] Ford challenged the admissibility of these opinions due to the expert's insufficient factual basis and unreliable methodology as applied to the facts of the case:

[1] *Nease v. Ford Motor Co*., Case No. 3:13 – 29840, 2015 WL 4508691, at *2 (S.D. W.Va. July 24, 2015).

- inspections of the vehicle showed the speed control cable was not bound up and no materials were actually found wedged between the components at issue;
- the expert's borescope examination of the subject vehicle's components could not be distinguished from a different vehicle that was known not to have experienced a stuck throttle event;
- the expert never demonstrated speed control cable binding on the subject vehicle;
- the expert did not conduct any tests showing that accumulation of contaminants could ever overcome the spring pressure to cause a throttle to remain in the open position.[2]

The district court rejected Ford's motion to exclude this opinion testimony, declaring – despite the directives of Rule 702(b) and (d) – that "[e]very argument raised by Defendant goes to the weight, not admissibility, of his testimony."[3] The viability of the plaintiffs' case depended entirely on this opinion testimony. The lawsuit went to trial and the jury returned a verdict for the plaintiffs.

The Fourth Circuit, after reviewing how the district court addressed this key opinion testimony, concluded that "the court abandoned its gatekeeping function[.]"[4] The expert's opinions were not "based upon sufficient facts or data or the product of reliable principles and methods applied reliably to the facts of the case,"[5] and the district court's unconsidered dismissal of Ford's motion to exclude reflected a failure to understand the court's duty under Rule 702:

> For the district court to conclude that Ford's reliability arguments simply "go to the weight the jury should afford Mr. Sero's [plaintiff's expert witness] testimony" is to delegate the court's gatekeeping responsibility to the jury. The main purpose of *Daubert* exclusion is to protect juries from being swayed by dubious scientific testimony. The district court's "gatekeeping function" under *Daubert* ensures that expert evidence is sufficiently relevant and reliable <u>when it is submitted to the jury</u>. Rather than ensure the reliability of the evidence on the front end, the district court effectively let the jury make this determination after listening to Ford's cross examination of Sero.[6]

Despite the clear guidance that the Fourth Circuit provided, Ford observes that even in the immediate aftermath of *Nease,* courts within that circuit do not grasp that fulfilling Rule

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[2] *Id*.

[3] *Nease v. Ford Motor Co*., Case No. 3:13 – 29840, 2015 WL 1181643, at *1 (S.D. W.Va. March 13, 2015). *See also Nease*, 2015 WL 4508691, at *3 (denying Ford's Rule 50(b) post-trial motion, stating "[t]he Court finds that Ford's arguments go to the weight the jury should afford Mr. Sero's testimony, not its admissibility.").

[4] *Nease v. Ford Motor Co*., 848 F.3d 219, 230 (4th Cir. 2017).

[5] *Id*. at 232.

[6] *Id*. at 231(emphasis original)(quotation omitted).

702's obligations demands that courts assess as a preliminary admissibility question whether the requirements of Rule 702(b), (c) and (d) are established by a preponderance of the evidence.[7] Three rulings exemplify this point. In *Sardis v. Overhead Door Corp*., the court rejected a motion to exclude based on the inadequacy of the expert's factual basis without finding that the expert had a sufficient foundation. The court declared that "a lack of testing, however, affects the weight of the evidence, not its admissibility" and noted that the defendant could address the expert's deficiencies with "vigorous cross-examination[.]"[8] Similarly, in *Patenaude v. Dick's Sporting Goods, Inc.*, the court dismissed a challenge aimed at the inadequacy of an expert's factual basis by stating, in contradiction to Rule 702(b), "it is well settled that the factual basis for an expert opinion generally goes to the weight, not admissibility."[9] Most recently, the court in *Rhyne v. U.S. Steel Corp*. repeatedly brushed aside arguments about the foundational deficiency of an expert's differential diagnosis, indicating that the factual basis is a matter solely for the jury to assess when deciding the weight to be given the opinions.[10] In doing so, the *Rhyne* court quoted a Fourth Circuit opinion issued just two months after the *Nease* decision that controverts both Rule 702(b) and the core *Nease* holding: "questions regarding the factual underpinnings of the expert witness' opinion affect the weight and credibility of the witness' assessment, not its admissibility."[11]

In Ford's view, the bewildering situation in the Fourth Circuit reveals the depth of ongoing judicial confusion about the courts' role in gatekeeping. Even following the *Nease* ruling and its unambiguous directive that "Rule 702 imposes a special gatekeeping obligation on the trial judge," many trial judges still will not evaluate the sufficiency of an expert's factual foundation or the reliability of the expert's methodological application to the facts of the case.[12]

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[7] The Fourth Circuit is certainly not unique in this regard, although Ford will confine its comments to the caselaw of the Fourth Circuit as a concise example of the widespread judicial inconsistency.

[8] Case No. 3:17-CV-818, 2019 WL 560273, at *3 (E.D. Va. Feb. 12, 2019)(quotation omitted).

[9] Case No. 9:18-CV-3151-RMG, 2019 WL 5288077, at *2 (D.S.C. Oct. 18, 2019).

[10] Case No. 3:18-CV-00197-RJC-DSC, at *11, *16, *17-18 (W.D.N.C. July 23, 2020).

[11] *Bresler v. Wilmington Trust Co*., 855 F.3d 178, 195 (4th Cir. 2017). Notably, this statement quotes *Structural Polymer Grp. v. Zoltek Corp*., 543 F.3d 987, 997 (8th Cir. 2008), but that opinion discloses that the proposition actually comes from a pre-*Daubert* ruling, *South Cent. Petroleum, Inc. v. Long Bros. Oil Co.,* 974 F.2d 1015, 1019 (8th Cir.1992). This is a common occurrence. *See* Lee Mickus, "Gatekeeping Reorientation: Amend Rule 702 to Correct Judicial Misunderstandings about Expert Evidence," Washington Legal Foundation Working Paper No. 217, at 25 n.77 (May 2020)("Pronouncements that challenges to an expert's factual basis or application of the methodology bear only on the weight of the testimony, not its admissibility, consistently stem from pre-*Daubert* decisions."). The tendency of some courts to structure their expert assessments around stale caselaw statements contributes to the courts' inconsistency and confusion about the admissibility standard. *Id*. at 24-25.

[12] Remarkably, district courts in recent cases such as *Rhyne*, *Patenaude* and *Sardis* have quoted the *Bresler* statement that "questions regarding the factual underpinnings of the expert witness's opinion affect the weight and credibility of the witness's assessment, not its admissibility" even though that language was specifically identified as an example of "wayward case law" that disregards Rule 702(b). Memorandum from Daniel J. Capra, Reporter, Advisory Comm. on Evidence Rules, to Advisory Comm. on Evidence Rules, *Forensic Evidence, Daubert and Rule 702* (Apr. 1, 2018) at 44-45 *in* ADVISORY COMMITTEE ON EVIDENCE RULES APRIL 2018 AGENDA BOOK 49 (2018). *Rhyne* even post-dates Judge Schroder's identification of the *Bresler* statement as "effectively

The lack of uniformity in the treatment of opinion testimony leaves litigants guessing about how courts will address evidence critical to the viability of claims and defenses.

If a circuit ruling like *Nease* will not focus the attention of judges within that same circuit on the findings the court must make when applying Rule 702, then an amendment to Rule 702 is necessary to re-align the courts with the intended operation of the rule and bring consistency to the gatekeeping function. An amendment should add direction that the court must find by a preponderance of the evidence that the requirements of Rule 702(b), (c) and (d) have been established.[13] This change to the rule should be accompanied by a detailed Committee Note indicating that prior cases declaring an expert's factual foundation or methodological application to be questions of weight solely for the jury to determine do not reflect the Rule 702 standard. Ford expects that these actions would bring court approaches to expert admissibility in line with the intended operation of Rule 702.

## CONCLUSION

Ford appreciates the Subcommittee's interest in examining Rule 702 practice and the beneficial effect an amendment would have to address ongoing court confusion about the expert admissibility standard. Please do not hesitate to contact Ford if the Subcommittee would like Ford to provide further information or assistance.

Ford Motor Company

John Mellen
General Counsel

vitiat[ing] the application of Rule 104(a) to Rule 702(b)." Thomas D. Schroeder, *Toward a More Apparent Approach to Considering the Admission of Expert Testimony*, 95 NOTRE DAME L. REV. 2039, 2050 (2020).

[13] *See*, *e.g.*, International Association of Defense Counsel, In Support of Amending Rule 702 and Its Comments to Achieve More Robust and Consistent Gatekeeping at 6 (July 31, 2020)(suggesting language for amendment). In other contexts, Federal Rules of Evidence specify that judges must determine particular issues and incorporate the burden of production. *E.g.*, Fed. R. Evid. 411(b)(2)("In a civil case, the court may admit evidence offered to prove a victim's sexual behavior or sexual predisposition if its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party."); Fed. R. Evid. 403 ("The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following. . .").

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September 30, 2020

*Via Federal Express*

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

Re: Amending Federal Rule of Evidence 702

Dear Ms. Womeldorf:

It is my understanding that the Advisory Committee on Evidence Rules (the "Committee") is considering amendments to Federal Rule of Evidence 702. On behalf of Ballard Spahr, LLP, and as a commercial litigator who had addressed myriad issues arising under Rule 702 over the past 42 years of practice in numerous federal courts around the country, I am writing to point out some of the conflicting positions taken by various Circuits in interpreting and applying Rule 702.

Expert testimony is often critically-important in cases involving complex or technical subject matter, as it carries great weight with juries. The standards applied by the courts in determining the admissibility of expert testimony often play a significant, if not determinative, role in the outcome of numerous high-stakes cases. However, in the many years since the Committee last amended Rule 702 in 2000, and the Supreme Court last addressed Rule 702 in *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), uncertainty and confusion have been engendered by conflicting decisions of the appellate and trial courts on various issues arising under Rule 702. The Committee should consider adopting amendments to the Rule to provide courts and practitioners with additional clarity and to promote much-needed uniformity in the application of the Rule.

In particular, an amendment is needed to resolve a circuit split in which some courts have improperly limited a trial court's gatekeeping function under *Daubert* to a review of the reliability of an expert's methodology under Rule 702(c), without regard to whether the expert reliably applied this methodology based upon sufficient facts or data.

For example, in *City of Pomona v. SQM North America Corp*., 750 F.3d 1036, 1048 (9th Cir. 2014), the Ninth Circuit held that "only a faulty methodology or theory, as opposed to imperfect execution of laboratory techniques, is a valid basis to exclude expert testimony." The Court of Appeals held that the trial court abused its discretion in excluding the proposed expert testimony, declaring that defendant's reliability challenges to the expert's testimony "is an issue for the jury" and "go to the weight that a fact finder should give to his expert report." *Id.* at 1047-1048.

The Court made no effort to reconcile this holding with Rule 702's requirement that the expert "has reliably applied" his or her chosen "principles and methods to the facts of the case" and that the testimony be "based upon sufficient facts or data." Fed.R.Evid. 702(b), (d). Moreover, the Court expressly acknowledged (*id*. at 1047) that its rule conflicts with the Third Circuit's oft-quoted holding in *In re Paoli R.R. Yard PCB Litigation*, 35 F.3d 717, 745 (3d Cir. 1994) (*Paoli II*), that "*any step* that renders the expert's testimony unreliable under the *Daubert* factors renders the expert's testimony inadmissible. This is true whether the step completely changes a reliable methodology or merely misapplies that methodology." (emphasis added). Significantly, *Paoli II's* "any step" approach was cited with approval in the Advisory Committee's Note to the 2000 amendment.

In a memorandum sent by Professor Daniel Capra to the Rule 702 Subcommittee on October 1, 2018, he discussed the conflict between *SQM* and *Paoli II*; emphasized that "the language used by the court [in *SQM*] is definitely at odds with Rule 702(d);" and commented that the *SQM* decision was one of "a fair number of courts [that] appear to have not read the Rule as it is intended." *See* Daniel Capra, Memorandum to Rule 702 Subcommittee re: Rule 702(b) and (d) — weight and admissibility questions, at 1, 12-13 (Oct. 1, 2018) (Agenda Book, Advisory Committee on Evidence Rules Oct. 19, 2018, meeting) at 171, 182-83.

The Ninth Circuit's "faulty methodology" rule also conflicts with rulings by the Second, Fifth, Sixth, Tenth, and Eleventh Circuits, each of which have endorsed the Third Circuit's "any step" requirement. *See Amorgianos v. Nat'l R.R. Passenger Corp*., 303 F.3d 256, 267 (2d Cir. 2002) (quoting *Paoli II*); *Curtis v. M&S Petroleum, Inc*., 174 F.3d 661, 670-71 (5th Cir. 1999) (same); *Tamraz v. Lincoln Electric Co.*, 620 F.3d 665, 670 (6th Cir. 2010) (same); *Attorney General of Oklahoma v. Tyson Foods, Inc*., 563 F.3d 769, 779-81 (10th Cir. 2009) (same); *McClain v. Metabolife Int'l, Inc*., 401 F.3d 1233, 1245 (11th Cir. 2005) (same).

On the other hand, decisions from other circuit courts are more closely aligned with the position adopted by the Ninth Circuit. For example, the First Circuit has held that "[t]he soundness of the factual underpinnings of the expert's analysis and the correctness of the expert's conclusions based on that analysis are factual matters to be determined by the trier of fact." *Milward v. Acuity Specialty Prods. Grp., Inc*. 639 F.3d 11, 22 (1st Cir. 2011). Similarly, the Seventh Circuit has stated that "[t]he reliability of data and assumptions used in applying a methodology is tested by the adversarial process and determined by the jury; the court's role is generally limited to assessing the reliability of the methodology – the

framework – of the expert's analysis." *Manpower, Inc. v. Ins. Co. of Pennsylvania*, 732 F.3d 796, 808 (7th Cir. 2013).

And the Eighth Circuit has concluded that "the factual basis of expert testimony 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." *Bonner v. ISP Techs., Inc*., 259 F.3d 924, 929 (8th Cir. 2001). These appellate courts take the position that "[t]he district court usurps the role of the jury, and therefore *abuses its discretion*, if it unduly scrutinizes the quality of the expert's data and conclusions rather than the reliability of the methodology the expert employed." *Manpower, Inc*., 732 F.3d at 806 (emphasis added).

The foregoing conflict in the circuits has been discussed in numerous articles. *See, e.g*., "Defendant's Chances on *Daubert* May Vary By Circuit," Law360, Oct. 1, 2019; "High Court Ensures Split Over Gatekeeping Role Persists," Law360, Feb. 10, 2015 (noting that the Supreme Court denial of certiorari in *City of Pomona v SQM* "leaves open the question of whether faults in an expert's methodology require the wholesale exclusion of their proffered opinions or merely go to the weight of those opinions. As a result, *Daubert* challenges will continue to be governed by a more permissive standard in the Seventh, Eighth and Ninth Circuits and a more restrictive analysis in the Second, Third, Sixth and Tenth Circuits.")

Unfortunately, as exemplified by the *City of Pomona* decision by the Ninth Circuit, courts are all too frequently abdicating their gatekeeping responsibility under Rule 702 and *Daubert*. They are allowing the admission of unreliable expert testimony, based on the flawed assumption that a jury can properly understand and evaluate it with the benefit of competing expert evidence and vigorous cross-examination. The Ninth Circuit's "faulty methodology" rule creates a great risk that liability determinations will be based upon unsound science and too often leads to coercive settlements and substantial jury verdicts, which appellate courts are loathe to second-guess.

Thus, an amendment to Rule 702 is needed to resolve the conflicts and disarray in the circuit courts over the proper treatment of the factual foundations of expert testimony. Litigants should not be subjected to different admissibility standards under Rule 702 based upon the vagaries of where their case was brought.

Very truly yours,

DocuSigned by:
Burt Rublin
DA21E97FFCBA498...

Burt M. Rublin

BMR/sdm

KUCHLER POLK WEINER, LLC

NEW ORLEANS, LA | HOUSTON, TX WWW.KUCHLERPOLK.COM

September 30, 2020

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***Via E-Mail:*** *RulesCommittee_Secretary@ao.uscourts.gov*

Rebecca A. Womeldorf, Secretary
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***RE: Proposed Amendments to Federal. R. Evid. 702 Commentary***

Dear Committee Members:

We understand that your committee is considering a Rule 702 amendment to clarify that sufficiency of an expert's opinion testimony is a threshold issue for the court rather than a question of weight to be decided by the jury. Confusion on that point is widespread among federal courts, and a review of inconsistent rulings within the Fifth Circuit alone underscores that revisions are badly needed to bring clarity to the law. Absent such clarification, practitioners face ongoing uncertainty and unpredictability concerning key admissibility determinations as they prepare evidence for trial. Please allow this comment to be considered in your analysis:

## I. The language of and comments to Rule 702 require trial courts to determine the sufficiency of an expert's testimony as a threshold question of admissibility.

Rule 702 requires, as a prerequisite to the admission of expert testimony, that "the testimony is based on sufficient facts or data." Fed. R. Evid. 702(b). The 2000 comments to Rule 702 underscore that courts "must" assess factual basis as a component of reliability: "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." Fed. R. Evid. 702, 2000 comments. The burden of demonstrating a sufficient factual basis for expert testimony, moreover, is placed squarely on its proponent: "[T]he proponent has the burden of establishing that the pertinent admissibility requirements are met by a preponderance of the evidence. *See Bourjaily v. United States*, 483 U.S. 171 (1987)." Fed. R. Evid. 702, 2000 comments.

## II. The Fifth Circuit has provided conflicting directives about the trial court's role in resolving challenges to the sufficiency of an expert's testimony.

Notwithstanding the language of Rule 702 and associated comments, practitioners are faced with conflicting directives from the Fifth Circuit. On the one hand, the Fifth Circuit has recognized that "an opinion based on 'insufficient, erroneous information,' fails the reliability standard." *Moore v. Int'l Paint, L.L.C.*, 547 F. App'x 513, 151 (5th Cir. 2013) (quoting *Paz v. Brush Engineered Materials, Inc.*, 555 F.3d 383, 389 (5th Cir. 2009)). "The existence of sufficient facts and a reliable methodology is in all instances mandatory." *Hathaway v. Bazany*, 507 F.3d 312, 318 (5th Cir. 2007). Thus, as required by the language of Rule 702, challenges to the factual basis for an expert's testimony are to be decided by the trial court as a threshold to admissibility.

On the other hand, however, the Fifth Circuit Court of Appeals has also stated:

> As a general rule, questions relating to the bases and sources of an expert's opinion affect the weight to be assigned that opinion rather than its admissibility… As the Supreme Court explained, "[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." *Daubert*, 509 U.S. at 596, 113 S.Ct. 2786; *see also Mathis v. Exxon Corp.*, 302 F.3d 448, 461 (5th Cir. 2002). While the district court must act as a gatekeeper to exclude all irrelevant and unreliable expert testimony, "the rejection of expert testimony is the exception rather than the rule." Fed. R. Evid. 702 advisory committee's notes (2000) (internal citations omitted).

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

Lacking clear guidance, the generalities stated in *Puga* have paved the way for many district courts within the Fifth Circuit to by-pass the requisite Rule 702 inquiry concerning (i) the factual basis for expert testimony, and (ii) whether the methodology has been reliably applied. These decisions reflect widespread confusion about the proper inquiry under Rule 702.

## III. District courts have declined to conduct a Rule 702 inquiry into the factual basis of expert testimony.

Rule 702 states that trial courts must determine whether an expert's testimony is based on "sufficient facts and data." Nonetheless, courts have passed reliability questions on to juries without resolving a requisite threshold inquiry for the court: whether the underlying testimony is based on sufficient facts and data. Courts have deferred that question to the jury based on a mistaken belief that the "bases and sources" of expert testimony go to its weight rather than its admissibility:

- A Texas federal district court declined to resolve objections that an expert had "no support" for his opinions, and that use of and reliance on particular data inputs "rendered his opinions unreliable and speculative." According to the court, whether the expert used "arbitrary inputs" was "an issue for trial." *Innovation Sciences, LLC v. Amazon.com, Inc.*, Civ. No. 4:18-cv-474, 2020 WL 4201925, *8 (E.D. Tex. Jul. 22, 2020)

(quotation omitted). The court also stated that even "[i]f the underlying reasoning" for the expert's methodology was "flawed, absurd, or even irrational," nonetheless "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof' will serve as the proper antidote for attacking these potentially 'shaky' arguments." *Id.* And even if the expert's "claims are as unsupported or conclusory as [Defendants] claim[ ], then 'vigorous cross examination' will reveal that." *Id.*

- A district court in Louisiana held that: "To the extent [the defendant] questions otherwise the content of and support for [an expert's] report, including the bases and sources of his opinions, [the defendant] can address its concerns at trial through cross-examination of [the expert] and the presentation of countervailing testimony, as those issues go to the weight, not the admissibility, of [the expert's] testimony." *Compton v. Moncla Companies, LLC*, Civ. No. 17-2258, 2020 WL 1638287, *4 (E.D. La. Apr. 2, 2020).

- Another court declined to address an objection that the expert's damages assessment included improper assumptions and ignored key facts, stating that: "If [the expert] missed any important facts, the oversight should go to the weight of his opinions, not to their admissibility." *United States v. City of Houston, Texas*, Civ. No. H-18-0644, 2020 WL 2516603, *12 (S.D. Tex. May 15, 2020).

## IV. District courts have declined to conduct a Rule 702 analysis into methodological gaps in expert testimony.

Under Rule 702, "the trial court must scrutinize not only the principles and methods used by the expert, but also whether those principles and methods have been properly applied to the facts of the case. As the court noted in *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 745 (3d Cir. 1994), "any step that renders the analysis unreliable ... renders the expert's testimony inadmissible. This is true whether the step completely changes a reliable methodology or merely misapplies that methodology." Fed. R. Evid. 702, 2000 Comment.

Nonetheless, federal district courts within the Fifth Circuit have characterized methodological challenges to gaps in expert testimony as matters of weight that may properly be deferred to the jury:

- Citing the Fifth Circuit's decision in *Puga*, a Texas federal district court permitted expert testimony over an objection that the expert failed to explain how each of his four premises validated his conclusion, and therefore that an analytical gap existed between the premises and the conclusion. "[W]hether [the expert's] testimony is supported by his premises is a question that should be determined by a jury because it attacks the weight of his testimony. The exclusion of expert testimony is the exception rather than the rule. *Puga v. RCX Sols., Inc.*, 922 F.3d 285 (5th Cir. 2019). Because the admissibility is not in question, the Court finds no reason to depart from the general rule of allowance." *Citizens State Bank v. Leslie*, Civ. No. 6-18-CV-00237, 2020 WL 3582665 (W.D. Tex. Apr. 9, 2020).

- Another Texas federal district court declined to address an objection that an expert did not "sufficiently explain the connection between her experience and her conclusions," concluding that the matter was "better left for cross examination, not a basis for exclusion." *AmGuard Insurance Companegal Aid*, 2020 WL 60247, *7, 111 Fed. R. Evid. Serv. 279 (S.D. Tex. Jan. 6, 2020). The 2000 comments to Rule 702, in contrast, specifically state: "If the witness is relying solely or primarily on experience, then the witness must explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts. The trial court's gatekeeping function requires more than simply 'taking the expert's word for it.'"

- A Louisiana federal district court declined to substantively address an objection that an expert's lost wages assessment was "not the product of reliable principles and methods and is based on unsupported assumptions and incorrect facts and data," characterizing the objection as an attack on the "basis and sources" of the expert's calculations and concluding that, as such, it went to weight rather than admissibility. *Janania v. Old Republic Insurance Co.*, Civ. No.19-12773, 2020 WL 4500160, *8 (2020).

- A Mississippi federal district court rejected an argument that the expert's opinions were based on nothing more than unsupported ipse dixit, stating simply: "[The expert] cited some basis for his opinions. Therefore, they are not wholly unreliable." *John C. Nelson Construction, LLC v. Britt, Peters and Associates, Inc.*, Civ. No. 2:18-CV-222, 2020 WL 2027218, *5 (S.D. Miss. Apr. 27, 2020).

## V. Examples of Unsatisfactory Rule 702 analysis

**Example 1**

In an asbestos exposure matter, the Court refused to limit the expansive opinions of plaintiff's proffered "Insulation Expert" based on a lack of qualifications and inadequate methodology. The proffered expert had a high school diploma and his sole relevant experience was (1) working as an insulator in shipyards for the majority of his working career; and (2) working as a California Certified Asbestos Consultant, which advises construction companies on issues relating to asbestos remediation in building materials. Despite being tendered as an "insulation expert," the witness offered opinions regarding the asbestos content of a host of products with which the plaintiff worked, including automotive brakes, clutches, engine gaskets, materials with which he has no relevant personal or professional experience. In addition, he offered opinions regarding the ability of these products to release respirable asbestos fibers when subjected to manipulation. To support these opinions, the expert testified that he performed various at-home "tests" on these products, but that he failed to keep records of these tests, including the testing protocol, or the results of the test. He was also unable to describe the methodology he employed in conducting his tests or measuring fiber release during the tests. The expert testified that he specifically does not rely on peer reviewed literature regarding fiber release, and instead relies on his own at-home tests.

We sought to limit the expert's testimony to matters on which he possessed the requisite training and experience, which were insulation and building materials, and excluding the expert's opinions relating to automotive products, with which he had no experience. We also sought to exclude the expert's reliance on his at-home "tests." After entertaining argument and acknowledging that the expert lacked the requisite training and experience with automotive products, the Court denied the motion and instructed the parties to raise it again after void dire on qualifications during the course of the trial.

**Example 2**

In another asbestos exposure case, the Court refused to exclude the testimony of an expert industrial hygienist regarding estimates of asbestos exposure a claimant received from various activities at our client's facility. The industrial hygienist relied on five studies approximating asbestos exposure from various activities involving insulation products, including cutting with a saw, tearing with a hammer, and mixing dry cement. Unfortunately, the evidence in the case failed to support a contention that any of these activities occurred at our client's facility, whether in the presence of the claimant or not. In fact, the available evidence indicated that at least some of these activities affirmatively did not occur. We filed a motion to exclude the expert's opinions as having been based on an inadequate foundation and contradictory to the available evidence.

The Court entertained extensive argument from us on the motion, agreeing with the fundamental premises of the motion that the studies relied upon by the expert were inapplicable to the case. After we completed our argument, the Court announced that the motion would be denied, without explanation and without ever hearing from plaintiff's counsel.

**Conclusion**

As these cases demonstrate, there is widespread confusion among federal courts about the proper role of courts in assessing the basis for an expert's testimony and the reliable application of the expert's methodology. Resulting inconsistencies in the case law all but assure that proper challenges to expert testimony under Rule 702 will nonetheless be characterized as matters of "weight and sufficiency" that the trial court need not address. In turn, divergent court rulings make it difficult if not impossible to predict the likelihood that such challenges will succeed. As a consequence, parties face not only increased costs associated with arguing matters that should be well-settled based on the language of Rule 202, but more importantly decreased certainty about threshold admissibility questions as they prepare evidence to support their claims and defenses for trial.

We appreciate your consideration of this comment and look forward to the results of your committee's final recommendation.

Respectfully submitted,
**KUCHLER POLK WEINER LLC**

By: */s/ Dawn R. Tezino*
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Memorandum To: Advisory Committee on Evidence Rules
From: Daniel J. Capra, Reporter
Re: Proposed Amendment to Rule 106
Date: October 1, 2020

The Committee has been studying and discussing a request from Judge Paul Grimm to consider possible amendments to Rule 106. Rule 106, known as the rule of completeness, currently provides as follows:

> **Rule 106. Remainder of or Related Writings or Recorded Statements**
>
> If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part — or any other writing or recorded statement — that in fairness ought to be considered at the same time.

The problems raised by Judge Grimm arise mostly in criminal cases, but as seen in this memo there are a number of Rule 106 rulings in civil cases as well. And this should not be surprising, because Rule 106 issues arise whenever an advocate makes a selective, misleading presentation of a document or statement. The possible benefit in such a presentation is not limited to criminal cases.

Judge Grimm in *United States v. Bailey,* 2017 WL 5126163 (D.Md.), sets forth the following hypothetical to illustrate the need for a rule of completeness: There is an armed robbery and a gun is found. The defendant is being interrogated by a police officer and says, "yes I bought that gun about a year ago, but I sold it a few months later at a swap meet." The government in its case-in-chief, through the testimony of the police officer, seeks to admit only the part about the defendant buying the gun. This part is admissible as a statement of a party-opponent under Rule 801(d)(2). The defendant contends that admitting only the first part of the statement makes for an unfair, misleading presentation --- because without the completing part, the jury will draw the

inference that he implicitly admitted owning the gun at the time of the robbery, when in fact he did no such thing.[1]

Many courts require completion in the gun hypo, and that result is certainly supported by the policy underlying Rule 106. But a number of courts would not apply Rule 106, because they construe the rule to have two substantial limitations:

1. Some courts have held that Rule 106 cannot operate to admit hearsay; and the defendant's statement about selling the gun is hearsay.[2] These courts hold that Rule 106 is only about the order of proof and is not a rule that trumps other rules of exclusion.

2. Courts have correctly held that that the text of Rule 106 does not provide for completion of oral unrecorded statements. Most courts, however, have found a rule of completeness for oral statements in Rule 611(a) or the common law. Some courts have not --- perhaps because they have not been directed to Rule 611(a) or the common law by the party seeking completion.[3]

The Committee has reviewed and discussed Judge Grimm's proposals, which are: 1) to amend Rule 106 to allow a party to admit the party's statements over a hearsay objection, when they are necessary to complete an unfair, partial presentation of the party's statements; and 2) to extend Rule 106 to cover oral unrecorded statements.

The Minutes of the Fall 2019 Meeting indicate the position of the Committee on Rule 106 coming into the next meeting:

- The sense of the Committee is to retain the "fairness" language in the Rule and therefore the criteria for invoking the rule of completeness will remain the same. The amendment, if proposed, would address how a completing statement may be used.

- The Reporter is to provide two alternatives for addressing the hearsay issue: 1) allowing completion "over a hearsay objection" and 2) adding a second sentence to Rule

[1] One of my students had another example. The defendant, let's call him Eric, is on trial for shooting the deputy. He stated to the police: "I shot the sheriff, but I did not shoot the deputy." The government introduces the first part of the statement (probably admissible in most courts under Rule 404(b) to show intent, or background, or inextricably intertwined, or some such, and offered to create an inference that the defendant shot the deputy as well). The defendant seeks to complete with the remainder of the statement.

Another example bandied about is the government offering a statement of the defendant, "I killed him" while the defendant offers to complete this deleted portion: "with kindness."

[2] *See, e.g., United States v. Sanjar,* 853 F.3d 190, 204 (5th Cir. 2017): "When offered by the government, a defendant's out-of-court statements are those of a party-opponent and thus not hearsay. Rule 801(d)(2)(A). When offered by the defense, however, such statements are hearsay."

[3] The Supreme Court has stated that Rule 106 is only a "partial codification" of the common-law rule. *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 171 (1988).

106 stating that "The court may admit the statement to prove the truth of the matter asserted in it, if it is admissible for context."

● The Reporter is to provide two alternatives regarding oral statements. One is to make no change to the existing rule, so oral statements would remain uncovered by Rule 106. The other is to specifically include unrecorded oral statements within the protection of Rule 106.

● The amendment, if proposed, would not change the existing rule with respect to the timing of completion.

This memo is in four parts.[4] Part One discusses how and when Rule 106 applies, emphasizing that the requirements of the rule regarding the need for completion (which would not be changed by any proposed amendment) are stringent and that completion is rarely permitted. Part Two deals with the two major questions on which the courts are divided: 1) whether the rule operates as a hearsay exception, and 2) whether oral unrecorded statements are covered in one way or another. Part Three discusses the arguments in favor of and against an amendment to Rule 106, and the merits of various amendment alternatives that were presented at previous meetings. Part Four provides drafting alternatives.

Behind this memo in the agenda book is a memo from Professor Richter, on case law in those states with versions of Rule 106 that allow completion with oral, unrecorded statements. The memo addresses concerns that including unrecorded statements in the rule of completeness will raise special difficulties.[5]

[4] Some passages from this memo are unchanged from the memo submitted for the Fall, 2019 meeting. But there are changes, additions, and deletions that have been made to include new case law, to provide responses to some of the arguments and suggestions made at the last meeting, and to adapt to the positions taken by the Committee at the last meeting, as discussed above. New drafting alternatives are presented in response to the Committee's positions as well.

[5] Professor Richter's memo was provided in the agenda book for the last two meetings. It is reproduced for the convenience of the Committee.

## I. How and When the Rule Applies.

### *A. Rule 106 Applies in Narrow Circumstances*

Because Committee members at previous meetings expressed concern about whether an amendment will allow rampant completion and constant disruption of the order of proof, this memo seeks to provide more perspective on the *very limited scope of the existing rule.* The possibility of completion arises only in very narrow circumstances. These narrow standards would not be expanded by any of the proposals the Committee is considering, because the Committee has agreed that the "fairness" language of the existing Rule 106 is being retained.[6]

Rule 106 contains important threshold requirements that provide a substantial limitation on the consequences of the amendments being considered. It is not in any sense an automatic rule that a defendant is allowed to admit all exculpatory parts of a statement whenever the government admits an inculpatory part. Mere relevance is definitely not enough. Rather, the court must find two things before the rule of completion is triggered:

1. The statement offered by the proponent creates an inference *about the statement* that is inaccurate --- i.e., it gives a distorted picture of what the statement really means.

AND

2. The completing statement that the adversary seeks to introduce is necessary to eliminate the unfair inference and to make the statement accurate as a whole.

The Grimm example of the gun possession is one in which both of the above requirements are met. The portion chosen by the government creates an inaccurate picture about what was actually said. "I bought the gun" creates an inference that you still have it (exactly the inference the government is seeking) --- so it is misleading. The completing information – "I sold it" --- is necessary to eliminate a misleading impression about what the defendant said.

*By way of contrast*, another hypo will show where the rule of completeness does *not* require admission. Assume that the defendant is charged with possession of a firearm. He states to a police officer, "I had the gun on me, but I never used it." The government will be allowed to admit the first part of that statement (as a party-opponent statement under Rule 801(d)(2)(A)) without having to complete with the second. That is because "I had the gun on me" creates no unfair inference in a prosecution for *possessing* the gun; it's simply a confession of the crime. On the other hand, if the defendant is charged with *using* the firearm, completion should be required, because the first portion of the statement, "I had the gun on me" creates an unfair inference that he probably used the gun, and the second portion is necessary to eliminate that misleading impression.

[6] Note that there is language in the proposed Committee Note that emphasizes that nothing in the amendment will change the strict threshold requirements for invoking the rule.

Because the triggering requirements for Rule 106 are so narrow --- and would not be expanded by any proposal the Committee is considering --- it seems very unlikely that amending it to trump the hearsay rule and to cover oral unrecorded statements will create a flood of completion requests. The D.C. Circuit Court of Appeals held that Rule 106 allows the use of hearsay evidence to complete a partial, misleading presentation, and in response to a "floodgates" argument the court stated that "[i]n almost all cases we think Rule 106 will be invoked rarely and for a limited purpose." *United States v. Sutton,* 801 F.2d 1346, 1369 (D.C.Cir. 1986). There is nothing in the reported cases in the D.C. Circuit, nor in other circuits following the same rule, to indicate that the floodgates have been opened on Rule 106 completeness arguments.

It is notable that during the drafting process on Rule 106, the Department of Justice opposed the fairness standard currently employed in Rule 106. The Department argued that the "fairness" standard was too vague, and that completeness should instead be limited to "the same subject matter." The Department urged that the fairness language would allow defense counsel to "usurp the function of cross-examination" and "disrupt the orderly presentation of evidence." The Judicial Conference Committee on Practice and Procedure responded, pointing out that the "fairness" standard was the same one used successfully for depositions in Federal Rule of Civil Procedure 32, and that fairness may ultimately present a more restrictive standard than the suggested "same subject matter" language. The DOJ's argument was rejected, and the Rule passed with the fairness standard intact. And the practice under the rule, as described in the text, indicates that the rule is narrowly applied and that the Department's "floodgates" predictions have not come to pass.

**What follows are some examples of application of the fairness requirement of Rule 106, to illustrate the narrow circumstances in which it has been successfully invoked.**

***Here are some (the relatively few) examples of completion required:***

- *United States v. Haddad*, 10 F.3d 1252 (7th Cir. 1983): In a felon-gun possession case, the defendant admitted to the police that he was aware of drugs found under a bed, but stated simultaneously that he knew nothing about the gun that was found near it. The government offered only the part of the statement conceding awareness of the drugs. The relevance of that portion was that if the defendant knew about the drugs, he was likely to know about the gun. But that was an unfair inference from the statement as a whole, because the defendant explicitly *denied* knowing about a gun. So the portion offered by the government was misleading. The Seventh Circuit held that once the prosecution elicited testimony that the defendant admitted knowing about the drugs, the defendant should have been allowed to elicit the part about not knowing the gun was there. Otherwise the jury would use the statement as if the defendant implicitly admitted to having a gun, when that was not the case.

- *United States v. Sweiss,* 800 F.2d 684 (7th Cir. 1986): The government admitted a recording of a conversation between the defendant and an informant, which indicated that the defendant knew in advance of the conversation about a plot to obstruct justice. The government argued that this showed the defendant knew independently about, and so was connected to, the plot. But a prior recording of a conversation between the defendant and the same informant indicated that the defendant had been told about the plot *by the informant*. In effect, the government split up the statements "yes I know" and "because you told me." The court held that the defendant had the right to introduce the prior recording under the rule of completeness, to dispel the misleading inference from the second recording that he had independent knowledge.

- *United States v. Baker,* 432 F.3d 1189 (11th Cir. 2005): This is a case where the prosecution conceded on appeal that the defendant's exculpatory statements, made in a post-arrest confession, should have been admitted under the rule of completeness. There is no discussion in the reported case of what those statements were, and why they were necessary to complete. The court stated that the prosecution was correct in making the concession.

- *United States v. Castro-Cabrera*, 534 F.Supp.2d 1156 (C.D.Cal. 2008). The defendant was charged with reentering the United States after being deported. During a previous deportation hearing, the defendant was asked twice in a row to which country he claimed citizenship; the first time, he answered, "Hopefully United States through my mother," while the second time, he answered, "I guess Mexico until my mother files a petition." After the government offered only the second answer into evidence, the court found that the first answer was admissible as a completing statement, because it gave a fairer understanding of the defendant's answer. Without the remainder, the portion was a clear admission of Mexican citizenship, whereas both answers together suggested that the defendant was unsure, or thought he had dual citizenship.

## ***Here are some of the (many more) examples of completion not required:***

- *United States v. Altvater,* 954 F.3d 45 (1st Cir. 2020): In an insider trading prosecution, the government offered portions of the defendant's deposition before the SEC. The defendant argued that the government offered a "massaged" portion, edited to do as much damage as possible to the defendant's position at trial that he traded on publicly

available information based on his own idiosyncratic views. The defendant contended that Rule 106 required admission of all the redacted portions of the deposition. But the court held that the defendant had the burden of showing just how the portions offered by the government were misleading, and just how the redacted portions were necessary to correct any misimpression. The court stated that the defendant failed to "engage in the granular level of analysis" necessary to succeed on the completeness challenge. He requested that all redacted material be admitted "without attempting to meet his burden to explain why it would be necessary to admit into evidence each and every statement contained in the redacted material to dispel some alleged distortion caused by the government's redactions." Thus Rule 106 cannot be used for broadside claims that when portions are admitted, redactions must be admitted as well.

● *United States v. Williams,* 930 F.3d 44 (2nd Cir. 2019): Police found a gun in a car that was driven by the defendant. At a trial for felon-gun-possession, the government offered the defendant's oral post-arrest statement admitting the gun was his. The defendant sought to complete with other statements to the police in which he said the car belonged to his girlfriend and he did not know about the gun. The court held that Rule 106 could be used to overcome a hearsay objection, and that while Rule 106 did not apply to oral statements, Rule 611(a) and the common law could be used to provide for admissibility on the same grounds as written and recorded statements under Rule 106. However, the completeness principle only applied if the portions admitted by the government were misleading and the portions offered by the defendant corrected the misimpression. In this case, the standards for completion were not met:

> To require completion under the doctrine of completeness, Williams had to demonstrate that admission of his initial statements denying ownership of the gun was "necessary to explain" his later statements that the gun was his, "to place [these statements] in context, to avoid misleading the jury, or to ensure fair and impartial understanding" of these later statements. Williams did not make such a showing. It is not uncommon for a suspect, upon interrogation by police, to first claim in a self-serving manner that he did not commit a crime, only thereafter to confess that he did. But the rule of completeness does not require the admission of self-serving exculpatory statements in all circumstances, see *United States v. Jackson*, 180 F.3d 55, 73 (2d Cir. 1999), and the mere fact that a suspect denies guilt before admitting it, does not—without more—mandate the admission of his self-serving denial. As the district court here aptly pointed out, Williams's confession was "simply a reversal of his original position."

● *United States v.Thiam,* 934 F.3d 89 (2nd Cir. 2019): The defendant was convicted for receiving bribes as a public official. He made inculpatory statements in his post-arrest interview, regarding his acceptance of bribes, that were admitted against him. He argued

that the trial court erred in refusing to admit other excerpts of that interview under Rule 106. These excluded portions related to the role that other government officials played in the bribery scheme, and to personal loans that the defendant had received from other third parties. But these statements, while exculpatory, related to matters other than the defendant's activity. The court stated that "[b]ecause the rule of completeness is violated only where admission of the statement in redacted form distorts its meaning . . . it was within the district court's discretion to exclude these statements."

- *United States v. Marin,* 669 F.3d 73 (2d Cir. 1982): The defendant made statements to police about who he was with on the night that drugs were found in his car, but objected to redaction of his statement that it was Marin who put the drugs in the car. That redaction was done to comply with *Bruton,* because Marin was a codefendant. The court held that Rule 106 did not require completion (meaning in this context that a severance was not required) because the statement, as redacted, "concerned only the circumstances surrounding the meeting of Romero, Marin, and Farradaz in the Bronx, and their trip to Queens. The placement of the bag in the trunk of Romero's car was an entirely different matter and thus was . . . [not] necessary to explain or place in context the admitted portion." Put another way, the defendant's statement about who was in the car was not misleading.

- *United States v. Hird,* 901 F.3d 196 (3rd Cir. 2018): The defendant was a ticket-fixing judge charged with perjuring himself in a grand jury proceeding. He argued that the trial court should have admitted the portion of his grand jury testimony in which he stated that he never provided favors. The court found that the statement was not necessary for completing the portions of his testimony in which he (falsely) denied receiving consideration for fixing tickets. The court stated that the excerpt that the defendant sought to admit "occurs many pages before the testimony regarded as perjurious," was "separated by the passage of time during questioning" and was "unrelated in the overall sequence of questions and to the answers grounding his conviction." The court held that the rule of completeness does not apply to statements that are remote in time and circumstances from the statement offered by the proponent.

- *United States v. Shuck,* 1987 U.S. App. Lexis 1519471, at *6 (4th Cir.): The defendant's previous statements about committing the charged crime were admitted, and he argued that his additional statements about how he had never been convicted of a crime should have been admitted to complete. The court found that completion was not necessary: "General rehabilitation, such as being free of a state or federal conviction * * * is not directly relevant to Shuck's admissions. Nor do such materials explain the passages introduced by the government. Nor were the additional portions necessary to avoid misleading the trier of fact."

- *United States v. Branch,* 91 F.3d 699, 728 (5th Cir. 1996): After the disaster at the Waco compound, Castillo was charged with using or carrying a firearm during a crime of violence. He confessed to donning battle dress and picking up guns when he saw ATF agents approaching. He also stated that he never fired a gun during the raid. The government offered the former statement and not the latter. The court found that the exculpatory statement was not necessary for completion --- the "cold fact" that Castillo had retrieved several guns during the day was neither qualified nor explained by the fact that he never fired them. Importantly, Castillo was charged with using *or carrying* a gun during a crime of violence, and this charge did not require a finding that he shot a gun. The court concluded as follows:

> We acknowledge the danger inherent in the selective admission of post-arrest statements. * * * [But] we do no violence to criminal defendants' constitutional rights by applying Rule 106 as written and requiring that a defendant demonstrate with particularity the unfairness in the selective admission of his post-arrest statement.

- *United States v. Portillo,* 969 F.3d 144 (5th Cir. 2020): This is a case in which the government sought to introduce completing statements, but the admission of the statements was found to be error. The government's cooperating witnesses were impeached with inconsistencies, and the trial judge admitted some accompanying consistent statements under Rule 106. The court's analysis is as follows:

> The government cites pages from the record where the defendants referred to specific portions of the statements that were later introduced at trial. But the government does not clearly explain why this questioning created a misleading impression about the entirety of the prior consistent statements. We have explained that the rule of completeness justifies admission of a statement only where it is necessary to qualify, explain, or place into context the portion already introduced. [citing cases]. The government has not demonstrated that the statements admitted into evidence were necessary to correct any misleading impressions created by the defendants' references to the prior statements.

- *United States v. Dotson,* 715 F.3d 576, 581 (6th Cir. 2013): In a trial on charges of child pornography and exploitation of a minor, the trial judge admitted portions of a written statement given by the defendant to authorities following his arrest in which he stated that he made videos and photos of the victim; but the court rejected the defendant's request to admit the entire statement. The omitted portions showed that Dotson had a rough upbringing and had been sexually abused as a child, and that he was concerned that the victim knew he was exploiting her. The court held that the portions admitted were not

misleading and the portions omitted were not necessary to correct any misleading impression. The omitted portions "did not in any way inform his admission that he photographed the victim, made videos of her, and downloaded sexually explicit images of other children from the internet."

● *United States v. Wandahsega*, 924 F.3d 868 (6th Cir. 2019): The defendant was convicted of abusive sexual contact with his six year old son. He sought to introduce a video of his supervised visit with his son, the victim, where his son hugged him and interacted well with him. The defendant offered the video under Rule 106, on the theory that it contradicted testimony from witnesses about the victim's assertions that the defendant abused him. But the court found Rule 106 inapplicable because the government never sought to admit any portion of the video. *Rule 106 does not provide a ground of admissibility simply because the evidence proffered to complete contradicts the opponent's evidence.*

● *United States v. Lewis,* 641 F.3d 773 (7th Cir. 2011): Billingsley, charged with firearm possession and conspiracy to possess cocaine, confessed in an interview. He sought to complete by eliciting testimony from the agent who interviewed him about how he had never mentioned any of his co-defendant's criminal associates by name. The court found that although this remainder could rebut the government's theory about the level of the defendant's involvement in the conspiracy, and could help to explain the defendant's theory of the case in general, it did not affect the meaning of any of the defendant's statements to which the agent had already testified. Accordingly, no remainders were necessary. Thus, a remainder under the fairness test has to be explanatory *of the portion that it completes*. *See also United States v. Li,* 55 F.3d 325, 330 (7th Cir. 1995) (noting that "the trial judge need not admit every portion of a statement but only those needed to explain portions previously received," and reasoning that "[t]o determine whether a disputed portion is necessary, the district court considers whether (1) it explains the admitted evidence, (2) places the admitted evidence in context, (3) avoids misleading the jury, and (4) insures fair and impartial understanding of the evidence").

● *United States v. LeFevour,* 798 F.2d 977 (7th Cir. 1986): The court found that Rule 106 does not require the introduction of an entirely separate conversation, on a different subject matter, simply because it is relevant to defense. Relevance is not a sufficient ground to allow completion under Rule 106.

● *United States v. Martinez-Camargo,* 764 Fed. Appx. 205 (9th Cir. 2019): A large shipment of marijuana was found in the defendant's car when she crossed the border. The government offered excerpts of the defendant's post-arrest statements. The defendant

offered other portions in which she sought to explain her conduct and exculpate herself. The court held as follows:

> Martinez-Camargo's argument that the rule of completeness, Fed. R. Evid. 106, compels admission of the whole statement * * * fails. Rule 106 does not "require the introduction of any unedited writing or statement merely because an adverse party has introduced an edited version." *United States v. Vallejos,* 742 F.3d 902, 905 (9th Cir. 2014). Rather, it applies only when the edited statement creates a misleading distortion of the evidence. Because the admitted portions of her statement were not misleading, the district court did not abuse its discretion in determining that Rule 106 does not compel the admission of the omitted portions of the statement.

● *United States v. Dorrell,* 758 F.2d 427 (9th Cir. 1985): The government admitted a portion of the defendant's confession, leaving out the defendant's statements of his political and religious motives for committing the charged act. The court ruled that Rule 106 was inapplicable because the defendant's motivations for his actions "did not change the meaning of the portions of his confession submitted to the jury. The redaction did not alter the fact that he admitted committing the acts with which he was charged. Further, because the defense of necessity was unavailable, Dorrell's motivation did not excuse the crimes he committed."

● *United States v. Brown,* 720 F.2d 1059 (9th Cir. 1983): This was a completing attempt by the *government* that was unsuccessful. The government called witnesses who got plea deals, and introduced the deal terms on direct. The defendant argued on cross that there were promises made by the government that were not in the agreement. The government countered, for completeness purposes, with polygraph clauses in the agreements. But the court found the polygraph clauses to be not necessary for completion, because the defendant's attack was about what was *not* in the plea agreements.

● *United States v. Santos,* 947 F.3d 711 (11th Cir 2020): Appealing his conviction for obtaining naturalization wrongfully, the defendant argued that the trial court erred in excluding an exculpatory part of his confession. The court found no error. It noted that "Rule 106 does not automatically make the entire document admissible once one portion has been introduced." In this case, "the later exculpatory part of Santos's statement does not explain or clarify the earlier inculpatory part. In the first part, Santos admitted to Special Agent Laboy that he was arrested, convicted, and imprisoned for manslaughter in the Dominican Republic in the 1980's. This admission proved the fact of Santos's prior conviction. That is a separate and different topic from why Santos failed to mention his criminal history . . . on his Form N-400 application."

- *United States v. Lesniewski*, 2013 WL 3776235 (S.D.N.Y.): The court held that mere proximity of the omitted portion to the statements introduced does not justify completion. It found that the defendant's statements that were omitted were not necessary for completion because they were just "self-serving attempts to shoehorn after-the-fact justifications for his actions into description of his actions."

- *United States v. Nicoletti*, 2019 WL 1876814 (E.D. Mich.): A defendant charged with conspiracy to commit bank fraud argued that if the government was going to admit portions of wiretapped conversations that he had with a co-defendant, then all 13 hours ot tapes should be included under Rule 106. The court stated that "[i]mportantly, Rule 106 *places the burden on the party seeking admission* to show that the additional evidence is relevant and provides context" and "only those parts which qualify or explain the subject matter of the portion offered by opposing counsel should be admitted." Because the defendant did not specifically identify which portion of the recordings would clarify the government's proffered evidence, Rule 106 provided no relief.

- *United States v. Rodriguez-Landa*, 2019 WL 175518 (S.D. Cal.): "The Court finds that Rule 106 does not permit the introduction of these statements as they are not 'part' of the same recorded conversation introduced by government exhibit Although these statements were physically captured on the same audio recording, they arise out of a different conversation with a different participant."

- *United States v. Benally*, 2019 WL 2567335 (D.N.M.): In a murder case, the government admitted excerpts from the defendant's recorded statements to special agents during an interrogation. The statements described the defendant's interactions with the decedent and included a portion of the interrogation where the defendant refused to apologize about the decedent's death. The defendant sought to admit additional excerpts, explaining how the fight began, that the decedent had a knife, that the decedent previously started fights with him, and that he "teared up" when making the statements to the agents. The court held that the excerpts chosen by the government were not misleading and that nothing in the portions offered by the defendant corrected any misimpression.

- *Rodriguez v. Miami-Dade County*, 2018 WL 3458324 (M.D. Fla.): In a Title VII action, the plaintiff admitted some call logs and the defendant argued that the rule of completeness required admission of all call logs to the same people. The court found that the defendant made no argument that the remainder of the logs was necessary to rectify any misleading impression created by the plaintiff.

- *United States v. Gilbert*, 2018 WL 5253517 (N.D. Ala.): A defendant was convicted of bribing a legislator. The government offered the defendant's statement to police officers that he thought he was not violating the law because the subject of the payment was beyond the legislator's jurisdiction. The defendant sought to complete with a statement made later in the interview, to the effect that he had sought advice of counsel. The court found that this statement was not necessary to complete: **"**the fact that Roberson inquired about the legality of his actions is not directly related to his determination that the area targeted by the lobbying campaign was outside of Robinson's district. Thus, excluding the latter part of the interview did not distort the meaning of the admitted portion."

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**Of all the reported Rule 106 cases in federal district courts, the ratio of "completion required" to "completion not required" is about 1/15.[7] That is unsurprising because Rule 106 is a narrow rule. It does not send the trial court on a quest through mounds of evidence to try to find something that is relevant for the opponent.**

### *B. Rule 106 Can Protect the Government*

The rule of completeness is not a one-way street in favor of a criminal defendant. The government has an interest in being allowed to complete misleading presentations of statements proffered by the defendant, and Rule 106 has been applied to protect the government in such circumstances. For example, in *United States v. Tarantino*, 846 F.2d 1384 (D.C. Cir. 1988), it was the prosecutor who offered prior statements of a witness on redirect examination in order to complete what had been selectively adduced on cross-examination; the court found no error in the trial court's allowing completion. And in *United States v. Maccini*, 721 F.2d 840 (1st Cir. 1983), the court held it proper to permit a prosecutor to have additional portions of a witness's grand jury testimony read, after defense counsel introduced a misleading portion of that testimony. Similarly, in *United States v. Mosquera,* 866 F.3d 1032, 1049 (11th Cir. 2018), the court held that Rule 106 applied when the defendant selectively admitted portions of an interview that a witness had with a government agent. The court noted that additional portions of the interview were properly admitted "to avoid misrepresentation."

For other examples of the prosecution benefiting from Rule 106, *see United States v. Rubin,* 609 F.2d 51 (2nd Cir. 1979): The defense counsel selectively quoted interview notes in cross-examining an officer. The court found that the remainder was admissible in the government's behalf under Rule 106: "The notes had been used extensively and quoted from copiously by Rubin's counsel * * * possibly leaving a confusing or misleading impression that the portions quoted out of context were typical of the balance. We have repeatedly recognized that where

[7] Of course reported cases, while relevant, do not tell the whole story of how Rule 106 is used.

substantial parts of a prior statement are used in cross-examination of a witness, fairness dictates that the balance be received so that the jury will not be misled." *Accord United States v. Gravely,* 840 F.2d 1156, 1163 (4th Cir. 1988) (government allowed to complete with portions of the grand jury testimony of a witness, even though the statements were hearsay); *In re Ohio Execution Protocol Litigation*, 2018 WL 6520758 (S.D. Ohio Dec. 11, 2018) (redacted portions of prior witness testimony were admitted because necessary to complete the defendant's selective presentation).

### *C. Rule 106 Can Apply in Civil Cases*

As stated above, the possibility of a selective and unfair presentation is not limited to criminal cases. One example of completion required in a civil case is *Zahorik v. Smith Barney, Harris Upham & Co.,* 1987 U.S. Dist. Lexis 14078, at *6 (N.D. Ill.), which involved the introduction of charts that were misleading in the absence of the context in which they were prepared. The court found that it was "necessary to admit Huddleston's entire affidavit in order to explain the context in which the charts were prepared." It specifically noted that contemporaneous presentation of the affidavit was "preferable to Zahorek's suggestion that Smith Barney could correct any misinterpretations through the use of live testimony or deposition testimony." That was because, as the Advisory Committee Note to Rule 106 makes clear, repair work later in the trial may not be sufficient to correct the original misimpression.

*See also Phoenix Assocs. III v. Stone,* 60 F.3d 95, 101 (2nd Cir. 1995) (when financial statements prepared by an accountant were introduced, the trial court did not err in holding that the accountant's workpapers were necessary to complete, because the financial statements on their own were misleading); *Brewer v. Jeep Corp.,* 724 F.2d 653, 656 (8th Cir. 1983): In a product liability action, "the appellant was free to introduce the film containing the jeep rollovers but only upon the condition that the written study explaining these graphic scenes also be offered. The trial court's order required only that the complete report be admitted, the mundane as well as the sensational. In this the trial court was fair and its exercise of discretion was not an abuse."

### *D. Rule 106 Does Not Exclude Misleading Statements or Portions of Statements*

It is important to note that Rule 106 is not an all-purpose tool that allows a court to exclude evidence whenever it is argued to be "incomplete" or "misleading." Indeed it is not a rule of exclusion at all. The limited remedy provided by Rule 106 is completion, not exclusion.

For example, in *Chenoweth v. Yellowstone County,* 2019 WL 1382776 (D. Mont.), an employment action, the plaintiff offered a report that contained redacted personal information. The defendant argued that because of the deletions, the report should be excluded under Rule 106, because it was incomplete. But the court disagreed:

> Rule 106 does not prohibit admission of an incomplete document. Instead, it allows the party against whom the document is introduced to place the remainder in evidence without additional evidentiary foundation. *United States v. Phillips*, 543 F.3d 1197, 1203 (10th Cir. 2008).

Similarly, in *Kinney v. Porterfield*, 2020 U.S. Dist. LEXIS 140405 (D. Mont. Aug. 5, 2020), a civil case involving an alleged sexual assault, the defendant moved to exclude the video footage of a bar that depicted the plaintiff and the defendant a few hours before the alleged assault. The defendant argued that the video provided "an incomplete picture of the events that took place on the night in question" and so should be excluded under Rule 106. The court denied the motion as the defendant did not claim that the video was selective and did not offer any completing portions. The court declared that Rule 106 is used to present additional statements or recordings to a jury but "it does not inherently provide for the exclusion of incomplete statements or recordings."

Accord: *Wye Oak Technology, Inc. v. Republic of Iraq*, 2019 WL 1746326 (D.D.C.)("The rule of completeness, codified in Rule 106, does not provide grounds to exclude evidence. Instead, Rule 106 enables Wye Oak to introduce the other referenced documents, if Wye Oak possesses them or can obtain them, that ought to be considered alongside DX 53 and DX 58."); *Phoenix v. Esper,* 2020 U.S. Dist. LEXIS 118314 (W.D. Ky. July 6, 2020): The plaintiff relied on Rule 106 to "either seek to preclude Defendant from using her deposition testimony against her at trial or from playing only certain portions of her deposition at trial without greater context." The court stated that Rule 106 is not "a basis for excluding evidence but rather a tool that Phoenix can use to introduce evidence herself to give context to what Defendant seeks to use against her."

### *E. Rule 106 Partially Codifies the Common Law*

The Supreme Court has stated that Rule 106 is only a "partial codification" of the common-law rule of completeness. *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 171 (1988). What follows is a short account of the common-law rule of completeness.

The common-law rule of completeness has been described as follows by the court in *United States v. Littwin,* 338 F.2d 141 (6th Cir. 1964):

> The general rule is that if one party to litigation puts in evidence part of a document, or a correspondence or a conversation, which is detrimental to the opposing party, the latter may introduce the balance of the document, correspondence or conversation in order to explain or rebut the adverse inferences which might arise from the incomplete character of the evidence introduced by his adversary.

This concept of completeness is one of fundamental fairness that courts have applied in some form since at least the 17th century. Wigmore characterized the doctrine as one of "verbal completeness" requiring that the whole of a "verbal utterance" on a single topic or transaction be taken together. Wigmore emphasized that verbal utterances are "attempts to express ideas in words" and that words may easily be distorted by presenting them in edited form.

Wigmore stressed that the principle of completeness "does no more than recognize the dictates of good sense and common experience," and laid out guidelines that courts could use to determine if the opponent should be allowed to introduce completing oral evidence. First, the remainder should not be allowed if it is irrelevant to the issue. The purpose of introducing the remainder is to "obtain a correct understanding of the effect of the first part," and a wholly irrelevant remainder could never serve that function. Second, only the remainder that "concerns the same subject, and is explanatory of the first part" is allowed for purposes of completeness.

Common law courts permitted completion of both written and oral statements, although they acknowledged the practical difficulties that might arise in determining the "whole" of an oral utterance.[8] Courts typically required completion of oral statements when needed to provide the true "substance or effect" of a conversation.[9] Wigmore supported completion with oral statements, concluding that any dispute about the accuracy of a witness's recollection of an oral statement would raise a question of credibility for the jury.

With respect to the timing of completion, Wigmore articulated two categories of completion: "compulsory" and "optional."[10] Compulsory completeness represented the root of the modern interruption rule --- requiring completion of a statement during the initial presentation. Optional completeness on the other hand permitted the opponent of the initial statement to present the completing remainder herself, either on cross-examination of the witness who testified to the partial statement, or later during her own case. Although there was some conflict in the cases concerning the proper timing of completion, optional completion of both written and oral statements by an opponent during cross-examination or her own case in chief was commonly allowed.[11] In contrast, courts were more reluctant to require "interruption" of a proponent's case to complete partially presented statements.[12]

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[8] *See* Weinstein on Evidence at 106-4.

[9] Wigmore at § 2097, p. 609 ("The general rule, universally accepted, is therefore that the substance or effect of the actual words spoken will suffice, the witness stating this substance as best he can from the impression left upon his memory. He may give his "understanding" or "impression" as to the net meaning of the words heard.").

[10] Wigmore at § 2095, p. 607.

[11] Wigmore at § 2099, p. 618 (noting the "copious rulings allowing the opponent afterwards to put in the remainder" of an oral utterance and "the absence of rulings requiring the proponent to put in the whole at first").

[12] *Id.* (explaining that judges required a proponent to admit a remainder during its own presentation only in special circumstances, such as when presenting former testimony).

Common-law courts also grappled with the issue of completing statements that were otherwise inadmissible. For example, in *Rosenberg v. Wittenborn*, the plaintiff in an accident case elicited from a police officer the defendant's damning admissions at the scene of the accident that his light was "red" when he entered the intersection and that he was going approximately "thirty miles per hour."[13] When the defense sought to ask the officer on cross about the defendant's simultaneous explanation that he went through the red light *because his brakes failed*, the plaintiff raised a hearsay objection. The California Appeals Court found that completion with otherwise inadmissible hearsay was necessary to provide a fair depiction of the defendant's statements at the scene of the accident:

> Considerations of fair play demanded that the portion of the conversation placed in evidence by plaintiffs be supplemented by the qualifying and enlightening portions of the conversation which gave it a very different complexion than that which the plaintiffs' segregated passages bore.

Wigmore recognized that remainders such as this one ordinarily would constitute inadmissible hearsay if offered to prove the truth of the completing statement and suggested that the remainder should be used only to give "context" to the portion of the statement already admitted and should *not* be used as substantive evidence.[14] *But most common-law courts disagreed with this "context only" approach to the evidentiary value of a completing remainder*.[15] Courts frequently permitted completion with an otherwise inadmissible hearsay statement without limiting the purpose for which the completing remainder was admitted. For example, in *United States v. Paquet*, 484 F.2d 208, 211 (5th Cir. 1973), the Fifth Circuit held that where a Secret Service agent was permitted to testify about part of a conversation between an informant and the Defendant, the Defendant was entitled to testify as to what the informant had told him. The court noted that the rule could overcome a hearsay objection, as "[t]he prosecution cannot give its version of a matter and

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[13] Rosenberg v. Wittenborn, 3 Cal. Rptr. 459, 463 (Ct. App. 1960).

[14] Wigmore, at § 2100, p. 626.

[15] *See* Wigmore at § 2113, p. 660 (noting that "it is not uncommon for courts to treat the remaining utterance, thus put in, as having a legitimate assertive and testimonial value of its own – as if, having once got in, it could be used for any purpose whatever."); Wright & Graham, at § 5072.1, p. 393 ("the major purpose of the common law completeness doctrine was to provide an exception to those rules that prevented the opponent from showing how the proponent had misled the jury"). *See also Storer v, Gowen*, 18 Me. 174, 176-77 (1841) ("Both are equally evidence to the jury"); *Williams v. State*, 231 S.W. 110, 113 (Tex. Crim. App. 1921) (holding that the defendant's right to introduce an explanatory remainder after the prosecution introduced an inculpatory part of a whole "could not be nullified by the claim of the state that the part of the transaction and conversation introduced … was exculpatory"); *Wescoatt v. Meeker*, 147 P.2d 41, 48 (Cal. App. 1944) ("If a party chooses to prove oral declarations against interest of a deceased person…, he cannot prevent the opposing party from bringing out all that was said… even though this may result in getting into the record statements that might otherwise be excluded as self-serving."); *Simmons v. State,* 105 So. 2d 691 (Ala. App. 1958) (completeness "makes admissible self-serving statements which otherwise would be inadmissible").

thereafter muzzle the defendant." Some courts went so far as to characterize the right to complete as supplying an "independent exception to the rule against hearsay."[16]

With respect to confessions of a criminal defendant, pre-Rules courts generally demanded admission of an entire statement made to the police when the prosecution sought to use some portions. In *United States v. Wenzel*, 311 F.2d 164 (4th Cir. 1962), the court described the rule regarding completion of a defendant's confession as follows:

> When a confession is admissible, the whole of what the accused said upon the subject at the time of making confession is admissible and should be taken together, and if the prosecution fails to prove the whole statement, the accused is entitled to put in evidence all that was said to and by him at the time which bears upon the subject of controversy, including any exculpatory or self-serving declarations contained therewith.[17]

In sum, the common-law rule of completeness is broader than Rule 106 in at least two respects: 1. Completing statements are generally admissible under the common law even though they are hearsay --- and while this is true in many courts under Rule 106, it is not true in others; 2) Oral statements are admissible for completion under the common law, but they are not admissible under the terms of Rule 106. As we will see, this disparity in coverage as to oral statements has been corrected by most courts, who rely on either Rule 611(a) or the common law to admit oral statements when necessary for completion.

There is one final difference between Rule 106 and the common law: when completion *is* allowed under Rule 106, it usually happens at the same time as the distorted portion is admitted. This was not always so under the common law.

On the other hand, the most important aspect of the common law rule of completeness is incorporated in Rule 106. The treatises and cases show that the *trigger* for completion --- a distorted presentation and a completion that corrects the misimpression --- is essentially the same.

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[16] *Rokus v. City of Bridgeport*, 463 A.2d 252, 256 (Conn. 1983). *See also Stevenson v. United States*, 86 F. 106, 108 (5th Cir. 1898) ("when the United States proved the conversations and declarations the accused was entitled to have the full conversation or conversations given in evidence"); California Law Revision Commission Tentative Recommendation and Study Related to Uniform Rules of Evidence, Article VIII, Hearsay Evidence, 599 (Aug. 1962) ("To the extent that this section makes hearsay admissible, we may regard the section as a special exception to the hearsay rule.").

[17] See also *Williams v. State*, 231 S.W. 110, 113 (Tex. Crim. App. 1921) (holding that if the prosecution introduced an inculpatory part of a whole, the defendant's right to introduce the explanatory remainder "could not be nullified by the claim of the state that the part of the transaction and conversation introduced by it was exculpatory.").

## *Confusion Caused by Retaining the Common Law*

The apparent viability of the common law underneath the codified rule of completeness is, without doubt, a source of confusion. In very large part, the Federal Rules of Evidence supplant the common law. The original Reporter, Professor Cleary, stated that the goal of the project was that after the Rules were enacted, there would be no common law. Thus there is no common law of hearsay that is retained.[18] The common law limitations on habit evidence have been specifically abrogated by Rule 406. It's hard to see why the common law should be left to operate behind Rule 106 where it appears to have been superseded by every other rule.[19]

There are cases that show this confusion. For example, in the recent case of *United States v. Oloyede,* 933 F.3d 302 (4th Cir. 2019), one defendant, speaking to a police officer, made statements that inculpated him and others that exculpated other defendants. Those other defendants moved for completion. Because the statements were oral, they recognized that Rule 106 did not apply, but maintained that "there is a still-viable common law on the rule of completeness" that should have allowed the entire statement to come in. The court responded:

> ***"While we doubt that a common law rule of completeness survives Rule 106's codification, we hold that any such common law rule cannot be used to justify the admission of inadmissible hearsay. See Federal Rule of Evidence 802 (Hearsay is not admissible unless any of the following provides otherwise: a federal statute; these rules; or other rules proscribed by the Supreme Court)."***
>
> There are several takeaways from this pithy remark:
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> 1. The Court was apparently unaware of the Supreme Court's statement about partial codification in *Beech Aircraft.* If the Fourth Circuit can't get this right, how can we expect regular lawyers to do so?
>
> 2. While not citing *Beech Aircraft,* maybe the court just disagreed with the *Beech* declaration. After all, the *Beech* declaration was not a holding. And on the merits, for the reasons stated, it is far better to have a system with no residual common law lurking beneath the code --- where the whole point was to have a federal code of evidence *rather than* the murky common law.
>
> 3. The court is not saying that the common law did not allow completion with hearsay. (That would be wrong to say, as discussed above). Rather it is saying that the common law cannot be a source of *admitting* hearsay. Under Rule 802, *common law is not listed as one of the sources for admitting hearsay*. This makes sense from the Advisory Committee's position, as the Committee was trying to supplant the common law of hearsay --- the last

[18] See Rule 802, which provides that hearsay is inadmissible unless there is an exception --- and specifically not relying on common law as the source of any exception.

[19] Of course, privileges are an exception, but that is because Rule 501 (drafted by Congress over the opposition of the Advisory Committee) specifically provides that the federal common law of privilege is applicable. Rule 106 does not make a specific provision for common law.

thing it wanted was a bunch of common law hearsay exceptions being used to muck up the Rule 803/804 exceptions. But it does present a problem if a party is relying on the common law to offer hearsay under the rule of completeness. (Though why could it not be argued under *Beech Aircraft* that the common law survives Rule 802 as well? Let's hope not.).

4. Why did nobody argue Rule 611(a) for admitting the oral statements? I think the answer is that the whole area of "completeness" is just too complicated right now. There are too many sources to keep track of. Here was a case where the defense counsel was diligent --- counsel had done enough work to realize that a common-law argument remained (which means counsel did better research than the court did) --- but counsel didn't pick up the scent on Rule 611(a).[20] That is just a sad state of affairs. It calls strongly for all completeness issues to be decided under one rule.

In sum, it is pretty clear that we would all be better off without a common law backstop to Rule 106. This is especially so because unlike some evidentiary questions that can be raised *in limine*, completion questions are usually raised at trial when a proponent offers just a portion of a statement. At that time, it is hard to expect the parties to have both the common law and Rule 611(a) in mind when they are seeking to solve a completion problem. It would clearly be *much better* if all completion issues were covered in a single rule.

## II. The Two Major Questions on Which Courts are Divided

### *A. Can Hearsay Be Admitted When Necessary to Complete Under Rule 106?*

The most important problem --- and dispute among the courts --- regarding Rule 106 is whether the Rule requires the court to admit a completing statement over a hearsay objection. At the outset, it must be remembered that there are *substantial conditions* that must be met before you even get to the hearsay question: the portion offered by the proponent must be misleading, and the hearsay portion must be necessary to correct the misleading impression. As discussed above, Judge Grimm's example of the defendant's statement that he purchased the gun but then sold it before the crime is one in which the narrow conditions of Rule 106 completion are surely met. If the government seeks to make its partial, misleading presentation of the statement of ownership,

[20] It's hard to criticize counsel about not raising Rule 611(a). That rule is a broadly written grant of authority that gives the judge a bunch of discretion to control the presentation of evidence. It doesn't say anything about completion. When there is already a rule that specifically governs completion, one might be excused for not considering Rule 611(a).

the question then is whether the government can turn around and object on hearsay grounds to the remainder of the defendant's statement that he sold the gun.

As discussed in prior memos, a fair number of courts have held that even in this narrow situation, a defendant cannot invoke Rule 106 to correct the government's misleading presentation of the evidence. The rationale given is that Rule 106 cannot operate as a hearsay exception because it is not styled as a hearsay exception and is not located in Article VIII, where all the hearsay stuff is supposed to be. But as also noted previously, a number of courts have reasoned that in order to do its job of correcting unfairness, Rule 106 *has to* operate as a rule that will admit completing evidence over a hearsay objection. *See, e.g., Gudava v. Ne. Hosp. Corp.*, 2020 U.S. Dist. LEXIS 25151 (D. Mass.) ("Regardless of whether it satisfies an exception to the hearsay rule, defendant cannot simultaneously rely on evidence of the First Warning it issued to Gudava and bar Gudava from introducing evidence of her written appeal of that warning. Fairness dictates that either all or none of the entire record of Gudava's First Warning, including her appeal, will be admitted.").

### *1. Conflict in the Cases:*

Here is the conflicting case law on the hearsay question:

### *Cases holding or stating that Rule 106, when properly triggered, applies to overcome a hearsay objection to the remainder:*

- *United States v. Sutton*, 801 F.2d 1346, 1368 (D.C. Cir. 1986): The court notes that Rule 106 cannot do what it is intended to do --- correct a misleading impression --- unless it can be used as a vehicle to admit completing hearsay. The court also makes three important arguments for finding that Rule 106 operates as a hearsay exception:

  1. "[E]very major rule of exclusion in the Federal Rules of Evidence contains the proviso, 'except as otherwise provided by these rules.' * * * There is no such proviso in Rule 106, which indicates that Rule 106 should not be so restrictively construed."

  2. The DOJ petitioned Congress to add specific language stating that completing evidence had to be independently admissible. But Congress refused to add such language.

  3. Rule 106 was patterned after the California rule, and that rule was (and is) known to allow for admissibility of hearsay when necessary to rectify a misleading statement.

- *United States v. Bucci,* 525 F.2d 116 (1st Cir. 2008) ("Case law unambiguously establishes that the rule of completeness may be invoked to facilitate the introduction of otherwise inadmissible evidence.").

- *United States v. Williams,* 930 F.3d 44 (2nd Cir. 2019) (Livingston, J.) ("when the omitted portion of a statement is *properly* introduced to correct a misleading impression or place

in context that portion already admitted, it is *for this very reason* admissible for a valid, *nonhearsay* purpose: to explain and ensure the fair understanding of the evidence that has already been introduced"); *United States v. Johnson*, 507 F.3d 793, 796 (2d Cir. 2007) (under Rule 106, "even though a statement may be hearsay, an omitted portion of the statement must be placed in evidence if necessary to explain the admitted portion, to place the admitted portion in context, to avoid misleading the jury, or to ensure fair and impartial understanding of the admitted portion").

- *United States v. Gravely*, 840 F.2d 1156, 1163 (4th Cir. 1988): The *government* sought to complete with portions of the grand jury testimony of a witness. The defendant argued that the portions were hearsay. The court responded:

> The cross-designated portions, while perhaps not admissible standing alone, are admissible as a remainder of a recorded statement. Fed.R.Evid. 106 allows an adverse party to introduce any other part of a writing or recorded statement which ought in fairness to be considered contemporaneously. The rule simply speaks to the obvious notion that parties should not be able to lift selected portions out of context. *United States v. Sutton,* 801 F.2d 1346, 1366–69 (D.C.Cir.1986).

- *United States v. Portillo,* 969 F.3d 144 (5th Cir. 2020) (stating in dictum that Rule 106 allows the admission of statements necessary to complete "even when they are otherwise barred by the hearsay rule" and citing a Fourth Circuit case for the proposition).

- *United States v. Haddad*, 10 F.3d 1252, 1258 (7th Cir. 1983): "Ordinarily a defendant's self-serving, exculpatory, out of court statements would not be admissible. But here the exculpatory remarks were part and parcel of the very statement a portion of which the Government was properly bringing before the jury, i.e. the defendant's admission about the marijuana. * * * The admission of the inculpatory portion only (i.e. that he knew of the location of the marijuana) might suggest, absent more, that the defendant also knew of the gun. The whole statement should be admitted in the interest of completeness and context, to avoid misleading inferences, and to help insure a fair and impartial understanding of the evidence."

- *United States v. Harry,* 816 F.3d 1268 (10th Cir. 2016) (noting that the fairness principle of Rule 106 "can override the rule excluding hearsay" but finding that fairness did not require completion in the instant case). See also *United States v. Lopez-Medina,* 596 F.3d 716 (10th Cir. 2010) (completing hearsay was found admissible, the court reasoning that a party who introduces a misleading portion opens the door to a fair completion).

## *Cases holding or stating that Rule 106 cannot be used to admit evidence that is not otherwise admissible:*

- *United States v. Terry*, 702 F.2d 299, 314 (2d Cir. 1983) ("Rule 106 does not render admissible evidence that is otherwise inadmissible."); *Accord, United States v. Coplan,* 703 F.3d

46 (2nd Cir. 2012); *United States v. Nixon,* 779 F.2d 126 (2nd Cir. 1985); *United States Football League v. National Football League,* 842 F.2d 1335 (2nd Cir. 1988)("The doctrine of completeness, Rule 106, does not compel admission of otherwise inadmissible hearsay evidence.").

- *United States v. Hassan,* 742 F.3d 104 (4th Cir. 2014) (defendant's web postings were not admissible under Rule 106 because they were hearsay); *United States v. Lentz,* 524 F.3d 501 (4th Cir. 2008) ("Rule 106 does not render admissible the evidence which is otherwise inadmissible under the hearsay rules."). ***Accord*** *United States v. Oloyede,* 933 F.3d 302 (4th Cir. 2019).

- *United States v. Wandahsega,* 924 F.3d 868, 883 (6th Cir. 2019) (Rule 106 "does not transform inadmissible hearsay into admissible evidence."); *United States v. Costner,* 684 F.2d 370, 373 (6th Cir. 1982) ("The rule covers an order of proof problem; it is not designed to make something admissible that should be excluded."); *United States v. Adams,* 722 F.3d 788 (6th Cir. 2013) (discussed infra, holding that Rule 106 does not operate to admit hearsay even if admission is necessary to prevent an unfair result; the court recognizes that the government offered a misleading portion but held that the defendant had no relief under Rule 106); *United States v. McQuarrie*, 2020 WL 2732226 (6th Cir.) ("We have held that the rule of completeness reflected in Rule 106 covers an order of proof problem; it is not designed to make something admissible that should be excluded. Although we have sometimes been critical of the rule, we have repeatedly held that exculpatory hearsay may not come in solely on the basis of completeness.").

- *United States v. Vargas*, 689 F.3d 867, 876 (7th Cir. 2012) ("a party cannot use the doctrine of completeness to circumvent Rule 803' s [sic] exclusion of hearsay testimony.").

- *United States v. Woolbright,* 831 F.2d 1390 (8th Cir. 1987): "Neither Rule 106, the rule of completeness, which is limited to writings, nor Rule 611, which allows a district judge to control the presentation of evidence as necessary to the 'ascertainment of the truth' empowers a court to admit unrelated hearsay in the interest of fairness and completeness when that hearsay does not come within a defined hearsay exception."

- *United States v. Hayat,* 710 F.3d 875, 896 (9th Cir. 2013) ("Rule 106 does not compel admission of otherwise inadmissible hearsay evidence."); *see also United States v. Cisneros*, 2018 WL 3702497 (C.D. Ca. July 30, 2018) (exculpatory statements in a post-arrest interview could not be admitted under Rule 106 because they were hearsay, even assuming that they were necessary to clarify the defendant's inculpatory statements); *United States v. Encinas Pablo,* 2020 WL 516608 (D. Ariz.) (rejecting the defendant's argument that his hearsay

statements should be admitted under the rule of completeness because "out of court statements not falling within an exception to the hearsay rule are inadmissible regardless of Rule 106").

In sum there is a clear conflict in the courts about whether Rule 106 can operate to overcome a hearsay objection.

### *2. Admitted for What Purpose?*

In those cases where the courts have recognized that a remainder may be admitted under Rule 106 over a hearsay objection, there is some disagreement about the purpose for which that remainder is offered. The narrowest position is that the remainder can be offered not for its truth but only to put the original misleading statement in *context.* As such, it is not hearsay at all. Illustrative of this position is the recent opinion in *United States v. Williams,* 930 F.3d 44 (2nd Cir. 2019), where the court states that "when the omitted portion of a statement is *properly* introduced to correct a misleading impression or place in context that portion already admitted, it is *for this very reason* admissible for a valid, *nonhearsay* purpose: to explain and ensure the fair understanding of the evidence that has already been introduced."

In *Williams,* the statement offered for completion was not, in fact, found admissible because it didn't fit the strict fairness standards of Rule 106. In contrast, in most of the reported cases in which completing evidence *was* found admissible over a hearsay objection, it was found to be admissible *as proof of a fact.* In other words, *Williams* is dicta while the holdings are that the completing statement can be offered as proof of a fact. Here are a few examples:

- In *Sutton, supra,* the court held that defendant Sucher had the right under Rule 106 to admit portions of a conversation he had, where the government had admitted other portions that were misleading. The government offered Sucher's statements that he sent documents to Kolbert to show consciousness of guilt. The court treats the remainder in this way:

> Sucher's defense was that he innocently gave Kolbert the documents without any knowledge of illegality. Three of the four excluded statements *would support an inference consistent with that defense.* The second statement (2) could have *supported Sucher's assertion* that he provided documents to Kolbert out of a desire to cooperate with his fellow employee at DOE. The first (1) and fourth (4) statements would have *supported an inference* contrary to the government's contention that Sucher exhibited consciousness of his guilt. The possible contrary inference of (1) and (4) is that Sucher gave documents innocently, and was afraid that Kolbert may have falsely told Maxwell that Sucher, as the source of the documents, was a knowing and willing participant in the illegal conspiracy.

It is apparent that the court is holding that the completing statements are offered for the *fact* that Sucher had no consciousness of guilt. That's what it means to "support an

inference." The trial court had excluded the statements on the ground that they were hearsay to prove Sucher's prior state of mind. And the appellate court is saying that, yes this is true, but it is *admissible* to prove that prior state of mind under Rule 106.

Moreover, as seen earlier, the *Sutton* court emphasized the absence of any language in the Rule suggesting that the completing portion needs to be "otherwise admissible" --- and the court specifically concludes that the completing remainder need not be otherwise admissible. If the court were intending to admit the completing portion for context only, it *would* be otherwise admissible (for a non-hearsay purpose) and all of the court's analysis of the history and location of the rule would be pointless. The court has to be admitting the completing portion for its truth with this analysis.

● In *Haddad, supra,* the Seventh Circuit held that when the government offered the defendant's statement, "the drugs were mine," the defendant should have been allowed to complete with the contemporaneous statement "but I don't know about the gun." The court found the exclusion to be harmless error, however. The analysis of why the completing statement should have been admitted, and the analysis of why exclusion was harmless, indicate that the court is saying that the statement should have been admitted to prove a fact --- that the defendant did not know about the gun:

> The marijuana that Mr. Haddad admitted placing under the bed was only some six inches from the implicated gun. The defendant in effect said "Yes, I knew of the marijuana but I had no knowledge of the gun." The admission of the inculpatory portion only (i.e. that he knew of the location of the marijuana) might suggest, absent more, that the defendant also knew of the gun. The whole statement should be admitted in the interest of completeness and context, to avoid misleading inferences, and to help insure a fair and impartial understanding of the evidence. The error in the evidentiary ruling was, nevertheless, harmless.
>
> Even though Mr. Haddad did not testify, he called his girlfriend, Ms. McMullin, to the witness stand. She testified that it was she who purchased the gun and that she hid it from the defendant and that the defendant had no knowledge of the weapon. So the defendant got before the jury the same message that is contained in the exculpatory portions of his statement to Officer Linder, to-wit: that he had no knowledge of the gun.

So the court is saying that the error is harmless because there was already alternative *proof of the same fact*. Moreover, it makes no sense to say that "I know nothing about the gun" is admissible only for context. The only way it provides context is if it is true.

It appears that courts that allow completion notwithstanding a hearsay objection are doing so on the grounds of fairness and a level playing field – which suggests a *parity of purpose* for

both statements --- a parity which would not be met if a party admits a misleading part of a statement for its truth, and the opponent only gets to have the completing part admissible for context.

### *3. "Context" as a Trigger for Completeness, Not as a Limit on How the Completing Statement Can Be Used.*

It is very important to note that when a court says that completion is required to put a statement "in context" it does not necessarily mean that the completing statement *is only admissible for context.* For example, the *Haddad* court, supra, says the whole statement "should be admitted in the interest of completeness and context, to avoid misleading inferences, and to help insure a fair and impartial understanding of the evidence." But this reference to "context" is about the trigger for completion in the first place --- the completing statement is not admissible at all unless it puts the admitted statement in context. The separate question is: how is the statement to be used once it *is* admitted? That separateness is seen in *Haddad,* where the court is stating that the remainder should have been admitted to prove, as a fact, that the defendant didn't know the gun was there.

It is perfectly consistent to say that completion is allowed when a proffered statement must be put in context, but that fairness requires the completing statement, once allowed, to be used for its truth --- because the offering party who created the problem should not be left with an advantage. Moreover, it makes no sense to admit a statement to put the distorting statement in context, and then to hold that the completing statement may not be used for the truth, if the only way it provides context *is if it is true*.

Note that the "context" standard for completion under Rule 106 must be triggered whether the completing statement is hearsay, non-hearsay, or hearsay subject to an exception. For example, assume a defendant offers an excited utterance as a completing statement during the prosecution's case. That statement is not *immediately* admissible under Rule 106 unless a government-proffered statement is subject to a misconception, and the defendant's statement puts it "in context." But if those conditions are found, the statement is not limited to being *offered* for context. It is admissible to prove a fact.[21] The same would be true for courts that are finding that Rule 106 operates as a means to admit hearsay necessary for completion.

This dispute, about whether a completing statement can be admissible for its truth (as the reported cases appear to hold), as opposed to admissible only for context, is one that the Committee

[21] If you are wondering why you need Rule 106 when the excited utterance is independently admissible, remember that Rule 106 is a timing mechanism. So if the statement is necessary to place another statement in context, the party would be able to complete contemporaneously, and wouldn't have to wait until its case to admit the excited utterance.

must work through if it wishes to propose an amendment to Rule 106. The drafting options in the last section of this memo revisit the question of "offered for truth" vs. "offered for context."

## *B. Does the Rule of Completeness Apply to Oral, Unrecorded Statements?*

Rule 106 does not, by its terms, apply to oral statements that have not been recorded --- which is, as stated above, a departure from the common law.

The exclusion of unrecorded statements from Rule 106 has led most courts to find an alternative way to admit such statements when necessary for completion --- and this makes good sense because, as Judge Grimm stated, there is no rational basis for a categorical distinction between an oral statement and a recorded statement if each meets the fairness requirement of Rule 106.

One possible way to allow oral statements where necessary to complete is to resort to the common law rule of completeness. As stated above, the Supreme Court stated in *Beech Aircraft* that the common-law rule of completeness---which does cover unrecorded oral statements --- retains vitality. *See United States v. Sanjar,* 853 F.3d 190, 204 (5th Cir. 2017) (common law rule of completeness "is just a corollary of the principle that relevant evidence is generally admissible").

But most courts do not directly rely on the common law --- probably because, like the Fourth Circuit in *Oleyede, supra,* they don't think that a common law of evidence exists after the enactment of the Federal Rules of Evidence. Rather, most courts admit unrecorded statements for completion through an invocation of Rule 611(a), which grants courts the authority to "exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to . . . make those procedures effective for determining the truth."

The leading case on unrecorded statements and completeness under Rule 611(a) is *United States v. Castro,* 813 F.2d 571, 576 (2d Cir. 1987), where the court held that Rule 611(a), "compared to Rule 106, provides equivalent control over testimonial proof." The court concluded that "whether we operate under Rule 106's embodiment of the rule of completeness, or under the more general provision of Rule 611(a), we remain guided by the overarching principle that it is the trial court's responsibility to exercise common sense and a sense of fairness to protect the rights of the parties." *Accord United States v. Williams,* 930 F.3d 44 (2nd Cir. 2019) ("in this Circuit, the completeness principle applies to oral statements through Rule 611(a)").

The end result is that in most courts unrecorded statements are subject to the rule of completeness in the same measure as written statements --- but, weirdly, not under the very rule that governs completeness.

***Other than the Second Circuit cases cited above, the following courts have explicitly recognized a rule of completeness applicable to oral unrecorded statements, usually under Rule 611(a):***

- *United States v. Tarantino***,** 846 F.2d 1384 (D.C. Cir. 1988) (unrecorded statements of a government witness properly admitted to complete).

- *United States v. Verdugo*, 617 F.3d 565 (1st Cir. 2010) ("the district court retained substantial discretion under Fed. R. Evid. 611(a) to apply the rule of completeness to oral statements"). *Compare United States v. Altvater,* 954 F.3d 45 (1st Cir. 2020) ("We note that Rule 106, by its text, does not apply to unrecorded oral statements. As such, Rule 106 could not be used to justify the admission of the unrecorded statements, . . . though other non-constitutional requirements might.").

- *United States v. Holden,* 557 F.3d 698, 704 (6th Cir. 2009): "The common law version of the rule was codified for written statements in Fed.R.Evid. 106, and has since been extended to oral statements through interpretation of Fed.R.Evid. 611(a). Courts treat the two as equivalent. *United States v. Shaver*, 89 Fed.Appx. 529, 532 (6th Cir.2004)."

- *United States v. Haddad*, 10 F.3d 1252 (7th Cir. 1993) (exculpatory portion of an oral confession should have been admitted to complete; declaring that Rule 611(a) gives the judge the same authority regarding unrecorded statements as Rule 106 grants regarding written and recorded statements).

- *United States v. Woolbright,* 831 F.2d 1390 (8th Cir. 1987) (stating that Rule 611(a) supports a rule of completeness for unrecorded statements that is the same as that applied to written and recorded statements under Rule 106; but holding that neither rule allows the admission of otherwise inadmissible hearsay).

- *United States v. Lopez-Medina*, 596 F.3d 716, 734 (10th Cir. 2010) ("We have held the rule of completeness embodied in Rule 106 is substantially applicable to oral testimony as well by virtue of Fed. R. Evid. 611(a)").

- *United States v. Baker,* 432 F.3d 1189 (11th Cir. 2005): "We have extended Rule 106 to oral testimony in light of Rule 611(a)'s requirement that the district court exercise 'reasonable control' over witness interrogation and the presentation of evidence to make them effective vehicles for the ascertainment of truth. Thus, the exculpatory portion of a defendant's statement should be admitted if it is relevant to an issue in the case and necessary to clarify or explain the portion received."

- *United States v. Green,* 694 F. Supp. 107, 110 (E.D. Pa. 1988), aff'd, 875 F.2d 312 (3d Cir. 1989) (dictum; the court finds that the rule of completeness applies to unrecorded

statements, relying on Second Circuit authority, but finds the offered portion in this case to be not necessary for completion).[22]

Besides the user-unfriendliness of having three separate sources of authority to cover the completeness problem (i.e., Rule 106 as to written and recorded statements and Rule 611(a) or the common law as to unrecorded oral statements), there is another important reason to consider amending Rule 106 to include coverage of unrecorded oral statements: There are some cases in which courts faced with a completeness argument as to unrecorded oral statements **simply say that Rule 106 does not apply, and so that is that --- *these courts do not evaluate the statement under Rule 611(a) or the common-law rule of completeness***. That is to say, they implicitly reject, or just ignore, the Second Circuit's view on applying the rule of completeness to unrecorded statements through Rule 611(a).

For example, in *United States v. Gibson,* 875 F.3d 179 (5th Cir. 2017), the defendant complained that the trial court erred in preventing defense counsel from cross-examining a former employee about an unrecorded statement that the defendant made to him. The trial judge precluded the question on the ground that the defendant's statement was hearsay. The defendant contended that the government had on direct inquired into other statements that the defendant had made to the employee, and that the defendant had a right under Rule 106 to introduce a statement that completed the misleading portion. The court disagreed, stating that "Rule 106 applies only to written and recorded statements." That was the end of that.

It is likely that counsel in *Gibson* never raised Rule 611(a) or the common law rule of completeness with regard to unrecorded oral statements offered to complete. But that in itself might indicate a reason to treat both recorded and unrecorded statements under a single rule --- in order to avoid a trap for the unwary. Again, arguments about completeness usually arise right at the trial, when it is unlikely that most lawyers (or judges) will be thinking about sources of law outside Rule 106 when faced with a completeness problem.

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[22] The Fifth Circuit in *United States v. Sanjar,* 876 F.3d 725, 739 (5th Cir. 2017), in dictum, seems to recognize that oral statements might be admissible to complete under some circumstances (though in *United States v. Gibson,* discussed infra, it specifically held that oral statements were not admissible to complete):

> The language of Rule 106 expressly limits it "to situations in which part of a writing or recorded statement is introduced into evidence." That said, the Eleventh Circuit has held that testimony may nonetheless fall within the rule's ambit if it is "tantamount" to offering a recorded statement into evidence. But we have held that this standard is not met in the situation here when the agent neither read from the report nor quoted it.
>
> The common law rule of completeness, which is just a corollary of the principle that relevant evidence is generally admissible, does provide a right to cross examine. *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 171–72 (1988). The rule comes into play, however, only when the additional inquiry is needed to "explain, vary, or contradict" the testimony already given. The other statements by Sanjar that defense counsel sought to ask the agent about, many of which are assertions of innocence, were "not necessary to qualify, explain, or place into context" the limited statements the agent testified about on direct. [most citations omitted]

The Fifth Circuit in *Gibson* is not the only court that has excluded unrecorded statements without resort to Rule 611(a) or the common law. ***The following courts also have made statements that end their analysis of oral statements with the language of Rule 106:***

- *United States v. Wilkerson,* 84 F.3d 692, 696 (4th Cir. 1996) (finding no relief from a misleading presentation because the completing statement was unrecorded and so Rule 106 does not apply).

- *United States v. Mitchell,* 502 F.3d 931, 965 n.9 (9th Cir. 2007) (refusing to consider completion with unrecorded statements because Rule 106 does not apply); *United States v. Hayat,* 710 F.3d 875, 895 (9th Cir. 2013) ("our cases have applied the rule of completeness only to written and recorded statements"). In *United States v. Liera-Morales,* 759 F.3d 1105, 1111 (9th Cir. 2014), the 9th Circuit adhered to its view ***even though it recognized that other circuits allow oral statements to complete*:**

> By its terms, Rule 106 "applies only to written and recorded statements." *United States v. Ortega*, 203 F.3d 675, 682 (9th Cir.2000). Consistent with Rule 106's text, we have recently observed that "our cases have applied the rule only to written and recorded statements." *United States v. Hayat*, 710 F.3d 875, 896 (9th Cir.2013) (internal quotation marks omitted). Nevertheless, at least two of our sister circuits have recognized that the principle underlying Rule 106 also applies to oral testimony "by virtue of Fed.R.Evid. 611(a), which obligates the court to make the interrogation and presentation effective for the ascertainment of the truth." *United States v. Mussaleen*, 35 F.3d 692, 696 (2d Cir.1994) (internal quotation marks omitted); accord *United States v. Li*, 55 F.3d 325, 329 (7th Cir.1995) ( "[T]he rule of completeness applied to the oral statement.").

- *United States v. Ramirez-Perez,* 166 F.3d 1106 (11th Cir. 1999): The court held that the rule of completeness did not apply to the defendant's confession *even though it was written and signed*. That is because the officer who took the confession was asked at trial only about what the defendant said, not what the defendant wrote down. The court concluded that "[b]ecause the prosecutor questioned the agent only about what Maclavio said rather than about what was written in the document, Rule 106 did not apply."

> **Note: The result in *Ramirez-Perez* has to be wrong even in a circuit holding that Rule 106 does not apply to unrecorded statements. The proponent should not be able to avoid Rule 106 by asking the witness what he heard, when what he heard was placed in a record. The case provides a pretty good example of the need to treat recorded and unrecorded statements the same under the rule of completeness. The "oral statement" exception to Rule 106 is subject to abuse.[23]**

[23] It should be noted that *Ramirez-Perez* is inconsistent with other authority in the 11th Circuit. See *United States v. Baker,* supra (applying Rule 611(a) to an oral statement offered to complete). But that inconsistency would seem to

- *United States v. Cooya,* 2012 WL 1414855 (M.D. Pa.) ("Rule 106 applies only to written and recorded statements"; no attempt made to analyze completeness under Rule 611 or the common law rule of completeness).

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To clarify, none of the above case law holds that Rule 611(a) and the common law *cannot* be used for completion of oral statements. These cases immediately above stop at Rule 106 and do not reach the Rule 611(a) question – perhaps because the party seeking completeness never asked the court to do so (though as seen above the Ninth Circuit recognizes the Rule 611(a) case law and does not follow it). But the very fact that the party may not have directed the court outside the language of Rule 106 might counsel in favor of a clarifying amendment that would put all statements offered for completion *under a single rule*.

As Judge Campbell has said, we don't need to draft rules for good lawyers, as they can work things out. We need to draft rules for lawyers that read the rules the way they are written and go no further. If that is the case, there is a good argument for amending Rule 106 to cover oral statements --- because *it will not change the result that is currently reached in the many courts that have properly addressed the matter*, and it will help the parties and courts where lawyers read the rule and do no more.

Again to emphasize: adding oral statements to Rule 106 will not create a management problem for the court, because most courts have already properly recognized that oral statements *are covered by the rule of completeness.* Thus, it is not a question of opening the floodgates or changing the law in most courts. It is basically a question of making the rule less opaque and more user-friendly.

## III. The Possibilities for Amending Rule 106 --- Arguments for and Against the Alternatives

There are a number of possible amendments that might be proposed to address the conflicts in the courts regarding Rule 106, and also to improve the rule.

The first is to provide that a statement that completes in accordance with the fairness standards of Rule 106 is admissible for its truth over a hearsay objection.

A second possibility is to take a more limited approach, and provide that the completing statement is admissible for the non-hearsay purpose of providing context for the misleading portion.

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point to some cause for rule clarification, given the complexity of the Rule 611(a)/common law construct for oral statements that is currently employed by most courts.

A third possibility --- which can be combined with either of the above options, is to expand the coverage of Rule 106 to include unrecorded oral statements.[24]

These options are discussed below, and analysis is directed toward some of the arguments that have been raised at previous meetings with respect to these options.

## A. Providing that a Statement that is Necessary to Complete is Admissible over a Hearsay Objection

As stated above, many courts have found that even if a statement qualifies under the Rule 106 fairness standard --- that is, even if it ought in fairness to be admitted contemporaneously with the portion admitted by the adversary --- it is nonetheless subject to exclusion as hearsay. These courts view Rule 106 to be merely a timing rule for evidence that is otherwise admissible. The contrary view, of a number of courts, is best set forth in *United States v. Sutton,* 801 F.2d 1346 (D.C.Cir. 1986), where the court held that Rule 106 is by its terms not limited by other rules of admissibility, and concluded that "Rule 106 can adequately fulfill its function only by permitting the admission of some otherwise inadmissible evidence when the court finds in fairness that the proffered evidence should be considered contemporaneously."

This is a conflict in the courts about an important and oft-recurring matter. It is a conflict that has existed for more than thirty years. One of the strongest reasons for amending an Evidence Rule has traditionally been that to do so will resolve a longstanding conflict --- resolving such a conflict is at the heart of codification of a uniform set of Federal Rules of Evidence.

It seems pretty unlikely that the Supreme Court will resolve the conflict. The Supreme Court has only reviewed Rule 106 once – in *Beech Aircraft v. Rainey,* 488 U.S. 153 (1988). The *Beech Aircraft* Court could have resolved the conflict in the rule, but pointedly refused to do so: it stated that "[w]hile much of the controversy in this suit has centered on whether Rule 106 applies, we find it unnecessary to address that issue. Clearly the concerns underlying Rule 106 are relevant here, but, as the general rules of relevancy permit a ready resolution to this litigation, we need go no further in exploring the scope and meaning of Rule 106." 488 U.S. at 175.

If the conflict on Rule 106 is to be resolved, it seems apparent that it must be resolved in favor of admissibility (in *some* form) of the completing evidence – again assuming that the strict requirements for completion under Rule 106 are established. It seems simply wrong to hold that the adverse party can introduce a misleading portion of a statement, and then turn around and object to evidence that would fairly be offered to rectify the misleading impression. Professor

[24] Other options have already been rejected by the Committee at previous meetings and will not be discussed here:
1. Limiting completion to statements by the same person.
2. Requiring the party who proffers the misleading statement to offer the completing statement.
3. Allowing oral statements only if there is "no substantial dispute" that they were made.
4. Specifically stating that completion is allowed only if the initially proffered statement is "misleading."
5. Providing a separate subdivision for oral statements with a different test for admissibility.
6. Providing for flexibility in the timing of completion by adding to the text of the Rule.

Wright and Graham opine that construing Rule 106 to allow such injustice would violate the basic principles of Rule 102:

> No one has ever explained how these standards would be met by a construction that would allow a party to present evidence out of context so as to mislead the jury, [and] then assert an exclusionary rule to keep the other side from exposing his deception.

21A Wright et al., Federal Practice and Procedure, §5078.1.

**What follows is a discussion of some of the arguments that have been made regarding an amendment that would allow completing evidence to be admissible over a hearsay objection.**

## *1. Argument Against Amendment: The Testifying Alternative*

Some courts have argued that a court's refusal to allow completion with hearsay statements is not unfair, because the defendant can simply rectify the situation by taking the stand and testifying to the completing statement. So for example, the argument is that the defendant in the Grimm hypothetical could simply take the stand and say, "when I told the officer I bought the gun, I also told him that I sold it before the crime."[25]

***But there are a number of reasons why the defendant's testimony option is not a good solution to the unfairness problem:***

1. The defendant, by testifying, might be subject to impeachment under the liberal tests employed by the courts under Rule 609 (a ship that has sailed for now); impeachment with a prior conviction is a pretty heavy cost to pay for restoring fairness after the government has engineered a misleading impression.

2. The testimony remedy ignores the advantage that Rule 106 presents as to the *timing* of completion. The rule recognizes that contemporaneous completion is provided by the rule due to "the inadequacy of repair work when delayed to a later point in the trial." (Rule 106 Advisory Committee Note). Defendant's testifying in the defense case-in-chief is in no sense contemporaneous with the government's admission of the misleading portion.

3. Leaving completion to the defendant's testimony raises a tension with the defendant's constitutional right *not* to testify. The Seventh Circuit recognized the

[25] *See United States v. Holifield,* 2010 U.S. Dist. LEXIS 147815 (C.D.Cal.) ("The court orders that Defendant Jordan may not introduce any exculpatory statements, not previously introduced by the government, that constitute inadmissible hearsay" and that if the defendant wants to admit such statements "he must do so by taking the stand and testifying himself" because "Federal Rule of Evidence 106 does not influence the admissibility of such hearsay statements.").

unfairness of the testimony alternative in *United States v. Walker,* 652 F.2d 708, 713 (7th Cir. 1981):

> In criminal cases where the defendant elects not to testify, as in the present case, more is at stake than the order of proof. If the Government is not required to submit all relevant portions of prior testimony which further explain selected parts which the Government has offered, the excluded portions may never be admitted. Thus there may be no "repair work" which could remedy the unfairness of a selective presentation later in the trial of such a case. While certainly not as egregious, the situation at hand does bear similarity to "[f]orcing the defendant to take the stand in order to introduce the omitted exculpatory portions of [a] confession [which] is a denial of his right against self-incrimination." [quoting Weinstein's Evidence].

*See also United States v. Sutton,* 801 F.2d 1346, 1370 (D.C.Cir. 1986) ("Since this was a criminal case Sucher had a constitutional right not to testify, and it was thus necessary for Sucher to rebut the government's inference with the excluded portions of these recordings."); *United States v. Marin*, 669 F.2d 73, 85 n.6 (2d Cir. 1982) ("when the government offers in evidence a defendant's confession and in confessing the defendant has also made exculpatory statements that the government seeks to omit, the defendant's Fifth Amendment rights may be implicated").

4. In some cases the defendant is not seeking to complete his own statements, but rather offering the remainder of a statement by a *third party*, after the government selectively introduced a portion of the third party's statement. (Such as a statement made by a witness to a police officer). In those cases, it is hard to see how the defendant can testify his way out of a third party's statement that is redacted to be misleading.

5. Probably most importantly, even if the defendant testifies, he will most likely *not even be able* to testify to his prior statement. Thus, the Grimm defendant would not be able to testify that "I told the officer that I sold the gun." That is because that testimony would constitute a prior consistent statement, which would only be admissible if the defendant's credibility is attacked and the statement is relevant to rehabilitation. See Rule 801(d)(1)(B). In this case, the statement would not be probative to rehabilitate the defendant's credibility --- the attack would be that the defendant has a motive to falsify, but the statement (pursuant to an arrest) was not made before the motive to falsify arose. *See United States v. Collicott,* 92 F.3d 973, 979 (9th Cir. 1986) ("the plain language of Rule 801(d)(1)(B) does not suggest that where a party inquires into part of a conversation, the opposing party may introduce the whole conversation as substantive evidence under the Rule"). So the best that defendant could do is to testify that "I sold the gun" --- which, in light of the litigation, is not at all the same as "I told the officer that I sold the gun." Therefore, completion is necessary to correct the misleading portions of the defendant's statements *even if the defendant does testify.* See, e.g., *United States v. Vargas*, 2018 WL 6061207, at *2 (S.D.N.Y.) (completion with exculpatory statements was necessary because even though the defendant was going to testify, the admission of the prior inculpatory portions of the statements could lead the jury to conclude that he made no exculpatory statements; and without completion, the

defendant's exculpatory testimony at trial could be thought by the jury to be "a recent fabrication, inaccurately undercutting defendant's credibility.").

In sum, the testimony alternative does not appear to be a good answer to the argument that it is unfair for the government to admit a misleading portion of a statement and then lodge a hearsay objection to the necessary remainder.

And of course, the testimony alternative is not a solution when it is the *government* that wants to complete. The government may not be able to find or call the witness whose statement it wishes to complete. The same goes for civil cases if the statement that needs to be completed is from a third party.

## *2. Argument Against Amendment: Parties Wouldn't Risk Being Rebutted by Completing Evidence*

At a previous Committee meeting, the thought was raised that the problem of admitting misleading portions of a statement would be self-regulating --- meaning it wouldn't happen --- because the party would be worried that the remainder would be admitted somewhere down the line. Let's call that the "deterrence" argument --- you don't need an amendment because the party making the initial offer will be deterred from introducing a misleading portion.

There are two reasons to think that the deterrent effect of later rectification will not be sufficient to protect against the use of misleading portions. The first reason is recognized in the Advisory Committee Note and was previously discussed. A major reason for the rule is to permit contemporaneous completion because of "the inadequacy of repair work when delayed to a point later in the trial." Thus, the *very premise* of the rule is that the risk of correction "somewhere down the line" is not a sufficient deterrent.

Second and more importantly, if the "repair" would come from a hearsay statement, then *there will be no rectification down the line* in the courts that hold that Rule 106 does not allow admission of hearsay. That is the consequence of those cases --- the misleading statement is admitted, without ever being rebutted because the misleading party raises a hearsay objection to the remainder.

Is it really possible that a court would allow a party to admit a misleading portion of the statement, but then prevent a completion on hearsay grounds even though fairness would require it? The answer is yes. There are, in fact, decided cases in which the court recognizes that the initial portion is misleading, yet admissible --- and unrebuttable because the completing party seeks to complete with hearsay. The leading example of this troubling result is *United States v. Adams,* 722 F.3d 788, 827 (6th Cir. 2013). Defendant Maricle, a state court judge, was accused of conspiring to buy votes and to help appoint corrupt members of the Clay County Board of Elections. The government was allowed to present portions of a phone recording in which a cooperating witness (White) told Maricle about questions she had been asked during her grand jury testimony. White

told Maricle that she had been asked whether Maricle had appointed her as an election officer. Maricle responded, "Did I appoint you? (Laugh)," and White said "Yeah." Maricle then said, "But I don't really have any authority to appoint anybody." That last statement was redacted from the government's presentation. That meant that the portion indicated that Maricle had essentially adopted the accusation that he had appointed White. When Maricle sought to complete with his statement that he didn't even have authority to make the appointment, the court excluded it as hearsay.

Remarkably, the Sixth Circuit found that the government had unfairly presented the evidence, but that nothing could be done about it:

> Defendants claim that "by severely cropping the transcripts, the government significantly altered the meaning of what [defendants] actually said." Maricle Br. at 35. *Although we agree that these examples highlight the government's unfair presentation of the evidence, this court's bar against admitting hearsay under Rule 106 leaves defendants without redress.* (emphasis added).

In a footnote in *Adams,* the court stated that "should this court sitting en banc address whether Rule 106 requires that the other evidence be otherwise admissible, it might consider" all the authorities that have criticized the rule that allows the government to admit a misleading portion and then object on hearsay grounds to a necessary completion.[26]

It should be noted that *Adams* was written seven years ago; the Sixth Circuit has not sat en banc on the Rule 106 question. And it continues to apply the rule as it did in *Adams. See, e.g., United States v. McQuarrie*, 2020 WL 2732226 (6th Cir.) ("Although we have sometimes been critical of the rule, [citing *Adams*] we have repeatedly held that exculpatory hearsay may not come in solely on the basis of completeness.").

It bears repeating that it is not only criminal defendants who are hamstrung by a ruling that Rule 106 cannot overcome hearsay. Consider *United States v. Woolbright*, 831 F.2d 1390 (8th Cir. 1987), a case in which the *government* wants to complete and is not permitted to do so with

[26] The authorities cited by the *Adams* court are:

> Stephen A. Saltzburg et al., 1–106 Federal Rules of Evidence Manual § 106.02 ("We believe that these rulings are misguided and contrary to the completeness principle embodied in Rule 106. A party should not be able to admit an incomplete statement that gives an unfair impression, and then object on hearsay grounds to completing statements that would rectify the unfairness."); Charles Alan Wright et al., 21A Federal Practice and Procedure § 5078.1 (2d ed.2012) ("Even were Rule 106 ambiguous on this point, Rule 102 requires that it 'be construed to secure fairness in administration ... to the end that the truth be ascertained and proceedings justly determined.' No one has ever explained how these standards would be met by a construction that would allow a party to present evidence out of context so as to mislead the jury, then assert an exclusionary rule to keep the other side from exposing his deception."); Dale A. Nance, *A Theory of Verbal Completeness*, 80 Iowa L.Rev. 825 (1995); *United States v. Sutton*, 801 F.2d 1346, 1368 (D.C.Cir.1986) ("The structure of the Federal Rules of Evidence indicates that Rule 106 is concerned with more than merely the order of proof.... Rule 106 can adequately fulfill its function only by permitting the admission of some otherwise inadmissible evidence when the court finds in fairness that the proffered evidence should be considered contemporaneously. A contrary construction raises the specter of distorted and misleading trials, and creates difficulties for both litigants and the trial court.").

otherwise inadmissible hearsay. Randle and Woolbright were found in a room with drugs after another person overdosed. All the drugs were found in a travel bag. Randle, who was not a defendant in the case, and who was unavailable for trial, told the police that the bag was hers. The defendant offered this statement, and the court found it admissible under Rule 804(b)(3), a declaration against penal interest, to prove Randle's possession (and not Woolbright's). But in another part of the statement, Randle said that she and Woolbright were on a honeymoon --- thus leading to an inference that Woolbright constructively possessed the drugs in the bag. The trial judge admitted the remainder under Rule 106, because Randle's statement that the drugs were hers led to a misleading inference that they were hers *alone*. But the court held that "neither Rule 106, the rule of completeness, which is limited to writings, nor Rule 611, which allows a district judge to control the presentation of evidence as necessary to the 'ascertainment of the truth' empowers a court to admit unrelated hearsay in the interest of fairness and completeness when that hearsay does not come within a defined hearsay exception." Thus the misleading impression created by the defendant should have gone unrectified in the absence of a hearsay exception, according to the court.[27]

For these reasons, the possibility that parties will be deterred from misleading presentations by the risk of rebuttal is not a ground for rejecting an amendment to Rule 106 that would allow the opponent to admit completing hearsay to remedy a misleading presentation.

### *3. Argument: What About the Constitution as a Remedy?*

It might be argued that any unfairness resulting from the fact that a criminal defendant cannot rebut a misleading presentation with completing hearsay could be rectified by the Constitution. Couldn't the defendant in *Adams* argue that his constitutional right to an effective defense was violated by the exclusion of his completing hearsay? For example, in *Chambers v. Mississippi,* 410 U.S. 284 (1973), the Court found that the defendant's constitutional right to an effective defense was violated when a confluence of state evidence rules barred the admissibility of hearsay evidence strongly indicating that a third party committed the crime. A response to this argument, however, is that the *Chambers* Court, and subsequent decisions, emphasize that the constitutional right to overcome evidentiary rules of exclusion is extremely narrow. The accused must show that the evidence rule infringes upon a "weighty interest" and that the exclusion is "arbitrary or disproportionate to the purposes[] [it is] designed to serve." *United States v. Scheffer,* 523 U.S. 303, 308 (1998) (finding that exclusion of exculpatory polygraph evidence does not violate the right to an effective defense). So whether an accused will be protected by the Constitution in *Adams*-like situations is a matter of debate --- and leaving it to the constitution would lead to a case-by-case approach rather than a rule.

The federal case law that exists on the subject has denied *Chambers*-based claims where defendants argue unfairness because their inculpatory statements are admitted and their exculpatory statements are not. The leading case is *Gacy v. Welborn*, 994 F.2d 305, 325 (7th Cir.

[27] The *Woolbright* court ultimately stretched pretty far to find no error, by stating that Randle's statement about the honeymoon was admissible under the residual exception.

1993). Gacy filed a petition for federal habeas corpus relief from his murder conviction. The government offered Gacy's inculpatory statements under Rule 801(d)(2)(A), and then, according to the court, "used the hearsay objections to prevent Gacy from getting the more favorable portions of his story before the jury indirectly." Nevertheless, the appellate court found no error in the trial court's exclusion of Gacy's statements. As the court explained:

> Beyond explicit rules such as the privilege against self-incrimination and the confrontation clause, none of which applies here, the Constitution has little to say about rules of evidence. The hearsay rule and its exception for admissions of a party opponent are venerable doctrines; no serious constitutional challenge can be raised to them.
>
> A challenge would lie if a state used its evidentiary rules to blot out a substantial defense. See *Chambers v. Mississippi*, 410 U.S. 284 (1973); *Green v. Georgia*, 442 U.S. 95 (1979). These cases hold that states must permit defendants to introduce reliable third-party confessions when direct evidence is unavailable. *No court has extended them to require a state to admit defendants' own out of court words.*

But even if the Constitution could be a solution for allowing completing hearsay from a defendant, there are at least two reasons to prefer a rule change to cover such situations:

> 1. It is never a good idea to have evidence rules that are susceptible to unconstitutional application. That is not only a bad outcome in terms of the integrity of rulemaking. It is also a trap for the unwary. Lawyers who assume (reasonably) that evidence rules are controlling may not be aware of the line of cases establishing a constitutional right to an effective defense that overcomes certain evidentiary exclusions. And even lawyers that know about these cases may rightly think that they are too narrow to cover every instance of unfairness when the government introduces a misleading portion of a statement. It is notable that the *Adams* court itself, in holding that Adams had "no redress" to the unfairness, did not reference the constitutional right to an effective defense --- meaning at a minimum that Adams's counsel probably did not raise the point.
>
> 2. The constitutional right to an effective defense has no applicability where the misleading portion is offered *by the criminal defendant,* or by a party in a civil case. In those situations, the remedy against unfairness must come from the Evidence Rules, or not at all.

For these reasons, the unfairness resulting from an unrebutted misleading presentation should be a matter for Rule 106, not the constitutional right to an effective defense.

### *4. Argument Against Amendment: Completion Would Allow Unreliable Hearsay to be Admitted.*

At a previous meeting, a Committee member complained that an amendment to Rule 106 would allow "unreliable" hearsay to be admitted. The specific argument was that the defendant's statement in the Grimm hypothetical that he gave the gun away should not be admissible for its truth because it is unreliable.

But there is a strong argument to be made that a concern about unreliability of a completing statement misses the point. To start with, in the classic case of an adversary's statement, *the initial portion of the statement, offered by the government, is not admitted because it is reliable*. The rationale for admitting a party-opponent statement is described in the Advisory Committee Note to Rule 801:

> Admissions by a party-opponent are excluded from the category of hearsay on the theory that their admissibility as evidence is the result of the adversary system rather than satisfaction of the conditions of the hearsay rule. *No guarantee of trustworthiness is required in the case of an admission.*

Thus, a party-opponent statement is not admitted because it is reliable, but rather because it is consistent with the rationale of the adversary system, that you can use an opponent's own statements against them.

Following along with the adversarial premise, it is *not* consistent with the adversary system to allow an adversary to present the opponent's statement in such a way as to mislead the factfinder. Rule 801(d)(2) allows for *fair* adversarial use (you said it, you live with it) but there must be some protection against foul use (for when that is not what you really said). That is where Rule 106 comes in.

The argument that allowing Rule 106 to admit hearsay would result in unreliable evidence being introduced misunderstands the point of the completion --- the completion is necessary to provide an *accurate indication of what the defendant actually said*, regardless of whether the statement is in whole or in part reliable. Under these circumstances, if the first statement need not be reliable, why should the second statement have to be, when admission is necessary to protect against unfairness and to provide the jury more accurate information of *what was actually said*?

It should be noted, as to reliability, that proponents retain complete control over the admissibility of "unreliable" remainders --- they are free to forego the initial misleading statement instead of seeking to admit it. They are also free to argue to the factfinder that the completing remainder is a lie. What they should not be able to do is introduce misleading (and often unreliable) statements and then object that a statement correcting the misrepresentation is "unreliable."

## *5. Legislative History and Textual Arguments*

Providing language in Rule 106 that would allow completing statements to be admissible over a hearsay objection appears to be consistent with legislative intent. This argument is based on two separate points about the drafting of the rule:

> 1. The rule was patterned after (though admittedly not the same as) the California rule, which has always been held to allow for completion with hearsay evidence.
>
> 2. When the rule was being considered in Congress, the DOJ sought to add language that completing evidence had to be independently admissible. During hearings on the Federal Rules of Evidence, Assistant Attorney General W. Vincent Rakestraw specifically requested that the Senate Judiciary Committee amend Rule 106 to permit the introduction of "any other part or any other writing or recorded statement *which is otherwise admissible.*" But Congress did not add that language.[28]

There is a contrary textual argument, however --- that Rule 106 cannot and should not operate as a hearsay exception because it is not placed with the other hearsay exceptions in Article 8. If the drafters had wanted a "rule of completeness hearsay exception" why wouldn't they put it with the rest of the hearsay exceptions?

There are three pretty good responses to the location argument, however. First, Rule 802, which is the operative rule against hearsay[29], provides that hearsay is inadmissible "unless any of the following provides otherwise:

- a federal statute;
- *these rules*; or
- other rules prescribed by the Supreme Court.

The reference is to *these* rules, meaning *all* of the Evidence Rules. If the drafters had wanted to limit hearsay exceptions to those in Article 8, Rule 802 would have referred to "the rules in this article" rather than "these rules."

Second, courts have actually found other rules outside of Article 8 to be grounds for admitting hearsay. For example, Civil Rule 32(a)(4)(B) allows admission of hearsay from a deposition even though the declarant is not unavailable under the terms of the Evidence Rules. In effect the Civil Rule creates an independent hearsay exception. And courts have upheld that exception, referring to Rule 802's list of sources for an exception outside of Article 8. *See, e.g., Fletcher v. Tomlinson,* 895 F.3d 1010, 1013 (8th Cir. 2018) (holding that Rule 32 authorizes admissibility of deposition hearsay even though it is not admissible under the Article 8 exceptions;

[28] Letter from Rakestraw to Senate Jud. Comm., 93rd Congress, 121-23.

[29] Rule 801 provides the definition of hearsay; Rule 802 is the source of exclusion of hearsay.

relying on Rule 802 and noting that "[d]ecisions from around the country have concluded that Rule 32(a)(4)(B) operates as an independent exception to the hearsay rule.") If a hearsay exception can be found completely outside the Evidence Rules, there is no reason why an exception cannot be found within those rules outside Article 8.[30]

The third responsive argument regarding placement of Rule 106 is set forth by the D.C. Circuit in *United States v. Sutton,* 801 F.2d 1346, 1368 (D.C. Cir. 1986). The court found the placement of Rule 106 to be a point *in favor* of finding a hearsay exception:

> The structure of the Federal Rules of Evidence indicates that Rule 106 is concerned with more than merely the order of proof. Rule 106 is found not in Rule 611, which governs the "Mode and Order of Interrogation and Presentation," but in Article I, which contains rules that generally restrict the manner of applying the exclusionary rules. See C. Wright & K. Graham, Federal Practice and Procedure: Evidence § 5078, at 376 (1977 & 1986 Supp.).
>
> Moreover, every major rule of exclusion in the Federal Rules of Evidence contains the proviso, "except as otherwise provided by these rules," which indicates that the draftsmen knew of the need to provide for relationships between rules and were familiar with a technique for doing this. There is no such proviso in Rule 106, which indicates that Rule 106 should not be so restrictively construed.

In sum, it would appear that legislative history, a fair reading of the Evidence Rules, and the placement and language of Rule 106 support the conclusion that Rule 106 can operate as a hearsay exception for completing evidence.

## *6. Justifying a Rule 106 Hearsay Exception as a Matter of Forfeiture or "Opening the Door"*

When a party makes a misleading presentation, it has been held in many circumstances that the party forfeits the right to complain about the consequences. This is one aspect of "opening the door" --- a well-established doctrine in evidence. *See, e.g., United States v. Spotted Bear,* 920 F.3d 1199, 1201 (8th Cir. 2019) ("When a criminal defendant creates a false or misleading impression on an issue, . . . the government may clarify, rebut, or complete the issue with what would otherwise be inadmissible evidence, *including hearsay statements*.").

[30] Also, recently enacted Rules 902(13) and (14) effectively provide hearsay exceptions for testimony that authenticates electronic information --- a certificate is allowed as a substitute for trial testimony. And these exceptions are, of course, outside Article 8.

It has been held, for example, that a defendant who selectively reveals only the helpful parts of a testimonial statement forfeits the right to complain that the remainder is testimonial hearsay that violates the right to confrontation. The New York Court of Appeals, in *People v. Reid,* 19 N.Y.3d 382, 948 N.Y.S.2d 223, 227 (2012), put it this way:

> If evidence barred under the Confrontation Clause were inadmissible irrespective of a defendant's actions at trial, then a defendant could attempt to delude a jury by selectively treating only those details of a testimonial statement that are potentially helpful to the defense * * *. A defendant could do so with the secure knowledge that the concealed parts would not be admissible under the Confrontation Clause. To avoid such unfairness and to secure the truth-seeking goals of our courts, we hold that the admission of testimony that violates the Confrontation Clause may be proper if the defendant opened the door to its admission.

If forfeiture-by-misleading is sufficient to overcome a *constitutional* objection, it certainly should be sufficient to overcome a hearsay objection.

Notably, the California Supreme Court has applied the *rule of completeness* to operate as a forfeiture provision where the proponent offers a misleading portion of a statement and objects to the admissibility of the remainder--- and in so doing it specifically rejected any concerns about admitting unreliable statements for completion purposes. In *People v. Vines,* 251 P.3d 943, 968–69 (Cal. 2011), the court stated that "like forfeiture by wrongdoing, [the rule of completeness] *is not an exception to the hearsay rule that purports to assess the reliability of testimony. The statute is founded on the equitable notion that a party who elects to introduce a part of a conversation is precluded from objecting . . . to introduction by the opposing party of other parts of the conversation which are necessary to make the entirety of the conversation understood*."

It is also notable that Evidence Rule 502(a), governing subject matter waiver of privilege, lifted the language from Rule 106 as the "fairness" standard for determining subject matter waiver. See Advisory Committee Note to Rule 502(a) (noting that the animating principle of Rule 106 and 502(a) are the same). Under Rule 502(a), a party that makes a "selective, misleading presentation [of privileged communications] that is unfair to the adversary opens itself to a more complete and accurate presentation" through undisclosed privileged communications on the same subject matter. Id. If a selective, misleading presentation results in a *subject matter waiver of privilege,* it is hard to see how it cannot result in a forfeiture of a hearsay objection under Rule 106.

Indeed, in the circuits that exclude completing evidence on hearsay grounds, there is an objectionable inconsistency between Rules 106 and 502(a), contrary to the legislative intent behind Rule 502(a) --- *which was directly enacted by Congress*. Congress concluded that the two rules addressed the same type of problem and should be applied in the same way.[31] So it would appear

[31] Other rules with similar results are Rule 410(b)(1) (allowing admission of protected plea statements in which a selective and misleading impression can be corrected by those statements --- again using the "ought in fairness" standard); and Rule 804(b)(6)(hearsay objection forfeited for wrongdoing that did and was intended to keep the declarant from testifying). It makes no sense that a forfeiture of evidentiary protections is found in these rules but not in Rule 106.

that an amendment that corrects the courts that ignore the relationship between Rule 106 and 502(a) would be consistent with congressional intent and the fabric of the rules. *See, e.g., Jokich v. Rush Univ. Med. Ctr.,* 2020 WL 1548955, at *2 (N.D. Ill. ) (noting, in the context of an argument over the scope of attorney-client privilege, that "[t]he language concerning subject matter waiver —'ought in fairness'— is taken from Rule 106 because the animating principle is the same. Under both Rules, a party that makes a selective, misleading presentation that is unfair to the adversary opens itself to a more complete and accurate presentation").

## B. The Context Alternative

One argument against adding a hearsay exception to Rule 106 is that it is not needed to remedy the unfairness, because the statement, if necessary to complete, is admissible as non-hearsay. That would mean that the courts that do exclude completing evidence on hearsay grounds are simply wrong about the hearsay question itself (as the Second Circuit noted in the recent *Williams* case, discussed above). The foundation of the argument is that when the proponent offers evidence out of its necessary context, any out-of-court statement that is clearly necessary to place the evidence in proper context is not hearsay at all; rather it is admissible for the not-for-truth purpose of providing context.

If this analysis is right, then technically there would be no need to amend the rule, because the rule itself does not need to operate as a hearsay exception --- it already allows the completing statement to be admissible because that statement, offered only for context, does not offend the hearsay rule. But if a large number of courts are getting the hearsay question wrong, and have been doing so for years, a possible response short of a hearsay "exception" is to amend the rule to state that if the narrow conditions for completion are met, the completing statement may be admitted for the non-hearsay purpose of context. The amendment would be justified as sending a needed signal to many courts that they should be doing what they haven't been doing. There are precedents for such an amendment --- i.e., telling the courts that they have been misapplying the rule and to stop it --- including: 1) the 2003 amendment to Rule 608(b), which corrected the courts that had been holding, incorrectly, that the Rule's bar on extrinsic evidence was applicable to all forms of impeachment, not just impeachment for untruthful character; and 2) The 2006 amendment to Rule 404(a), which corrected courts that had been holding, incorrectly, that character evidence could be offered to prove conduct in some civil cases.[32]

Consequently, if the Committee determines that the completeness-hearsay problem is correctly resolved by admitting the completing portion for context, a rule amendment should be proposed to make that explicit. The question is whether that amendment goes far enough --- or whether it is necessary to provide that the completing portion can be offered as proof of a fact.

[32] The Rule 702 amendment that would add a preponderance of the evidence standard to the text, included in this agenda book, is another example.

**There are some pretty serious problems with a rule that allows completing statements to be admitted *only* for "context":**

1. If the completing statement can be used by the jury only for context and never as proof of a fact, the result will be an *evidentiary imbalance* --- the party that created the whole problem by offering a misleading portion is entitled to have that portion considered as proof of a fact, while the party simply seeking fairness is not allowed to argue that the completing portion can be used as proof of a fact. So the "wrongdoer" ends up with a comparative advantage.

2. The "context" solution can result in a *confusing limiting instruc*tion and a complicated situation for the jury to figure out. Take the Grimm hypo, for example, where the defendant says "I bought the gun, but I sold it before the crime." The government can argue that the defendant's possession of the gun before the crime has been proved by the defendant's own statement "I bought the gun"--- and of course the jury will be allowed to draw the inference that because he bought the gun, he still had it at the time of the crime. The defendant, for his part, can't argue that the evidence indicates that he no longer had the gun. He is limited to the argument that the completing statement may be considered, but only for "context." If the jury follows that instruction --- a big if --- it would probably mean that the inferences that the jury would otherwise draw from the misleading portion should not be drawn because of the context of the statement. Apparently, that would mean that they should assume there is no evidence one way or the other about the defendant's possession of the gun at the time of the crime – when in fact it should mean that there is affirmative evidence that the defendant did *not* have the gun at the time of the crime. That all seems a very complicated resolution, and one that is unfair to the defendant. And there is good reason to think that the jury will not be able to follow a context instruction in this instance. That is because the evidence of the gun purchase was offered precisely for the inference that the defendant continued to have the gun at the time of the crime.

3. The "context" solution is ***artificial*** in those cases where, in order to provide context, the statement will have to be true. Again consider Judge Grimm's example of "I owned the murder weapon, but I sold it before the murder." When "I sold it before the murder" is admitted for "context," how is it actually relevant to context unless it is true? If it is false, it doesn't correct any misimpression at all. The completing statement doesn't change the meaning of the original portion regardless of the completing statement's content. The only way it changes the meaning is if it is true. And if that is the case --- as it seems to be in many of the cases --- then it makes little sense to take the difficult, instruction-laden context route. An amendment that puts forth an artifice is not doing the job of making Evidence Rules more just and easier to apply.

4. If a rule is written that *only* allows completing statements to be admissible for context, then it changes the law in those circuits that currently allow completing statements to be admitted as proof of a fact. These cases were discussed earlier, but for a quick recap, see *United States v. Sutton,* D.C. Circuit, where the court held that the completing statements should have been admitted to prove that the defendant actually did not have a guilty state of mind; and *United States v. Haddad,* 7th Circuit, where the court held that the completing statement should have been admitted to prove that the defendant actually did not know about the gun in the house.

It would be ironic if an amendment purportedly intended to promote fairness under Rule 106 would actually operate to truncate the rule in the circuits that have applied it to allow hearsay statements to be admitted to prove a fact --- on fairness grounds.

Fundamentally the context alternative confuses the reason for allowing completion in the first place (to provide context) with the use to which the evidence should be put upon admission.

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In the end, there is much to be said for a solution that would allow the completing portion to be admissible *to prove a fact.* It puts the parties on an even playing field; it avoids a confusing limiting instruction; and it would appear to be the just result --- because the party who introduced the misleading portion should have lost any right to complain.

Professor Dan Blinka, an important evidence scholar, explains the proper approach to completion this way:

> The better practice . . . is to introduce the remaining parts on the same footing as those originally offered. . . Juries, like all people (even lawyers), are ill-equipped to draw tortured distinctions between statements offered for their "truth" and those admitted solely to provide "context." Nor does it seem necessary to carve out a unique rule for statements by party opponents. The real protection is [the] reminder that the rule of completeness is not an "unbridled opportunity" to waft inadmissible evidence before the jury: the trial judge should admit only those statements "which are necessary to provide context and prevent distortion." This standard suffices without resort to a meaningless limiting instruction. When applying the rule of completeness, the judge is, in effect, ruling that a balanced, fair presentation of the evidence includes those parts requested by objecting counsel. Doctrinal messiness dissipates by conceptualizing the evidence as a single admissible unit.[33]

[33] 7 Wisconsin Practice, Evidence § 107.2 (4th ed. August 2019 update).

## C. The Alternative of Including Unrecorded Oral Statements in the Text of Rule 106

### *1. Legislative History*

The Advisory Committee Note to Rule 106 states that unrecorded oral statements are not covered due to "practical considerations." While that is opaque, there is some history on the Advisory Committee's decision to exclude unrecorded statements from the coverage of Rule 106. A brief discussion of that history follows:

> The Reporter's First Draft of Rule 106 allowed completion with another part of a "writing, statement, or conversation." Thus, unrecorded oral statements would be allowed under that draft. The tentative final draft changed the language to "writing or recorded statement." The minutes of a 1968 Advisory Committee meeting indicate that a member moved to strike the term "conversation" with the intent to "limit the scope of the rule to concrete factors." Then there was "a lengthy and indecisive discussion on whether the word 'conversations' belonged in the rule." The deletion of the term "conversation" was eventually voted on and approved by a vote of 10 to 3.
>
> The original Reporter, Professor Cleary, stated that the term "conversations" was deleted because "the general outline of a conversation is less definite than documentary evidence and exploration of what in fairness ought to be considered with respect to a conversation is likely to involve a "more discursive and time-consuming inquiry" than what would be required for writings.[34]

One conclusion from all this is that if the completing statement is unrecorded, disputes might arise about the content of the statement --- disputes that are less likely to arise if the statement was written or recorded.[35] Another possibility is that the drafters had it most prominently in mind

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[34] The Florida Advisory Committee, commenting on the Florida counterpart to Federal Rule 106, explains the exclusion of oral statements this way:

> This section does not apply to conversations but is limited to writings and recorded statements because of the practical problem involved in determining the contents of a conversation and whether the remainder of it is on the same subject matter. These questions are often not readily answered without undue consumption of time. Therefore, remaining portions of conversations are best left to be developed on cross-examination or as a part of a party's own case.

Note, though, that the Florida explanation assumes that the remainder will be *admissible* at a later point. If it is inadmissible hearsay, that is not the case. In essence, Rule 106's coverage of oral unrecorded statements is not very important (just a question of timing), unless Rule 106 can be used to overcome a hearsay exception. If it can, then excluding unrecorded oral statements from its coverage results in a major difference between recorded and unrecorded statements that is difficult to justify as a bright line rule.

[35] It is not clear that difficulties of proof were at the heart of the Advisory Committee's decision. That same Committee proposed a rule on prior inconsistent statements that allowed oral unrecorded statements to be admissible for their truth. There was no concern expressed about difficulty in proving up such statements; and it could be expected that the witness being impeached with a prior oral statement might deny having made it.

to draft a rule requiring contemporaneous completion, and might have thought that contemporaneous completion for every conversation would be unduly disruptive.[36] But any concern about disruption hasn't played out, because the vast majority of courts *are in fact allowing oral statements for completion* --- under Rule 611(a).

So whatever the rationale for excluding oral conversations from Rule 106, the fact is that most courts *are* admitting oral statements if the strict grounds for completion under Rule 106 are met. Therefore the discussion the Committee has had over the past few meetings about "including" oral statements, and the concern about that inclusion, is akin to closing the barn door after the cows have left; or unringing a bell; or uncracking an egg. Courts are generally (albeit with some apparent outliers) admitting oral statements to complete. *Thus the question is not about the merits of including oral statements but only about whether it should be done under a single rule rather than a hodgepodge of rules and common law.*

### *2. Difficulties in Proof as a Bar on Oral Unrecorded Statements?*

Let's assume, arguendo, that the merits of including oral statements within the rule of completeness still needs to be discussed. Is there a reason to be concerned about oral statements because they might be harder to prove than written and recorded ones? The answer would seem to be that even if there is concern about disputes over unrecorded oral statements, complete exclusion of such statements is overkill. While there might be a dispute about the content or existence of some unrecorded statements in some cases, surely the difficulty of proof is a matter that could be handled on a case-by-case basis under Rule 403 --- as Judge Grimm has argued. Under this view, the fairness rationale of Rule 106 would apply to completing unrecorded statements, unless the court finds that the probative value of the completion is substantially outweighed by the difficulties and uncertainties of proving whether and what was said.

When it comes down to it, the problem raised by unrecorded statements offered to complete --- were they ever made, or are they being misreported --- is the problem raised by *every single unrecorded statement reported in a court*---such as an oral unrecorded declaration against interest or excited utterance. So why should completing unrecorded statements be treated differently from any other unrecorded statement? Moreover, when an unrecorded statement is being offered for completion, the statement that it is completing is very likely a part of a broader unrecorded statement, a portion of which is *offered initially by the adversary*. So in the Grimm hypothetical, the police officer takes the stand and testifies that the defendant told him he purchased the gun. The defendant wants completion with his oral statement that he sold the gun. Why is there any less uncertainty and difficulty in rendering the first statement, about the purchase? The officer is rightly allowed to testify to that first part even if there is a dispute about what was said. What was said

[36] For example, you might need to complete an oral conversation with a different witness who was also present and could testify to the remainder. It could be disruptive to interrupt the opponent's case and present a witness. In contrast, the writing or recording has already been admitted, at least in part.

becomes a question of credibility. So why should it be any different with the completing statement? That distinction does not make sense.

Moreover, the failure to cover an oral statement under the rule of completeness gives rise to the possibility of sharp practices and abuse. An example is *United States v. Ramirez-Perez,* 166 F.3d 1106 (11th Cir. 1999), discussed above. The defendant made a written confession, and the government offered a misleading portion. But the rule of completeness was held not to apply because the officer was only asked about what the defendant *said*, not about what he wrote down --- even though there was no showing that the two renditions were different. The prosecutor was careful to ask the witness "what did the defendant say?" Such a baldfaced attempt to avoid the Rule 106 fairness rule was made possible by the circuit case law providing that the rule of completeness does not apply to oral unrecorded statements.

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In the end, there is an argument that including unrecorded oral statements in Rule 106 will serve these separate purposes:

> 1) In those many circuits that cover unrecorded statements under Rule 611(a) or the common law, everything will now be collected under one rule. One advantage of good codification is that an unseasoned litigator can just look at the written rule and figure out what to do. But that is not now possible with unrecorded oral completing statements, because looking at Rule 106, one would think that there would be no way to admit the completing statement. It is unlikely that Rule 611(a), or the common-law rule of completeness, would come readily to mind. So adding coverage of unrecorded statements to Rule 106 would be part of the good housekeeping and user-friendliness that is an important part of rulemaking. And, as stated above, it would assure that oral and written statements are treated the same way in terms of overcoming a hearsay objection.
>
> 2) In those courts that provide no protection at all for misleading portions of unrecorded statements, a rule amendment would bring an important substantive change grounded in fairness; and it would prevent bad faith attempts to avoid the rule of completeness in cases where oral statements are subsequently rendered into writing.

## *3. Reviewing the Practice in Courts Allowing Completion with Unrecorded Oral Statements.*

As discussed above, most circuits allow completion of misleading statements with unrecorded statements. And Professor Richter's extensive memo on state practice analyzes the states that permit oral statements to complete. Given the concern about disputes over the content

of an unrecorded statement, one might wonder whether these courts have had difficulties, e.g., extensive hearings to determine what was said.

At the federal level, I have not found a reported case on Rule 106 in which a court expressed a concern about an unrecorded statement offered for completion, in terms of difficulty of determining what, if anything, was said. Nor has there been any concern that I could find in the reported case law about the possibility of a presentation being problematically interrupted by the need to complete a conversation.

I have not found any case even discussing a dispute between the parties about an unrecorded statement. This is of course not dispositive, as I don't claim perfection, and anyway such disputes may not be reported. But it is some indication that there is not a state of discontent over admission of oral unrecorded statements to complete in those many federal jurisdictions that allow it. Part of the reason may well be that the grounds for being able to offer completing evidence --- whether recorded or not --- are so narrow that it rarely if ever comes down to the form of the statement. That is, given the fact that the first portion must be misleading, and the completing portion must actually correct the misleading impression, by the time those requirements are met, the court would be reluctant to exclude the completing statement merely because it is unrecorded.

As to the possibility of disruption with completing oral statements, to the extent there has been any concern at all, it appears to be remedied by allowing the trial court to have discretion regarding the timing of the completion. Because most courts have held that timing is within the discretion of the court, the courts appear to ameliorate the possibility of disruption by allowing the completing party to present the completing statements at a later point. See, e.g., *Phoenix Assocs. III v. Stone*, 60 F.3d 95, 101 (2nd Cir. 1995) ("While the wording of Rule 106 appears to require the adverse party to proffer the associated document or portion contemporaneously with the introduction of the primary document, we have not applied this requirement rigidly.").

At the state level, Professor Richter has conducted significant research into how unrecorded statements have worked under state rules of completeness that permit such statements to be admitted. Professor Richter's memo is included in the agenda book immediately after this one. In quick summary, she did not find a single state case where the court wrestled with a dispute about the content of a completing oral statement. Thus, it would appear that the "practical" concerns about completing with oral statements are substantially overblown.

## IV. Drafting Alternatives

Three drafting alternatives are presented:

1. An amendment that would allow admission of a completing remainder over a hearsay exception.

2. An amendment that would allow the completing remainder to be admitted only for context.

3. An amendment that covers oral unrecorded statements ---which is added to alternatives 1 and 2, as the Committee has decided that if any change is to be made, the top priority is the hearsay/context question --- so an amendment that would only deal with oral statements is not on the table.

What follows, therefore, are four drafting alternatives, with Committee Notes that are obviously similar but with differences tailored to the alternative.

## *A. Draft One --- Admissibility of Completing Statement Over a Hearsay Objection, and Including Oral Unrecorded Statements.*

**Rule 106. Remainder of or Related ~~Writings or~~ ~~Recorded~~ Written or Oral Statements**

If a party introduces all or part of a ~~writing or~~ ~~recorded~~ written or oral statement, an adverse party may require the introduction, at that time, of any other part — or any other ~~writing or~~ ~~recorded~~ written or oral statement — that in fairness ought to be considered at the same time. The adverse party may do so over a hearsay objection.

### *Draft Committee Note*[37]

Rule 106 has been amended in two respects. First, the amendment provides that if the existing fairness standard requires completion, then that completing statement is admissible over a hearsay objection. Courts have been in conflict over whether completing evidence properly required for completion under Rule 106 can be admitted over a hearsay objection. The Committee has determined that the rule of completeness, grounded in fairness, cannot fulfill its function if the party that creates a misimpression about the meaning of a proffered statement can then object on hearsay grounds to evidence that would correct the misimpression. *See United States v. Sutton*, 801 F.2d 1346, 1368 (D.C.Cir.1986) (noting that "[a] contrary construction raises the specter of distorted and misleading trials, and creates difficulties for both litigants and the trial court"). For example, assume the defendant in a murder case admits that he owned the murder weapon, but also simultaneously states that he sold it months before the murder. In this circumstance, admitting only the statement of ownership creates a misimpression because it suggests that the defendant implied that he owned the weapon at the time of the crime, when that is not what he said. The prosecution, which has by definition created the situation that makes completion necessary, should not be permitted to invoke the hearsay rule and thereby allow the misleading statement to remain unrebutted. A party that presents a distortion can fairly be said to have forfeited its right to object to hearsay that would be necessary to correct a misimpression. For similar results see Rules 502(a), 410(b)(1), and 804(b)(6).

The courts that have permitted completion over hearsay objections have not usually specified whether the completing remainder may be used for its truth or only for its nonhearsay value in showing context. Under the amended Rule, the use to which a

[37] Note that the second paragraph of the Committee Note seeks to address the point that sometimes the completing statement should be admissible only for context and sometimes for its truth. In either case the statement would be admissible "over a hearsay objection."

completing statement can be put will be dependent on the circumstances. In some cases, completion will be sufficient for the proponent of the completing statement if it is admitted to provide context for the initially proffered statement. In such situations, the completing statement is properly admitted over a hearsay objection because it is offered for a non-hearsay purpose. An example would be a completing statement that corrects a misimpression about what a party heard before undertaking a disputed action, where the party's state of mind is relevant. The completing statement is admitted only to show all that the defendant heard, regardless of the underlying truth of the completing statement. But in some cases, a completing statement places an initially proffered statement in context only if the completing statement is true. An example is the defendant in a murder case who admits that he owned the murder weapon, but also simultaneously states that he sold it months before the murder. The statement about selling the weapon corrects a misimpression only if it is offered for its truth. In such cases, Rule 106 operates to allow the completing statement to be offered as proof of a fact.

Second, Rule 106 has been amended to cover oral statements that have not been recorded. Most courts have already found unrecorded completing statements to be admissible under either Rule 611(a) or the common-law rule of completeness. This procedure, while reaching the correct result, is cumbersome and creates a trap for the unwary. The amendment, as a matter of convenience, brings all rule of completeness questions under one rule. It is not intended to change the standards for admitting oral unrecorded statements that are currently employed by the courts under Rule 611(a) or the common law.

The original Advisory Committee Note cites "practical reasons" for limiting the coverage of the Rule to writings and recordings. To the extent that the concern was about disputes over the content or existence of an unrecorded statement, that concern does not justify excluding all unrecorded statements completely from the coverage of the Rule. *See United States v. Bailey,* 2017 WL 5126163, at *7 (D.Md. Nov. 16, 2017) ("A blanket rule of prohibition is unwarranted, and invites abuse. Moreover, if the content of some oral statements are disputed and difficult to prove, others are not—because they have been summarized . . ., or because they were witnessed by enough people to assure that what was actually said can be established with sufficient certainty."). Fundamentally, any question about the content of an oral unrecorded statement is no different under Rule 106 than it is in any other case in which an oral unrecorded statement is proffered. Disputes over what a declarant said are generally for the factfinder.

The rule retains the language that completion is made at the time the original portion is introduced. That said, many courts have held that the trial court has discretion to allow completion at a later point. See, e.g., *Phoenix Assocs. III v. Stone*, 60 F.3d 95, 101 (2nd Cir. 1995) ("While the wording of Rule 106 appears to require the adverse party to proffer the associated document or portion contemporaneously with the introduction of the primary document, we have not applied this requirement rigidly."). Nothing in the amendment is intended to limit the court's discretion to allow completion at a later point.

The amendment does not give a green light of admissibility to all excised portions of written or oral statements. It does not change the basic rule, which applies only to the narrow circumstances in which a party introduces a statement that creates a misimpression, and the adverse party proffers a statement that in fact corrects the misimpression. The mere fact that a statement is probative and contradicts a statement offered by the opponent is not enough to justify completion under Rule 106.

## *B. Draft Two --- Completing Statement Admissible Over a Hearsay Objection (Oral Statements Not Covered).*

**Rule 106. Remainder of or Related Writings or Recorded Statements**

If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part — or any other writing or recorded statement — that in fairness ought to be considered at the same time. The adverse party may do so over a hearsay objection.

## Draft Committee Note

Rule 106 has been amended to provide that if the existing fairness standard requires completion, then that completing statement is admissible over a hearsay objection. Courts have been in conflict over whether completing evidence properly required for completion under Rule 106 can be admitted over a hearsay objection. The Committee has determined that the rule of completeness, grounded in fairness, cannot fulfill its function if the party that creates a misimpression about the meaning of a proffered statement can then object on hearsay grounds to evidence that would correct the misimpression. *See United States v. Sutton,* 801 F.2d 1346, 1368 (D.C.Cir.1986) (noting that "[a] contrary construction raises the specter of distorted and misleading trials, and creates difficulties for both litigants and the trial court"). For example, assume the defendant in a murder case admits that he owned the murder weapon, but also simultaneously states that he sold it months before the murder. In this circumstance, admitting only the statement of ownership creates a misimpression because it suggests that the defendant implied that he owned the weapon at the time of the crime, when that is not what he said. The prosecution, which has by definition created the situation that makes completion necessary, should not be permitted to invoke the hearsay rule and thereby allow the misleading statement to remain unrebutted. A party that presents a distortion can fairly be said to have forfeited its right to object to hearsay that would be necessary to correct a misimpression. For similar results see Rules 502(a), 410(b)(1), and 804(b)(6).

The courts that have permitted completion over hearsay objections have not usually specified whether the completing remainder may be used for its truth or only for its nonhearsay value in showing context. Under the amended Rule, the use to which a completing statement can be put will be dependent on the circumstances. In some cases, completion will be sufficient for the proponent of the completing statement if it is admitted to provide context for the initially proffered statement. In such situations, the completing statement is properly admitted over a hearsay objection because it is offered for a non-hearsay purpose. An example would be a completing statement that corrects a misimpression about what a party heard before undertaking a disputed action, where the party's state of mind is relevant. The completing statement is admitted only to show all that the defendant heard, regardless of the underlying truth of the completing statement. But in some cases, a completing statement places an initially proffered statement in context only if the completing statement is true. An example is the defendant in a murder case who admits that he owned the murder weapon, but also simultaneously states that he sold it months before the murder. The statement about selling the weapon corrects a misimpression only if it is offered for its truth. In such cases, Rule 106 operates to allow the completing statement to be offered as proof of a fact.

Rule 106 retains the limitation that it does not cover oral statements that are unrecorded. The original Advisory Committee Note cites "practical reasons" for limiting the coverage of the Rule to writings and recordings. Most courts, however, have found unrecorded completing statements to be admissible under either Rule 611(a) or the common-law rule of completeness. *See, e.g., United States v. Castro,* 813 F.2d 571, 576 (2d Cir. 1987) (noting that Rule 611(a), "compared to Rule 106, provides equivalent control over testimonial proof" and concluding that "whether we operate under Rule 106's embodiment of the rule of completeness, or under the more general provision of Rule 611(a), we remain guided by the overarching principle that it is the trial court's responsibility to exercise common sense and a sense of fairness to protect the rights of the parties"). Nothing in the amendment is intended to affect that case law. Courts continue to have discretion to admit evidence of an unrecorded oral statement after considering the probative value of the statement in correcting a misimpression against the time and effort necessary to prove it up. The Committee found no reason to disrupt existing case law that admits oral unrecorded statements under Rule 611(a) or the common law by amending Rule 106 to cover such statements.

The rule retains the language that completion is made at the time the original portion is introduced. That said, many courts have held that the trial court has discretion to allow completion at a later point. See, e.g., *Phoenix Assocs. III v. Stone*, 60 F.3d 95, 101 (2nd Cir. 1995) ("While the wording of Rule 106 appears to require the adverse party to proffer the associated document or portion contemporaneously with the introduction of the primary document, we have not applied this requirement rigidly."). Nothing in the amendment is intended to limit the court's discretion to allow completion at a later point.

The amendment does not give a green light of admissibility to all excised portions of all writings and recordings. It does not change the basic rule, which applies only to the narrow circumstances in which a party introduces a statement that creates a misimpression, and the adverse party proffers a statement that in fact corrects the misimpression. The mere fact that a statement is

probative and contradicts a statement offered by the opponent is not enough to justify completion under Rule 106.

## *C. Draft Three: Admissibility for Context—Oral Statements Covered*

**Rule 106. Remainder of or Related ~~Writings or Recorded~~ Written or Oral Statements**

If a party introduces all or part of a ~~writing or recorded~~ written or oral statement, an adverse party may require the introduction, at that time, of any other part — or any other ~~writing or recorded~~ written or oral statement — that in fairness ought to be considered at the same time. A statement qualifying under this rule is admissible for the non-hearsay purpose of providing context.

### *Draft Committee Note*

Rule 106 has been amended in two respects. First, the amendment clarifies that if evidence is found necessary to correct a misimpression about a proffered statement under the strict requirements of the rule, then that completing evidence is admissible for the non-hearsay purpose of providing context for the evidence initially introduced. Courts have been in conflict over whether completing evidence properly admissible under Rule 106 can be admitted over a hearsay objection. The Committee has determined that courts precluding the use of hearsay to correct a misimpression have failed to consider that the completing evidence is admissible for the non-hearsay purpose of placing the initially introduced evidence into context. For example, assume the defendant in a murder case admits that he owned the murder weapon, but also simultaneously states that he sold it months before the murder. In this circumstance, admitting only the statement of ownership creates a misimpression because it suggests that the defendant admitted owning the weapon at the time of the crime. The remainder of the statement places the misleading portion in proper context. As such, a hearsay objection should be overruled because the completing portion is not offered for its truth.

It may be in a particular case that the completing portion is admissible for its truth, because it falls within a hearsay exception or exemption. In that case, the completing statement is admissible for two purposes --- to provide context and as proof of a fact.

Second, Rule 106 has been amended to cover oral statements that have not been recorded. Most courts have already found unrecorded completing statements to be admissible under either Rule 611(a) or the common-law rule of completeness. This procedure, while reaching the correct result, is cumbersome and creates a trap for the unwary. The amendment, as a matter of convenience, brings all rule of completeness questions under one rule. It is not intended to change the standards for admitting oral

unrecorded statements that are currently employed by the courts under Rule 611(a) or the common law.

The original Advisory Committee Note cites "practical reasons" for limiting the coverage of the Rule to writings and recordings. To the extent that the concern was about disputes over the content or existence of an unrecorded statement, that concern does not justify excluding all unrecorded statements completely from the coverage of the Rule. *See United States v. Bailey,* 2017 WL 5126163, at *7 (D.Md. Nov. 16, 2017) ("A blanket rule of prohibition is unwarranted, and invites abuse. Moreover, if the content of some oral statements are disputed and difficult to prove, others are not—because they have been summarized . . ., or because they were witnessed by enough people to assure that what was actually said can be established with sufficient certainty."). Fundamentally, any question about the content of an oral unrecorded statement is no different under Rule 106 than it is in any other case in which an oral unrecorded statement is proffered. Disputes over what a declarant said are generally for the factfinder.

The rule retains the language that completion is made at the time the original portion is introduced. That said, many courts have held that the trial court has discretion to allow completion at a later point. See, e.g., *Phoenix Assocs. III v. Stone*, 60 F.3d 95, 101 (2nd Cir. 1995) ("While the wording of Rule 106 appears to require the adverse party to proffer the associated document or portion contemporaneously with the introduction of the primary document, we have not applied this requirement rigidly."). Nothing in the amendment is intended to limit the court's discretion to allow completion at a later point.

The amendment does not give a green light of admissibility to all excised portions of written or oral statements. It does not change the basic rule, which applies only to the narrow circumstances in which a party introduces a statement that creates a misimpression, and the adverse party proffers a statement that in fact corrects the misimpression. The mere fact that a statement is probative and contradicts a statement offered by the opponent is not enough to justify completion under Rule 106.

## *D. Draft Four: Admissibility for Context (and not Including Oral Statements)*

**Rule 106. Remainder of or Related Writings or Recorded Statements**

If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part — or any other writing or recorded statement — that in fairness ought to be considered at the same time. A statement qualifying under this rule is admissible for the non-hearsay purpose of providing context.

### *Draft Committee Note*

Rule 106 has been amended to clarify that if evidence is found necessary to correct a misimpression about a proffered statement under the strict requirements of the rule, then that completing evidence is admissible for the non-hearsay purpose of providing context for the evidence initially introduced. Courts have been in conflict over whether completing evidence properly admissible under Rule 106 can be admitted over a hearsay objection. The Committee has determined that courts precluding the use of hearsay to correct a misimpression have failed to consider that the completing evidence is admissible for the non-hearsay purpose of placing the initially introduced evidence into context. For example, assume the defendant in a murder case admits that he owned the murder weapon, but also simultaneously states that he sold it months before the murder. In this circumstance, admitting only the statement of ownership creates a misimpression because it suggests that the defendant admitted owning the weapon at the time of the crime. The remainder of the statement places the misleading portion in proper context. As such, a hearsay objection should be overruled because the completing portion is not offered for its truth.

It may be in a particular case that the completing portion is admissible for its truth, because it falls within a hearsay exception or exemption. In that case, the completing statement is admissible for two purposes --- to provide context and as proof of a fact.

Rule 106 retains the limitation that it does not cover oral statements that are unrecorded. The original Advisory Committee Note cites "practical reasons" for limiting the coverage of the Rule to writings and recordings. Most courts, however, have found unrecorded completing statements to be admissible under either Rule 611(a) or the common-law rule of completeness. *See, e.g., United States v. Castro,* 813 F.2d 571, 576 (2d Cir. 1987) (noting that Rule 611(a), "compared to Rule 106, provides equivalent control over testimonial proof" and concluding that "whether we operate under Rule 106's embodiment of the rule of completeness, or under the more general provision of Rule

611(a), we remain guided by the overarching principle that it is the trial court's responsibility to exercise common sense and a sense of fairness to protect the rights of the parties"). Nothing in the amendment is intended to affect that case law. Courts continue to have discretion to admit evidence of an unrecorded oral statement after considering the probative value of the statement in correcting a misimpression against the time and effort necessary to prove it up. The Committee found no reason to disrupt existing case law that admits oral unrecorded statements under Rule 611(a) or the common law by amending Rule 106 to cover such statements.

The rule retains the language that completion is made at the time the original portion is introduced. That said, many courts have held that the trial court has discretion to allow completion at a later point. See, e.g., *Phoenix Assocs. III v. Stone*, 60 F.3d 95, 101 (2nd Cir. 1995) ("While the wording of Rule 106 appears to require the adverse party to proffer the associated document or portion contemporaneously with the introduction of the primary document, we have not applied this requirement rigidly."). Nothing in the amendment is intended to limit the court's discretion to allow completion at a later point.

The amendment does not give a green light of admissibility to all excised portions of writings and recordings. It does not change the basic rule, which applies only to the narrow circumstances in which a party introduces a statement that creates a misimpression, and the adverse party proffers a statement that in fact corrects the misimpression. The mere fact that a statement is probative and contradicts a statement offered by the opponent is not enough to justify completion under Rule 106.

# TAB 3B

MEMORANDUM

To: Advisory Committee on Evidence Rules

From: Liesa L. Richter, Academic Consultant to the Evidence Advisory Committee

Date: October 1, 2019

Re: State Counterparts to Fed. R. Evid. 106/Completion of Oral Statements

Federal Rule of Evidence 106, the "rule of completion," permits an adverse party to insist upon the completion of a partial written or recorded statement offered by his opponent when the remainder "in fairness ought to be considered at the same time."[1] Although Federal Rule 106 does not authorize the completion of oral statements, some federal courts nonetheless permit completion of oral statements through the court's power pursuant to Rule 611(a).[2] The Advisory Committee has been exploring the possibility of amendments to Rule 106, including a possible amendment to extend application of Rule 106 to unrecorded, oral statements. Several states have enacted counterparts to Federal Rule of Evidence 106 that expressly permit the completion of oral statements or "conversations" in addition to written or recorded statements. California, Connecticut, Georgia, Iowa, Montana, Nebraska, New Hampshire, Oregon, Texas, and Wisconsin all have completion rules that permit the completion of unrecorded oral statements. I have examined numerous completion cases in these jurisdictions to evaluate whether extending the rule of completion to oral statements has caused inefficiencies or other practical difficulties.

***Summary***

A review of the case law in these jurisdictions reveals several trends. First, most of the cases involving the rule of completion in these jurisdictions continue to involve written or recorded statements. Notwithstanding the express ability to complete oral statements, the vast majority of appellate cases reviewing a trial court's application of the doctrine of completeness deal with recorded witness interviews, signed written statements, or depositions. The completion of oral statements arises very infrequently in the appellate cases. Second, none of the appellate cases suggested any dispute or inefficiency surrounding proof of the content or nature of oral statements when the issue of completion of oral statements did arise. In cases involving oral statements, the typical questions regarding whether the initial partial presentation created a misleading impression and whether the proffered remainder served to place that portion of the statement in context predominated. Finally, much like the federal cases, the state cases involving completion construe completion narrowly and frequently reject attempts by criminal defendants to force the introduction of the remainder of their own self-serving statements to "complete" incriminating portions offered by the prosecution. In sum, the express inclusion of oral statements within the

[1] Fed. R. Evid. 106.

[2] *United States v. Holden*, 557 F.3d 698, 704 (6th Cir. 2009) ("The common law version of the rule was codified for written statements in Fed. R. Evid. 106, and has since been extended to oral statements through interpretation of Fed. R. Evid. 611(a).").

rule of completeness at the state level has not generated difficulties in the administration of the doctrine of completeness visible at the appellate level.

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A discussion of the case law in each of the aforementioned jurisdictions follows. It includes some cases involving written and recorded statements to give a flavor of the completion cases in each jurisdiction, as well as the few cases involving completion of oral statements.

## *I. California*

Section 356 of the California Evidence Code allows for the completion of written or oral statements, as follows:

> "Where part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by an adverse party; when a letter is read, the answer may be given; and when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, conversation, or writing which is necessary to make it understood may also be given in evidence."

California courts describe their rule of completeness in broad terms, explaining that "[i]n the event a statement admitted in evidence constitutes part of a conversation or correspondence, the opponent is entitled to have placed in evidence all that was said or written by or to the declarant in the course of such conversation or correspondence, provided the other statements have *some bearing upon, or connection with*, the admission or declaration in evidence."[3] Notwithstanding that broad description of the standard for requiring completeness, California courts limit completion in a manner that is similar to the federal courts. The appellate cases on completion seem to favor the prosecution, either by holding that completion by the prosecution allowed by the

[3] *People v. Harris*, 118 P.3d 545 (Cal. 2005). Interestingly, on the unrelated issue of whether the rule of completeness should trump the hearsay rule, the California Supreme Court has held that the rule of completeness extinguishes a criminal defendant's Sixth Amendment Confrontation rights. The California court has analogized the rule of completeness to forfeiture by wrongdoing, finding that a criminal defendant's use of a portion of a statement in a misleading manner forfeits any right to object to the remainder on *Crawford* grounds. *See People v. Vines*, 251 P.3d 943, 968–69 (Cal. 2011), *as modified* (Aug. 10, 2011), and *overruled by People v. Hardy (on other grounds)*, 418 P.3d 309 (Cal. 2018). In *Vines*, the defendant sought to admit a portion of an out-of-court statement made to police by his accomplice implicating a third party in the robbery at issue. The trial court held that the prosecution would be permitted to admit the remainder of the accomplice's statement in which he implicated the defendant in the shooting that occurred during the robbery if the defendant introduced a portion of the statement. The California Supreme Court affirmed: "like forfeiture by wrongdoing, section 356 is not an exception to the hearsay rule that purports to assess the reliability of testimony. The statute is founded on the equitable notion that a party who elects to introduce a part of a conversation is precluded from objecting on confrontation clause grounds to introduction by the opposing party of other parts of the conversation which are necessary to make the entirety of the conversation understood.... As *Crawford* forbids only the admissibility of evidence under statutes purporting to substitute another method for [the] confrontation clause test of reliability, evidence admissible under section 356 does not offend *Crawford*." *See also* People v. Parrish, 152 Cal. App. 4th 263, 272, 60 Cal. Rptr. 3d 868, 875 (2007) (after defendant was permitted to introduce statements of accomplice to detective during interview, court held that prosecution was properly permitted to introduce other portions of same interview implicating defendant to complete and place in context exculpatory portions admitted by defendant. Completeness satisfied *Crawford*.)

trial court was appropriate or affirming the trial court's rejection of defense efforts to complete. Because the California rule of completeness does not distinguish between written, recorded, and oral statements, many of the cases do not discuss whether statements were oral or recorded. Even in the cases in which it seems that the underlying statements were made orally, I could find no discussion of any difficulty or disagreement with respect to the content of those oral statements. Cases rejecting and requiring completion are described below.

### *A. Completion Not Required*

Most of the cases in which the California courts reject completion involve attempts by criminal defendants to introduce self-serving statements after the prosecution's admission of defendants' incriminating statements. The California appellate court affirmed the trial court's refusal to allow the defense to complete the defendant's partial oral statement introduced by the prosecution in *People v. Mendoza*.[4] In that case, Amanda Rodriguez was working as a greeter at a grocery store. She saw a man, later identified as the defendant, bypass the cash registers and exit the store holding a clear bag containing several food items. Rodriguez followed Mendoza to the parking lot and asked if he had a receipt. Mendoza responded by loudly exclaiming: "No, bitch. I don't have a receipt. I'm hungry." The prosecution moved *in limine* to exclude the "I'm hungry" portion of Mendoza's statement to Rodriguez arguing that the statement was irrelevant, had no probative value, and would only serve to confuse and mislead the jury. Mendoza objected, citing section 356, arguing that it was improper for the court to present only portions of his statement. After hearing argument from both sides on the issue, the court granted the motion *in limine* and excluded the portion of Mendoza's statement in which he said "I'm hungry." On appeal, Mendoza argued that the trial court erred under the rule of completeness. The appellate court affirmed, explaining that: "the omitted part of Mendoza's statement does nothing to qualify or enlighten the jury's understanding of Mendoza's previous statements. Each of Mendoza's statements, "No bitch. I don't have a receipt" and "I'm hungry," are easily understood without the other. Omitting "I'm hungry" does nothing to mislead the jury."

*People v. Chandler* was a sexual assault prosecution against a teacher.[5] In that case, the prosecution introduced evidence that a school administrator had an oral conversation with the defendant to warn the defendant not to be alone with students in his classroom with the door closed. The defense unsuccessfully sought to complete the conversation by introducing the defendant's exculpatory statements to the administrator in the same conversation explaining his innocent reasons for being alone with his students. The appellate court affirmed the trial court's refusal to allow the defendant's completion of his oral statements, stating that: "[T]he defendant's explanation of what he had been doing in the classroom was simply irrelevant; it was not needed to make Vijayendran's statements to appellant understood." The court concluded that excluding appellant's explanation of what he was doing in the classroom "did not result in a misleading impression of what Vijayendran intended to convey or did convey."

[4] *People v. Mendoza,* No. G055457, 2018 WL 6565927, at *1 (Cal. Ct. App. Dec. 13, 2018), *review filed* (Dec. 14, 2018).
[5] *People v. Chandler*, No. H040429, 2015 WL 7726506, at *15 (Cal. Ct. App. Nov. 30, 2015).

In *People v. Brooks*, the court also rejected the defendant's completion argument with respect to oral statements.[6] After the prosecution admitted portions of oral statements made by the victim concerning her fear of the defendant, the defendant sought to introduce other oral statements made by the victim regarding her husband's prior physical abuse. The court rejected the defense efforts to offer these statements through the rule of completion because (1) they were not part of the same conversation as the admitted statements concerning the victim's fear of the defendant and (2) they did not remedy any distortion in the admitted statements concerning her fear of the defendant.

In *People v. Lopez*, , the California appellate court found that the defendant's trial counsel was not ineffective in failing to seek admission of the defendant's helpful statements made during phone calls regarding the same subject addressed during an oral conversation in a taxi cab that was admitted at trial.[7] The court found that the defendant's statements during the phone calls were not part of the same conversation as the admitted statements and thus were not admissible to complete under Section 356:

> The conversation to be placed in context was the one between Corey and Isenhower. Lopez was entitled to have placed in evidence all that was said to or by 'the declarant'—Corey or Isenhower—in the course of the conversation between them. Lopez was not the declarant in that conversation. Lopez's statements to Isenhower during the pretext telephone conversations were not statements made by the declarant admissible under Evidence Code section 356 to provide context to the conversation between Corey and Isenhower.

In *People v. Ayon*, the appellate court upheld the trial court's refusal to allow the defendant to offer his own exculpatory statements in a phone call he made from jail after the prosecution admitted inculpatory statements he made during the same call.[8] In the first part of the phone call admitted by the prosecution, the defendant spoke to his young child and told her "dada did something bad, baby, so the cops have him, baby" and "dada's a bad boy." An adult woman was on the phone as well when the defendant made these statements to his daughter. After the child got off the phone, the defendant began to converse with the woman. The woman indicated that she had bought the defendant a "mystery thriller" book and they argued about whether the defendant would accept the book, with the defendant insisting that he wanted a book about "ghosts and demons...." Thereafter, the woman asked the defendant if he had talked to his lawyer. In answering the question, the defendant claimed, "they know I didn't do that shit." The trial court rejected the defense efforts to admit this exculpatory statement to place the incriminating statements he made to his young child in context. The trial court found that the jail call involved two separate conversations, one with the child and one with the child's mother, and therefore found that the doctrine of completeness did not necessitate admission of the later exculpatory statements. The appellate court agreed: "The conversation between Ayon and the adult woman did not give context or meaning to Ayon's conversation with his daughter. The two conversations thus were unrelated. The trial court's ruling that the exculpatory statement could not be admitted into evidence did not

[6] *People v. Brooks*, 3 Cal. 5th 1, 49–50, 396 P.3d 480, 518, *as modified on denial of reh'g* (May 31, 2017), *reh'g denied* (July 12, 2017), *cert. denied sub nom. Brooks v. California*, 138 S. Ct. 516, 199 L. Ed. 2d 397 (2017).
[7] *People v. Lopez*, No. G050281, 2015 WL 264577, at *16–17 (Cal. Ct. App. Jan. 20, 2015).
[8] *People v. Ayon*, No. D064994, 2015 WL 4557042, at *8 (Cal. Ct. App. July 29, 2015).

prejudicially distort the conversation between Ayon and his daughter or present a misleading or distorted version of the relevant events."

### *B. Completion Required*

There are many cases in which the California courts find completion appropriate – *typically in favor of the prosecution in a criminal case.* Although some of these cases clearly involved oral statements, it is difficult to determine whether others involved testimony concerning oral statements or recorded statements originally provided orally.

In *Carson v. Facilities Dev. Co.,* the court found that the trial court erred in refusing to allow completion of an admitted oral statement.[9] In the civil suit arising out of the death of the plaintiff's wife in a collision with the defendant's car, the defense admitted an oral statement made by the plaintiff to police immediately after the accident in which he stated that his wife did not have adequate time to pull out into the intersection where she was hit. The appellate court found that his second oral statement to the same officer to the effect that the driver of the vehicle that hit plaintiff's wife was driving "fast" should have been admitted to complete the conversation because it suggested that the driver's speed may have explained his wife's inability to clear the intersection. Although it found the error harmless, the appellate court found that the trial judge erred in refusing to allow the plaintiff to admit his second oral statement to complete the one admitted by the defense:

> Here, the second statement appears to explain the first statement. Carson may have felt that his wife could not get through the intersection without being hit due to the speed with which Kurtz was coming toward her. The self-serving nature of the second hearsay statement does not preclude its admission under Evidence Code section 356. Therefore, the trial court erred in refusing to allow witness Varlas to state whether Carson had told him that Kurtz's "car went by him fast."

The court in *People v. Harris* interpreted completion expansively in favor of the prosecution. In that case, the court held that the trial court properly allowed the prosecution to admit the remainder of a shooting victim's oral statement to a police officer after the defense admitted a portion of the victim's statement from the same conversation to impeach his preliminary hearing testimony. [10] During his preliminary hearing testimony, the victim had denied that he was a loan shark. At trial, after this preliminary hearing testimony was admitted, the defendant called a police officer who testified to a small portion of a telephone conversation he had with the victim in which the victim admitted that he was a loan shark. The prosecution was thereafter permitted to ask the officer about the remainder of the same telephone conversation with the victim in which the victim recounted how the defendant shot him on the way to obtain money to repay a loan. The court found that the remainder of this conversation, which concerned the victim's loan-sharking activity and its connection to the defendant, was important to place the portion of the conversation admitted by defendant into context: "In applying Evidence Code section 356 the courts do not draw narrow lines around the exact subject of inquiry. In the event a statement admitted in evidence constitutes part of a conversation or correspondence, the opponent is entitled to have placed in

[9] *Carson v. Facilities Dev. Co.,* 36 Cal. 3d 830, 850–51, 686 P.2d 656, 668 (1984).
[10] *People v. Harris*, 37 Cal. 4th 310, 334–35, 118 P.3d 545, 563 (2005).

evidence all that was said or written by or to the declarant in the course of such conversation or correspondence, provided the other statements have *some bearing upon, or connection with,* the admission or declaration in evidence...."

The California appellate court also upheld the prosecution's completion of a witness's oral statement to a police officer in *People v. Hernandez*.[11] In that sexual assault case, defense counsel asked a police officer during cross-examination about the officer's oral conversation with a witness in which the witness related statements made to her by the minor sexual assault victim.[12] The defense questioning suggested that the minor reported to the witness that the defendant had asked her to watch a pornographic movie but that she had refused and walked away. On redirect, the prosecution was permitted to ask about the remainder of the same oral conversation between the victim and witness in which the victim then told the witness about sexual abuse committed by the defendant. The appellate court affirmed:

> During cross-examination, defense counsel questioned Xiong about the details of what Sylvia told him about what Norma had said about appellant showing her pornographic movies. On redirect examination, the prosecutor asked about additional details from the same conversation. Appellant objected on the grounds of hearsay and "beyond the scope." … Because the testimony elicited by the prosecutor on redirect examination regarding additional parts of Xiong's conversation with Sylvia C. had "some bearing upon" Xiong's testimony about the same conversation on cross-examination, the jury was "entitled to know the context in which" statements on cross-examination were made.

In *People v. Harrison*, the defendant elicited a police officer's testimony that one Johnson told the officer that he was present when the defendant was negotiating with one of the murder victims about buying crack cocaine and when the defendant killed both victims.[13] Over the defendant's objection, the prosecution elicited the officer's testimony about additional details Johnson gave of the murders. The California Supreme Court affirmed, reasoning: "[O]nce defendant had introduced a portion of Johnson's interview into evidence, the prosecution was entitled to introduce the remainder of Johnson's interview to place in context the isolated statements of Johnson related by [the officer] on direct examination by the defense."

In *People v. Wharton*, the defendant elicited evidence from a police officer that the defendant showed contrition by confessing to a previous murder.[14] Over the defendant's objection, the prosecutor introduced evidence of the details of that confession. The appellate court held that the evidence elicited by the prosecution was admissible under section 356, reasoning that the "defendant presented evidence from which the jury could infer that his moral culpability for that crime was somewhat reduced. On redirect, the prosecutor was entitled to rebut that inference with evidence of the entire conversation, revealing that the defendant's admission of guilt was not an

[11] *People v. Hernandez*, No. A117006, 2008 WL 1736061, at *11–12 (Cal. Ct. App. Apr. 16, 2008).
[12] Hearsay issues were apparently satisfied by California hearsay exceptions.
[13] *People v. Harrison* (2005) 35 Cal.4th 208, 25 Cal.Rptr.3d 224, 106 P.3d 895.
[14] *People v. Wharton* (1991) 53 Cal.3d 522, 592–593, 280 Cal.Rptr. 631, 809 P.2d 290.

admirable expression of remorse but was instead made under circumstances showing a false and morally objectionable sense of personal justification."

In *People v. Clark*, the court upheld the prosecution's completion with a tape-recorded portion of a witness interview and rejected a defense argument that the completing portion of a statement must be introduced in the same form as the original portion of the statement. In that case, defense counsel used transcripts of a witness's interview with police to refresh the witness's recollection during questioning on cross-examination.[15] On re-direct, the prosecution was permitted to introduce completing portions of the tape recorded interview itself. Although the defense acknowledged questioning the witness concerning the interview, the defense argued that no portion of the transcript was ever put into evidence and argued that Evidence Code section 356 would only allow the complete conversation to be admitted in the form of further questioning of the witness, rather than in its recorded form as a tape or its written form as a transcript. The California court rejected this argument about consistent form: "Here, whatever the form of the evidence, the "subject of inquiry" under Evidence Code section 356 concerned the same conversation, the one Grasso had with Weaver. The trial court therefore did not err in admitting the tape recordings under Evidence Code section 356."

In sum, a review of recent California appellate cases reveals no unique inefficiencies or disputes concerning the completion of oral statements.

## *II. Connecticut Rule 1-5*

The Connecticut completeness provision applies broadly to "statements" of all varieties:

> **(a) Contemporaneous Introduction by Proponent.** When a statement is introduced by a party, the court may, and upon request shall, require the proponent at that time to introduce any other part of the statement, whether or not otherwise admissible, that the court determines, considering the context of the first part of the statement, ought in fairness to be considered contemporaneously with it.
>
> **(b) Introduction by Another Party.** When a statement is introduced by a party, another party may introduce any other part of the statement, whether or not otherwise admissible, that the court determines, considering the context of the first part of the statement, ought in fairness to be considered with it.[16]

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[15] *People v. Clark*, 63 Cal. 4th 522, 600, 372 P.3d 811, 871–72 (2016).

[16] Conn. Code Evid. Sec. 1-5. The commentary to Rule 1-5 explains the distinction between subsections (a) and (b) of the Rule as follows: "Unlike subsection (a), subsection (b) does not involve the contemporaneous introduction of evidence. Rather, it recognizes the right of a party to subsequently introduce another part or the remainder of a statement previously introduced in part by the opposing party under the conditions prescribed in the rule. See *State* v. *Paulino*, 223 Conn. 461, 468-69, 613 A.2d 720 (1992). Although the cases upon which subsection (b) is based deal only with the admissibility of oral conversations or statements, the rule logically extends to written and recorded statements. Thus, like subsection (a), subsection (b)'s use of the word "statement" includes oral, written and recorded statements. In addition, because the other part of the statement is introduced under subsection (b) for the purpose of putting the first part into context, the other part need not be independently admissible. See *State* v. *Paulino*, supra, 223 Conn. 468-69; *State* v. *Castonguay*, supra, 218 Conn. 496; cf. *Starzec* v. *Kida*, 183 Conn. 41, 47 n.6, 438 A.2d 1157 (1981)."

The commentary to Connecticut Rule of Evidence 1-5 expressly recognizes the Rule's application to oral statements and its ability to overcome hearsay and other evidentiary objections: "'Statement,' as used in this subsection, includes written, recorded and oral statements. Because the other part of the statement is introduced for the purpose of placing the first part into context, the other part need not be independently admissible. See *State* v. *Tropiano*, 158 Conn. 412, 420, 262 A.2d 147 (1969), cert. denied, 398 U.S. 949, 90 S. Ct. 1866, 26 L. Ed. 2d 288 (1970)."[17] Notwithstanding the applicability of Connecticut Rule 1-5 to oral statements, almost all of the completion cases in Connecticut involve written or recorded statements and almost all of the appellate rulings favor the prosecution.

### *A. Completion Not Required*

In *State v. Jackson*, the Connecticut Supreme Court upheld the trial court's decision to allow the prosecution to admit a redacted and partial version of the defendant's written statement to police.[18] The prosecution admitted a portion of the defendant's statement in which he denied being present "at 903 Hancock Street at the time the victim was shot in order to show not only the defendant's consciousness of guilt, but that he was attempting to establish a false alibi."[19] The defendant objected, arguing that his entire statement should be admitted into evidence to clarify the context of his denial. The appellate court affirmed the trial court's admission of the defendant's partial written statement over the defendant's completeness objection:

> Rather than relating to the question of the purported false alibi and the defendant's whereabouts at the time of the shooting, the balance of the statement concerned only references to the defendant's claims that: (1) he knew the victim was his sister's boyfriend; (2) on the day in question, the victim had come to Hancock Street to sell drugs; (3) he had played cards with the victim on the day of the shooting but denied that the defendant owed the victim money at the conclusion of the card game; (4) he never saw the victim with a gun; and (5) he never harbored any ill will toward the victim and did not shoot him. The assertions set forth by the defendant were not related to the issue of his alibi, which was the purpose of the state's offering of the statement.

In *State v. Castonguay,* the defendant testified at his first trial, but elected not to testify when his case was retried.[20] At the second trial, the prosecution admitted portions of the defendant's cross-examination from his first trial. The defendant argued that he was deprived of due process and a fair trial when the trial court refused to allow him to introduce portions of his direct testimony from his first trial to balance the state's offer of his cross-examination testimony. The appellate court agreed with the prosecution that the defendant's statements from his direct examination in his first trial were self-serving, inadmissible hearsay that were unrelated to the admissions upon which the state intended to rely and, therefore, did not serve to place the state's offer in context.

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[17] Commentary to Conn. Code Evid. Sec. 1-5.
[18] *State v. Jackson*, 257 Conn. 198, 211, 777 A.2d 591, 601 (2001).
[19] *Id.*
[20] *State v. Castonguay*, 218 Conn. 486, 496, 590 A.2d 901, 907 (1991).

In *State v. Savage*, the defendant's effort to introduce the remainder of his oral conversation with his arresting officer was rejected after the officer testified that the defendant had denied his daughter's accusations of sexual abuse.[21] Because it was the defense that elicited the defendant's denial on cross-examination of the officer, the rule of completeness did not apply and would not allow the defendant to open his own door to the remainder of his oral statements.

### *B. Completion Required*

In *State v. Falcon*, the prosecution sought to call a cooperating co-conspirator of the defendant's to testify against the defendant.[22] The defense indicated that it intended to call the cooperating co-conspirator's cellmate to testify to oral statements made by the cooperating co-conspirator implicating himself in the victim's killing to impeach the co-conspirator's testimony for the prosecution. The Connecticut trial court ruled *in limine* that the prosecution would be permitted to introduce the entirety of the co-conspirator's oral statements made to his cellmate in the same conversation – including ones implicating the defendant in the kidnapping of the victim -- if the defense introduced some of the statements made to the cooperating co-conspirator's cellmate. "Should the defendant choose to have Marquez testify regarding Cardona–Dingui's prior inconsistent statement regarding the shooting, then the entire statement including the inculpatory statements regarding the kidnapping and the scene of the shooting are also admissible."

The completeness doctrine sometimes intersects with the Connecticut Evidence Rule permitting the substantive admissibility of the written prior inconsistent statements of testifying witnesses. In *State v. Arthur S.,* for example, an alleged victim of sexual assault testified against the defendant.[23] Her testimony was inconsistent, in part, with a written statement she had previously provided to the police, however. Thereafter, the prosecution sought to admit portions of the victim's prior inconsistent statement for its truth under the Connecticut rule permitting substantive use of written prior inconsistencies. The defendant argued that all information in the prior statement that was consistent with the witness's trial testimony should be redacted, but the prosecution sought to include some consistent portions of the written statement for context. Referencing the Connecticut rule of completeness, the court found that some of the consistent portions of the testifying victim's prior written statement were admissible to place admitted inconsistent portions of the witness's statement in context. "We agree with the court that under the circumstances of this case, in which the timing of the charges, as well as the ages of the victims during the conduct in question, were critical, the context is relevant. Specifically, the defendant sought to have all but three sentences redacted. Those lone three sentences refer to the defendant's sexual conduct but, with the exception of one sentence, do not place that conduct at the first Bristol residence when A and B were thirteen years old and J was twelve years old. The court's analysis reflects the exercise of sound discretion."

[21] *State v. Savage*, 161 Conn. 445, 447–48, 290 A.2d 221, 223 (1971).
[22] *State v. Falcon*, No. CR10072831, 2012 WL 6846406, at *2 (Conn. Super. Ct. Dec. 14, 2012).
[23] *State v. Arthur S.*, 109 Conn. App. 135, 141, 950 A.2d 615, 618 (2008).

## *III. Georgia*

Georgia's rule of completeness is found within Georgia's hearsay exceptions:

> When an admission is given in evidence by one party, it shall be the right of the other party to have the whole admission and all the conversation connected therewith admitted into evidence.

Ga. Code Ann. § 24-8-822 (West).

The Georgia rule encompasses oral statements and there are more cases involving completion of seemingly oral statements in Georgia than in other jurisdictions.

### *A. Completion Required*

The seminal Georgia Supreme Court case often cited in completeness cases involved oral conversations. In *West v. State*, the court held that the defense should have been allowed to introduce statements in mitigation that the defendant made to a witness in an earlier oral conversation after the prosecution admitted inculpatory statements the defendant made to the same witness in a later conversation.[24] In that case, the defendant had two conversations with the sheriff who ended up testifying for the prosecution. In the defendant's first conversation with the sheriff, the defendant admitted killing the victim but explained why he had done so. In a second conversation with the same sheriff, the defendant elaborated on the positions of both parties at the time of the killing and identified the shotgun used, but did not reiterate the reasons for the killing. The prosecution elicited only the defendant's statements to the sheriff in the second conversation and the trial court rejected the defendant's efforts to introduce evidence of his initial conversation with the sheriff in which he explained his justification for the killing. The Georgia Supreme Court agreed with the defense that the trial court had erred in this unique situation:

> If the accused, in the first statement, related as reasons why he killed the deceased circumstances of justification or mitigation, then it would seem contrary to the normal custom of conversations, for the accused, upon every occasion thereafter when discussing any circumstances of the killing with the same person, to reiterate the reasons already stated. To require the accused to repeat this part of his statement on every subsequent conversation with the same party, or else suffer the consequences of having the subsequent conversation used against him to establish a prima facie case, would be placing an unreasonable, unfair, and unjust burden upon him. After making the first statement in which the reasons for the killing are stated, it is but natural that, in a subsequent conversation with the same person and upon the same subject, what was said in the first statement, in the absence of something to the contrary, is necessarily understood, and must be taken and considered as a component part of the subsequent conversation. Accordingly, we think that the trial court erred in not permitting the accused, as provided in the Code, § 38-1705, to cross-examine Sheriff Deal and elicit statements which the accused made to him in the first conversation as to why the accused had killed the deceased.

[24] *West v. State*, 200 Ga. 566, 569–70, 37 S.E.2d 799, 801 (1946).

More recent Georgia cases have also required completion of partial oral statements. In *Allaben v. State*, the Georgia Supreme Court reversed a murder conviction because the defense was denied the opportunity to present the self-serving remainder of a partial oral conversation between the defendant and a prosecution witness that was presented by the prosecution.[25] The portion of the conversation admitted by the prosecution revealed the defendant's oral statements to the witness that he had killed his wife and that her body was in his truck. Thereafter, the trial court denied the defense request to admit the remainder of the conversation, in which the defendant claimed that he did not want his wife to die. The Georgia Supreme Court found that it was error to deny the defense the opportunity to present a complete picture of the oral conversation:

> The defense's proffer of Crane's expected testimony demonstrates that the remainder of the conversation between the two men was, in fact, relevant to both Crane's direct testimony and the charges for which Appellant was on trial. Specifically, it explained both the impetus for Appellant's actions toward his wife as well as his intent at the time of the incident. Indeed, Appellant's intent with respect to the use of the ether and sleeper hold—whether he intended to kill his wife or merely subdue her—was the central, and perhaps only disputed issue at trial, and evidence on that point was sparse. Further, the excluded portion of Crane's testimony supported Appellant's defense that the victim's death was unintentional.[26]

Completion of oral statements has also worked in the prosecution's favor in Georgia. In *Thomas v. State*, the defense was permitted to introduce the oral inculpatory statement of the defendant's daughter that she made to officers during the execution of a search warrant in connection with the pending drug charges against the defendant as an against-interest statement.[27] The trial court ruled that the daughter's oral statements to officers later during the same search recanting her confession and implicating the defendant were also admissible to complete the portion of her statement introduced by the defense. The Georgia Supreme Court agreed:

> As the first, exculpatory, statement was not the entire substance of what was said during the search, admission of any portion of the remainder of what was said was proper, and the trial court's admission of the second statement was not error.

*Westbrook v. State* involved the completion of oral statements made by a prosecution witness.[28] In that case, a prosecution witness in a murder case testified that defendant had shot and killed other players at a dice game. Thereafter, the defense was permitted to call a legal intern to

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[25] *Allaben v. State*, 299 Ga. 253, 255–57, 787 S.E.2d 711, 715–16 (2016).

[26] The Georgia Supreme Court seems to apply a standard of "relevance" to completion in this case that is broader than the FRE 106 standard requiring that the initial partial introduction create a misleading or distorted impression. Under a standard of distortion, the admitted statement might have suggested that defendant confessed to intentionally killing his wife, which was not the case. Under that interpretation, the remainder might have qualified the admitted portion. On the other hand, one could argue that the defendant's claim that he did not want his wife to die in no way changes his earlier statement that she was dead and that he killed her. Either way, there appeared to be no dispute as to the content of the defendant's oral statements.

[27] *Thomas v. State*, 196 Ga. App. 88, 89–90, 395 S.E.2d 615, 616–17 (1990).

[28] *Westbrook v. State*, 727 S.E.2d 473, 476–77 (Ga. 2012).

the stand to describe a prior oral inconsistent statement made to the defense by the witness. In his pretrial interview with the defense, the witness had denied that defendant had shot anybody. Thereafter, the trial court permitted the prosecution to bring out additional oral statements that the witness made to the defense during the same interview that undercut the defendant's claim of self-defense, namely that the witness reported that he had told the defendant that nobody at the dice game where the shooting occurred would be armed. The defendant argued that admission of the remaining oral statements constituted improper rehabilitation and hearsay, but the Georgia Supreme Court affirmed the trial court's admission of the additional oral statements by the prosecution under the Georgia rule of completeness, reasoning that the statements "helped to rebut the defense's charge that Moses had fabricated his incriminating testimony at trial by showing that he had also made statements incriminating Appellant during his pre-trial interview with defense counsel."

### *B. Completion Not Required*

The Georgia Supreme Court has taken a more restrictive view of completion in other cases, most of which involve recorded statements. For example, in *Jackson v. State*, the Georgia Supreme Court rejected defendant's appeal based upon an alleged completeness violation, finding that an omitted portion of a recorded phone call between the defendant and his mother was not necessary to place a portion admitted by the prosecution in context.[29] In that case, the defendant called his mother from jail. At the beginning of the phone call, he told his mother that he would not plead guilty because he "had not done anything wrong." Later in the phone call, defendant and his mother discussed a potential witness and the defendant told his mother to encourage the witness to stay "out of sight, out of mind" while police investigators were looking for him. The prosecution was permitted to play the latter portion of the call regarding the witness for the jury without the earlier portions of the call during which the defendant claimed that he had not done anything wrong. The Georgia Supreme Court found that this partial presentation of the call did not violate the rule of completeness:

> Here, the portion of the phone call in which the appellant told his mother about a potential plea offer (and in which he denied having done anything wrong) was unrelated to the later conversation about Stewart (and separated by conversations about a potential alibi and family issues involving the appellant's father). The discussion about a plea was not necessary "in fairness ... to be considered" as part of the later discussion about Stewart because it did not qualify, explain, or place into context the appellant's request that his mother encourage Stewart to remain unavailable to investigators.

Similarly, in *Thompson v. State*, the court applied a plain error standard of review and rejected the defendant's argument that the completeness rule required the trial court to play an entire recorded witness interview for the jury after the prosecution played certain portions of that interview.[30] The trial court allowed the defense to play some portions of the recorded statement

[29] *Jackson v. State*, 804 S.E.2d 367, 370–71 (Ga. 2017).

[30] *Thompson v. State*, 816 S.E.2d 646, 653 (Ga. 2018). *See also West v. State*, 808 S.E.2d 914, 917 (Ga. App. 2017) (Court properly refused to allow defendant to introduce portions of his recorded statement to law enforcement that prosecution omitted when it introduced his statement against him, including that the victim told him that she was almost 18 years old and he would not have had sex with her if he had known that she was younger. The rule of

suggesting that the witness was on medication during the interview. The Georgia Supreme Court found that the omitted portion of the recording did not serve to correct any misimpression.

## *IV. Iowa*

Iowa's rule of completeness also expressly allows for completion of "acts," "declarations," and "conversations":

> a. If a party introduces all or part of an act, declaration, conversation, writing, or recorded statement, an adverse party may require the introduction, at that time, of any other part or any other act, declaration, conversation, writing, or recorded statement that in fairness ought to be considered at the same time.
> b. Upon an adverse party's request, the court may require the offering party to introduce at the same time with all or part of the act, declaration, conversation, writing, or recorded statement, any other part or any other act, declaration, conversation, writing, or recorded statement that is admissible under rule 5.106(a). Rule 5.106(b), however, does not limit the right of any party to develop further on cross-examination or in the party's case in chief matters admissible under rule 5.106(a).

Iowa R. Civ. P. 5.106. The express language of the Iowa Rule also allows completion with "any *other* act, declaration, conversation, writing, or recorded statement" that ought to be considered at the same time as an admitted act, declaration, conversation, writing, or recorded statement.

### *A. Completion Not Allowed*

The Iowa Supreme Court appears to have construed its rule of completeness restrictively. In *State v. Huser*, the Iowa Supreme Court reversed a defendant's conviction due to a trial court ruling allowing the prosecution to complete oral statements properly admitted by the defense under the against-interest exception to the hearsay rule with oral statements made by the same declarant on a separate occasion.[31]

> For the reasons expressed above, we conclude that Woolheater's statement to Zwank after the crime—that Morningstar had something on Woolheater that could send him to prison—was admissible as a statement against interest. We further conclude there is no basis for requiring admission of other Woolheater statements based on opening the door, curative admissibility, or rule 5.106. In particular, we view rule 5.106 as not permitting admission of other hearsay conversations that have no bearing on the Zwank conversation itself.

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completeness "prevents parties from misleading the jury by presenting portions of statements out of context, but it does not make admissible parts of a statement that are irrelevant to the parts of the statement introduced into evidence by the opposing party." The defendant's belief as to the victim's age was not relevant because it was not an essential element of either statutory rape or child molestation, and because mistake of fact regarding the victim's age was not a defense to either crime.); *Roberts v. State*, 503 S.E.2d 614 (Ga. App. 1998) (decided under former OCGA § 24-3-38)(trial court did not err by admitting taped interview of child molestation victim that had been redacted in order to exclude mention of her past sexual history).

[31] *State v. Huser*, 894 N.W.2d 472, 509 (Iowa 2017).

In *State v. Turecek*, the Iowa Supreme Court found that the trial court properly rejected defense efforts to admit a previous oral communication between the defendants and their alleged victim to place seemingly incriminating statements by the defendants in a later admitted recorded conversation into proper context.[32] At trial, the prosecution admitted a recorded conversation in which the alleged minor victim of defendants' sexual assault said: "I didn't like that. That's rape. I'm only 13. I mean, that's pretty bad." In response, the defendants stated: "We apologize. We're sorry. I know we did wrong." Thereafter, one defendant sought to testify concerning a prior oral conversation with the victim in which she allegedly told him that drinking alcohol was akin to rape in her mind due to past sexual assaults by her father involving excessive drinking. The defendant claimed that the previous oral conversation was necessary under the rule of completeness to clarify that he thought he was admitting excessive drinking with the victim during the recorded conversation. Although the trial court permitted the defendant to testify generally that the victim had previously stated that drinking alcohol was like rape to her, the court denied the defense request to admit the precise oral conversation due to the inadmissible references to past sexual assaults by the victim's father. The Supreme Court upheld the trial court's ruling, finding that the court struck a proper balance between the doctrine of completeness and the Iowa rape shield rule.

In *State v. Chiavetta*, the Iowa appellate court affirmed the trial court's decision to allow the prosecution to admit a redacted version of the defendant's written statement to police that excluded self-serving portions of the statement.[33] The court rejected the defendant's argument that the remaining portions of the statement reflecting diminished responsibility should have been admitted through 5.106. The defendant's written statement was admitted as follows, with the italicized portions redacted:

> *Several weeks ago, Frank thought that I was too drowsy and he wanted me to take only half of my Effexor. Effexor has an effect on my moods and it's a blood level drug. After I started taking less and less of my Effexor, I started getting horrible thoughts in my head.* I just want everyone to know that I didn't mean for Frank to die. I don't know what I was thinking *and I know it's because of the Effexor.* I'm so sorry.

The appellate court found that the trial court did not abuse its discretion in allowing redaction of the italicized portions of the statement:

> The redacted evidence was essentially an assertion of diminished responsibility. That defense was not formally raised by defense counsel. Moreover, Chiavetta was found guilty of second-degree murder, which is not a specific intent crime to which the defense applies. Third, diminished responsibility cannot negate the element of malice aforethought. Finally, the court left in the following sentences: "I just want everyone to know that I didn't mean for Frank to die. I don't know what I was thinking." These sentences conveyed to the jury her defense, as characterized by appellate counsel, that "she acted recklessly and that Frank's death was accidental and not intended." For these reasons, we affirm the district court's redaction ruling.

[32] *State v. Turecek*, 456 N.W.2d 219, 225–26 (Iowa 1990).
[33] *State v. Chiavetta*, 737 N.W.2d 325 (Iowa Ct. App. 2007).

### *B. Completion Required*

An Iowa appellate court rejected a defense argument that the trial court committed reversible error when it excluded an oral hearsay statement of a third party claiming ownership of the drugs defendant was charged with possessing in *State v. McLachlan*.[34] The appellate court found that admission of that third-party confession by the defense would have required the simultaneous admission of the defendant's oral statement immediately preceding the confession asking someone else to take responsibility for the drugs under the rule of completeness:

> [T]he district court could not have allowed the defense to offer Jones's statement—"Yeah, it's mine"—into evidence without also allowing the State to offer the part of the exchange which immediately preceded the admission, which was McLachlan's call for someone to "take this for me. I'm looking at ten years." It has long been our law that "when one party inquires as to part of a conversation, the other is entitled to the whole thereof, bearing upon the same subject.

In *State v. Wycoff*, the Iowa Supreme Court confronted a case in which the prosecution and defense disagreed about the content of an oral conversation, but resolved it by approving testimony by both sides about the statement.[35] The defendant in the prison murder case called a fellow prison inmate to testify about that inmate's conversation with a prison guard in which the prison guard asked the inmate to implicate the defendant in the killing. When the prosecution attempted to ask the inmate on cross about completing oral statements the inmate made to the guard implicating the defendant during the same conversation, the inmate denied making any oral statements implicating the defendant. Thereafter, the trial court permitted the prosecution to call the prison guard to testify during its rebuttal case to relate oral statements made by the inmate in the conversation that implicated the defendant. Although the court did not expressly reference the doctrine of completion, it upheld the trial court's decision to allow the prosecution and the defense to call each of the participants in the oral conversation to examine the true tenor of the exchange:

> First, defendant himself, on his direct examination of Tressler, brought out the Tressler-Menke conversation. He did so because of Tressler's favorable testimony that Menke tried to get Tressler to testify against defendant. Now defendant objects because the State contradicts Tressler's testimony by the other party to the conversation: Menke testifies that the content of the conversation was different. We think it would be a strange doctrine indeed, and one to which we cannot subscribe, that would permit one side to show the content of a conversation and then be able to silence the other side about the conversation, on the ground of hearsay.

Courts sometimes apply the doctrine of completion in circumstances involving the rehabilitation of a trial witness impeached with a prior inconsistent statement. In these cases, the proponent of the witness attempts to introduce other portions of the statement used to impeach the witness to suggest consistency with trial testimony and to repair the impeachment. Although it seems that common law doctrines of relevance and rehabilitation would be adequate to allow this

[34] *State v. McLachlan*, 856 N.W.2d 382 (Iowa Ct. App. 2014).
[35] *State v. Wycoff*, 255 N.W.2d 116, 117–18 (Iowa 1977).

use of the remainder of a witness statement without the doctrine of completion, courts sometimes rely on completion in deciding whether to allow such rehabilitation.[36] In *State v. Austin*, the Iowa Supreme Court relied upon the rule of completeness in affirming the trial court's decision to allow the prosecution to play the entire videotape of a victim's interview with a social worker to clear up defense suggestions during the cross-examination of the victim that her statements during that interview were inconsistent with her trial testimony:[37]

> In this case, Austin chose very specific points from the interview about which to cross-examine A.H. Taken out of the context of the entire interview, the jury might have concluded that A.H.'s statements at the interview were inconsistent with her testimony at trial concerning such matters as whether Austin beat her before or after the assault or both times. The videotaped interview also helped to clear up apparent inconsistencies pointed out on cross-examination on such matters as whether A.H. was standing or prone during the assault…The court was well within its discretion in allowing introduction of the videotaped interview.

## *V. Montana*

Montana's rule of completeness also covers "acts," "declarations," and "conversations."

***Montana 106***

(a) When part of an act, declaration, conversation, writing or recorded statement or series thereof is introduced by a party:
(1) an adverse party may require the introduction at that time of any other part of such item or series thereof which ought in fairness to be considered at that time; or
(2) an adverse party may inquire into or introduce any other part of such item of evidence or series thereof.
(b) This rule does not limit the right of any party to cross-examine or further develop as part of the case matters covered by this rule.

MT R REV Rule 106 (West).[38] The Montana completion cases routinely reject completion, include only a couple that deal with oral statements, and reveal no special problems or inefficiencies generated by the completion of oral statements.

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[36] In a state that permits the rule of completeness to overcome a hearsay objection (but does not allow substantive admissibility of prior consistent statements offered to repair impeachment with a prior inconsistent statement), the doctrine of completeness could permit otherwise impermissible substantive use of completing statements.
[37] *State v. Austin*, 585 N.W.2d 241, 243 (Iowa 1998).
[38] There is some confusion in the Montana cases concerning the admissibility of otherwise inadmissible hearsay through Rule 106. In the commentary to the Rule, it states that otherwise inadmissible hearsay *is* admissible if it is necessary to complete: "The Montana completeness rule allows evidence which would ordinarily be inadmissible on its own to be admitted. McConnell v. Combination M & M Co., 30 Mont. 239, 263, 76 P 14 (1904)." Some Montana Supreme Court cases suggest that the opposite is true. See *State v. Castle*, 285 Mont. 363, 374, 948 P.2d 688, 694 (1997). ("Rule 106 does not, however, provide a separate basis for admissibility. As we stated in *Campbell,* this rule is separate and distinct from the hearsay rule. In that case we held that the defendant's line of inquiry to an informant did not open the door to all hearsay communications under this doctrine. Rule 106 does not make admissible statements that would otherwise be inadmissible."). It is not at all clear that the otherwise inadmissible hearsay at issue in *Castle* was completing within the meaning of Rule 106, however.

### *A. Completion Not Required*

In *Territory v. Clayton*, the court held that the trial court properly excluded self-serving oral statements the defendant made upon surrendering the murder weapon, over a claim that the rule of completeness required their admission.[39] Although the witness to whom the defendant surrendered the weapon had testified about obtaining the weapon from the defendant, that witness had not related any conversation between himself and the defendant at that time. Therefore, there was no partial presentation of the conversation to complete.

The court also upheld the exclusion of recorded statements made by the defendant in *State v. Le Duc*.[40] The defendant made a voluntary statement concerning the shooting at issue on the day of the homicide, which was recorded in shorthand by the county attorney's stenographer. At trial, during cross-examination of defendant, the county attorney was permitted to ask him if he had been asked a certain question when he was making his statement and whether he provided a certain answer. The defendant responded by saying, "I don't think so." On redirect examination, defense counsel sought to admit the defendant's entire statement, claiming that "When part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by the other." The trial court excluded the statement at that time. The stenographer for the county attorney testified on rebuttal that the defendant did make the statement in question. After his conviction, the defendant appealed the exclusion of the entirety of his statement and the appellate court affirmed the trial court's exclusion.

> At the time defendant offered the entire statement, there had been as yet no part of the statement actually admitted in evidence. The defendant had simply stated that he did not think he had made such a statement. It is true that Mary Hogan was called in rebuttal, and testified that defendant did make such a statement. Defendant, in surrebuttal, or in the cross-examination of Mary Hogan, had he so requested, might have offered such parts of the entire statement as would have a tendency to qualify, explain, or contradict that part of the statement testified to by Mary Hogan, but no such request was made. At the time the entire statement was offered it was properly excluded.

In *State v. Sheriff*, the defendant was interrogated by a detective following his arrest and eventually gave a recorded statement.[41] At trial, the prosecution questioned the detective about some incriminating portions of the defendant's post-arrest statement. Relying upon the Montana rule of completeness, the defense sought to cross-examine the detective about a portion of the defendant's statement in which the defendant stated that he would submit to a polygraph test in an effort to show his willingness to cooperate with the police. The appellate court found that the trial court properly applied the rule of completeness in excluding the portion of the statement referring to the polygraph:

> The part of defendant's statement testified to by Fox on direct examination related to whether or not defendant owned a gun or the clothing found in the back seat of his car. The fact that defendant also made a statement showing that he would take a polygraph test is

[39] *Territory v. Clayton*, 8 Mont. 1, 19 P. 293, 296–97 (1888).
[40] *State v. Le Duc*, 89 Mont. 545, 300 P. 919, 925 (1931).
[41] *State v. Sheriff*, 190 Mont. 131, 135–36, 619 P.2d 181, 183–84 (1980).

not of the nature that to omit it created a misleading impression on those statements that were admitted.

In *State v. Elliott*, the defendant argued that tapes of her interview with a law enforcement agent should have been excluded because they were incomplete.[42] Specifically, the defendant claimed that she was interviewed by the agent for more than one hour before the recording began and that the oral unrecorded statements she made prior to the tapes being commenced were necessary to provide a fair and complete picture of her interview. The appellate court found no error in admitting the tapes, noting that the defendant could have asked the agent about the unrecorded oral statements on cross-examination under the rule of completeness and that the prosecution did inquire about the unrecorded portion of the interview during the agent's direct examination. The court showed no concern about any dispute that might arise as to the oral statements.

## *VI. Nebraska*

The Nebraska rule of completeness also covers "acts," "declarations," and "conversations."

1) When part of an act, declaration, conversation or writing is given in evidence by one party, the whole on the same subject may be inquired into by the other. When a letter is read, all other letters on the same subject between the same parties may be given. When a detached act, declaration, conversation or writing is given in evidence, any other act, declaration or writing which is necessary to make it fully understood, or to explain the same, may also be given in evidence.
(2) The judge may in his discretion either require the party thus introducing part of a total communication to introduce at that time such other parts as ought in fairness to be considered contemporaneously with it, or may permit another party to do so at that time.

Neb. Rev. Stat. Ann. § 27-106 (West). Only a few of the Nebraska cases involve oral statements or conversations. The cases apply the rule of completeness to oral statements in the same way that they do in connection with written or recorded statements and reveal no disputes or other problems in determining the content of oral statements for purposes of completion.

### *A. Completion Not Required*

*Chirnside By & Through Waggoner v. Lincoln Tel. & Tel. Co* was a negligence action against a company based upon a company driver hitting and injuring a child.[43] The plaintiff called the officer who responded to the scene of the accident who testified that the company driver told him that his brakes were not working properly. During the defense case, the officer was recalled to the stand and asked about the remainder of the driver's oral conversation with him, including the driver's observation that the plaintiff child had been running into the intersection just before the collision. The plaintiff appealed a defense verdict claiming that introduction of this oral statement

[42] *State v. Elliott*, 43 P.3d 279, 287 (Mont. 2002).
[43] *Chirnside By & Through Waggoner v. Lincoln Tel. & Tel. Co.*, 224 Neb. 784, 789–91, 401 N.W.2d 489, 493–95 (1987).

by the defense was error according to the rule of completeness and the Nebraska Supreme Court agreed:

> "When part of a conversation is brought out on cross-examination the remainder of the conversation may be brought out ... if it tends to qualify or explain the part disclosed ...; *otherwise not.*"... The conversation introduced by plaintiff dealt only with whether the truck had faulty brakes. The proffered conversation did not qualify or explain the previous testimony. Whether Chadd was running or not running cannot conceivably be said to embrace the subject of faulty brakes. The admission of the testimony was error.

In *State v. Molina*, the trial court rejected the defendant's attempt to provide a "complete" picture of a prosecution witness's prior statements by introducing a 6 ½ hour video recording of her pre-trial interview.[44] The defendant was prosecuted for the murder of his child and the prosecution called the defendant's wife and the child's mother to testify concerning the killing at trial. During her direct testimony, the mother admitted that she had given a 6 ½ hour interview to authorities after the death in which she had not been entirely truthful. At that time, the defendant sought to introduce a recording of the entire 6 ½ hour interview to give the jury the full picture of the wife's prior inconsistent statements. The court stated that the defense could cross-examine the mother about her prior inconsistent statements in the interview and that the court would consider allowing some edited portions of the recording to be introduced for that purpose, but that it would not permit the defense to play the entire interview. The defense cross-examined the mother extensively, but did not attempt to impeach her with her interview statements, or to introduce the video recording of any part of the interview. Thereafter, the defendant again offered the entire 6 ½ hour interview into evidence and the court sustained the State's objection to the exhibit. The Nebraska Supreme Court rejected the defendant's arguments that the trial court had abused its discretion:

> Molina was offered the opportunity to present sections of the interview and argue how those sections might have been admissible, under rule 106, to explain the context of Mrs. Molina's statements. Instead, Molina chose to offer the entire 6 ½-hour interview, and he did not explain in what way the entire interview was necessary to understand the statements about which evidence had already been adduced, and regarding which Mrs. Molina had been examined. Under such circumstances, we cannot say it was an abuse of discretion for the district court to conclude that the relevance of playing the entire video-recorded interview would be substantially outweighed by considerations of undue delay or wasting time.

### *B. Completion Required*

The defendant in *State v. Rice* was convicted of murder and claimed on appeal that the trial court erred in rejecting defense efforts to introduce oral statements made by the defendant to complete a partial presentation by the State.[45] At trial, the prosecution introduced oral statements made by the defendant to law enforcement authorities immediately after the killing in which he admitted stabbing the victim and told officers the location of the murder weapon. The prosecution

[44] *State v. Molina*, 271 Neb. 488, 510–11, 713 N.W.2d 412, 435 (2006).
[45] *State v. Rice*, No. A-13-414, 2014 WL 815366, at *3–4 (Neb. Ct. App. Mar. 4, 2014).

omitted the defendant's contemporaneous oral statements claiming that the killing was in self-defense and the trial court sustained the prosecution's hearsay objection when defendant sought to have them introduced. Although the Nebraska appellate court found any error to be harmless, it suggested that the court's exclusion of the remainder of the oral statement during the prosecution case likely violated the Nebraska rule on completeness. There was no apparent dispute about the content of the defendant's oral statements:

> In the present case, we recognize that it is arguable that the proffered additional statements made by Rice to law enforcement officers could have been admissible under § 27–106. The State's primary argument at trial seemed to be that the statements were hearsay. Such an assertion is immaterial, however, as the very basis for § 27–106 is that it is a way to gain admission of evidence that would otherwise be inadmissible. …The State adduced evidence that Rice "admitted" to some kind of wrongdoing by making statements that he knew he was going to jail and by telling law enforcement officers where to locate the knife that was used in the stabbing. The additionally proffered statements concerned Rice's assertion to law enforcement that the victim had attacked him, that the victim had called him a derogatory name, and that he was defending himself from the victim's attack. The proffered additional statements arguably would have provided context for any kind of admission to having stabbed the victim, as they arguably indicate that although Rice was acknowledging having stabbed the victim, he did so in self-defense.

*State v. Swenson* was a prosecution for sexual assault on a minor.[46] At trial, the defense impeached a prosecution witness with inconsistent statements she made during a deposition. After the prosecution suggested that the witness was scared during her deposition and that her fear explained the inconsistencies, the defense asked the witness what she had said at the deposition when defense counsel asked her if she was scared and she responded that she had said "no, because you [the defense lawyer] seem like a nice guy." Thereafter, the prosecution asked the witness how defense counsel had responded when she said he seemed nice. Over a defense objection, the witness was allowed to relate defense counsel's response that he "was not such a nice guy." The appellate court found that the rule of completeness permitted the prosecution to ask about the lawyer's statement to the witness during the deposition to give the full tenor of the exchange between the witness and the lawyer:

> This statement was necessary to fully portray the exchange that occurred during her deposition so that the jury could determine whether or not it believed K.J.'s explanation for her inconsistent statements. While the testimony had the unfortunate effect of reflecting on defense counsel's character, defense counsel necessitated the testimony by eliciting incomplete testimony on the issue, and it did not constitute prosecutorial misconduct.

*Nickell v. Russell* was a civil negligence action that was retried after an appeal and following the death of the investigating officer.[47] At the second trial, the defense introduced portions of the dead officer's former testimony from the first trial pursuant to the former testimony exception that suggested that defendant may have been minimally negligent. The trial court excluded other portions of the same officer's former testimony proffered by the plaintiff suggesting

[46] *State v. Swenson*, No. A-12-277, 2013 WL 2106773, at *7 (Neb. Ct. App. May 7, 2013).
[47] *Nickell v. Russell*, 260 Neb. 1, 8–9, 614 N.W.2d 349, 355–56 (2000).

the officer's ultimate conclusion that the defendant was, in fact, negligent (apparently on the erroneous grounds that this portion of his testimony was read from his police report and constituted hearsay within hearsay). The Nebraska Supreme Court held that the excluded portions suggesting that the defendant may have been negligent were necessary under the rule of completeness:

> Those portions of Jacobsen's testimony offered by Russell, and admitted into evidence, would suggest to the jury that Jacobsen, a neutral investigating officer, had concluded that the accident was due only in slight part, if any, to Russell's negligence. That portion of Jacobsen's testimony offered by Nickell, however, would suggest to the jury that Jacobsen may have ultimately reached a different conclusion, i.e., that Russell had adequate time to avoid colliding with Nickell. In other words, Nickell attempted to offer portions of Jacobsen's testimony that would qualify and explain those portions of Jacobsen's testimony read into evidence by Russell. Based on § 27–106, we conclude that the district court abused its discretion in precluding that portion of Jacobsen's prior testimony offered to be read into evidence by Nickell.

## *VII. New Hampshire*

The New Hampshire rule of completeness was amended in 2017 to add a right to complete "unrecorded statements or conversations." According to the commentary to the rule, the amendment was designed to bring the New Hampshire Evidence Rule into line with the common law of New Hampshire that permits the completion of oral statements:

> **(a)** If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at the time, of any other part-- or any other writing or recorded statement-- that in fairness ought to be considered at the same time.
>
> **(b)** A party has a right to introduce the remainder of an unrecorded statement or conversation that his or her opponent introduced so far as it relates:
> (1) to the same subject matter; and
> (2) tends to explain or shed light on the meaning of the part already received.

N.H. R. Evid. 106. "The amendment made by supreme court order dated April 20, 2017, effective July 1, 2017, made stylistic and substantive changes to the rule.
The amendment designated the first paragraph (a) and added subdivision (b). The changes to (a) are stylistic and mirror the federal rule. The addition of (b), not included in Federal Rule of Evidence 106, codifies New Hampshire case law as set forth in *State v. Lopez*, 156 N.H. 416, 421 (2007)."[48]

[48] In discussing the completion of oral statements, the commentary to New Hampshire Rule 106 suggests that concerns about the completion of oral statements relate to the timing of the completion and not to issues of manageability. It demonstrates that this timing issue has led to the exclusion of oral statements in other jurisdictions, as follows: "The Reporter's Notes for the Vermont Rules of Evidence explain that:

> The rule permits the adverse party to require immediate introduction of remaining parts or related documents in the case of a writing in order to prevent the misleading impression given by an out-of-context presentation from taking root. ***Conversations are not accorded similar treatment, because of the cumbersomeness of presenting testimonial evidence of related parts in the middle of proponent's case.***

### *A. Completion Required*

In *State v. Warren*, the New Hampshire Supreme Court considered the application of the doctrine of completeness to purely oral statements that were at that time omitted from New Hampshire Rule 106 and reversed the defendant's conviction due to the improper exclusion of his oral exculpatory statements to a responding officer under the doctrine of verbal completeness.[49] In that case, the defendant was prosecuted for stabbing and killing his brother-in-law during a domestic dispute. The defendant had an oral conversation with the arresting officer shortly after the killing in which he told the officer that he and the victim were fighting, that the victim pulled a knife, and that he did not know where the knife was and was sorry for the killing. Before trial, the court granted a prosecution motion *in limine* to exclude the defendant's oral assertion that the victim had pulled a knife as hearsay. At trial, the prosecution called the arresting officer to the stand and elicited from him defendant's statement of remorse for killing the victim. Thereafter, the defendant sought permission to ask the officer about the defendant's assertion that he and the victim had been fighting and that the victim had pulled a knife pursuant to the doctrine of verbal completeness. The court denied the request. Because the defendant's oral exculpatory statements served to place his expression of remorse in context and were part of the same conversation, the New Hampshire Supreme Court held that these oral statements should have been admitted under the doctrine of completeness. The court first addressed the applicability of the doctrine of completeness to oral statements:

> By its express terms, Rule 106 applies only to writings or recorded statements. The common law rule, however, applied to conversations as well as to writings and recorded statements. …The defendant argues that while Rule 106 permits a party in certain circumstances to require an opponent to introduce simultaneously with a writing or recorded statement other related writings or recorded statements, the completeness doctrine applies to any verbal utterance. We agree. We note that nothing in Rule 106 appears to alter or conflict with the common law doctrine as applied to conversations. *See N.H. R. Ev.* 100 (rules of evidence govern to extent they alter or conflict with common law evidence doctrines). Indeed, the Reporter's Notes to Rule 106 state that while "[c]onversations are not accorded similar treatment, ... [t]he adverse party may ... present related parts of conversations by way of cross-examination or as part of his own case." *N.H. R. Ev.* 106 Reporter's Notes (quotation omitted). Accordingly, we conclude that Rule 106 has not replaced the common law rule of verbal completeness as applied to conversations. *Cf. United States v. Haddad,* 10 F.3d 1252, 1258 (7th Cir.1993) (finding that Federal Rule of

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> ***The adverse party may, however, present related parts of conversations by way of cross-examination or as part of his own case.*** He may, of course, also present the remainder of a writing in the same fashion *if he* wishes.

See generally, Federal Advisory Committee's Note to Rule 106; McCormick, *Evidence* 130-131 (2d Ed.1972)." (emphasis added). This timing concern was managed in New Hampshire by the adoption of a separate subsection of the completion rule relating to oral statements. The working draft of an amended Fed. R. Evid. 106 would also handle this concern by leaving the timing of completion to the discretion of the court.

[49] *State v. Warren*, 143 N.H. 633, 635, 732 A.2d 1017, 1018 (1999).

Evidence 611(a), which is identical to New Hampshire Rule of Evidence 611(a), gives the same authority to federal district courts as Rule 106 with respect to oral statements).

The court then found that the trial court had erred in denying the defendant's request to introduce his exculpatory oral statements:

> In this case, the defendant made three separate assertions in a single statement to Officer Blair: (1) he did not know where the knife was; (2) he was sorry; and (3) they were fighting and Connolly pulled a knife. The State selectively entered into evidence the first two assertions, as well as evidence that the defendant had indeed hidden his knife. Without the qualifying statement that they had been fighting and Connolly had pulled a knife, a rational juror could have inferred that moments after the stabbing the defendant was confessing guilt, rather than offering an explanation for the event that was consistent with his defense. Thus, the exculpatory phrase was necessary for the jury's proper evaluation of the inculpatory phrases that the State chose to elicit, and "to prevent [a] misleading impression ... from taking root."

In *State v. Ellsworth*, the New Hampshire Supreme Court reversed the defendant's conviction for sexual assault due to improper prosecutorial comments regarding his failure to testify.[50] The court also ruled on a verbal completeness issue raised by the defendant with respect to his apparently oral statements to an investigator to assist in retrial of the charges. In his conversation with the investigator, the defendant admitted to sleeping on a couch with the victim, but steadfastly denied any inappropriate contact. At trial, the prosecution offered the defendant's admission to sleeping on the couch with the victim, but successfully objected to the defendant's request to admit the remainder of the conversation. The New Hampshire Supreme Court found that this violated the rule of verbal completeness:

> Thus, there are two requirements to trigger the doctrine respecting conversations: first, the statements must be part of the same conversation; and second, admission of only a portion would mislead the jury. We agree with the defendant that the doctrine of verbal completeness was triggered. The defendant made two statements in his interview with Banaian: (1) he admitted sleeping on the couch with the victim; and (2) he denied assaulting the victim. The first prong of the verbal completeness analysis is thus satisfied-both statements were part of the same conversation. The second prong of the analysis is also satisfied. At trial, the State selectively introduced only one of the two statements. The introduction of the defendant's first statement created an inference that because the defendant slept on the couch with the victim, he also assaulted her. Nevertheless, the defendant was not allowed to introduce the statement in which he denied assaulting the victim. The admission of only one of the defendant's two statements was misleading to the jury. Accordingly, we conclude that the trial court erred when it excluded the statement in which the defendant denied assaulting the victim.

[50] *State v. Ellsworth*, 151 N.H. 152, 159, 855 A.2d 474, 480 (2004).

### *B. Completion Not Required*

In *State v. Lopez*, the New Hampshire Supreme Court rejected a defendant's completion argument with respect to oral statements. In that case, the defendant appealed his conviction for murder after beating his pregnant girlfriend to death with a hammer.[51] At trial the prosecution introduced evidence of oral statements the defendant made to his aunt at his mother's home shortly after the killing in which he stated: "I wish I could have took [sic] her head, that f* * *ing bitch. No regrets. I have no regrets." The defendant's mother was not present when this statement was made, but arrived shortly thereafter. After the defendant had been arrested and was being escorted to a police cruiser, the defendant's mother asked him why he had killed his girlfriend. In response to this question, he stated that he had "snapped." Although the trial court permitted the prosecution to admit the incriminating oral statement the defendant made to his aunt, it refused the defense attempt to introduce the oral statement he made to his mother. The New Hampshire Supreme Court held that the trial court had not abused its discretion in declining to admit the defendant's self-serving statements under the doctrine of verbal completeness:

> Thus, there are two requirements to trigger the doctrine respecting conversations: first, the statements must be part of the same conversation; and second, admission of only a portion would mislead the jury. The trial court found that the defendant's initial statement to his aunt and his later statement to his mother were not part of the same conversation. Therefore, the trial court permitted the defendant's aunt to testify about the defendant's first statement to her, but did not permit the defendant's aunt or brother to testify about the later statement to the defendant's mother. We agree that the statements were not part of the same conversation. The defendant's initial statements to his aunt were made immediately upon his arrival at his mother's home, when his mother was not present. The allegedly exculpatory statements to his mother were made sometime later, after she arrived, and after the defendant had been arrested. The statements simply were not part of the same conversation. Moreover, we conclude that the defendant's later statements … "would not help explain the initial statements because they took place under entirely different circumstances after the defendant had been arrested and charged with murder in the interim, and because the statements are self-serving."

In *State v. Douthart*, the New Hampshire Supreme Court held that the exclusion of a defendant's oral exculpatory statements did not violate the doctrine of verbal completeness.[52] In that case, the defendant appealed the exclusion of oral exculpatory statements he made to his girlfriend after she testified to inculpatory oral statements he made on a different occasion. The Court held that the trial court properly excluded the defendant's self-serving exculpatory statements because they were not part of the same conversation and were not necessary for verbal completeness:

> The defendant argues that both the inculpatory and exculpatory statements are part of an "on-going dialogue" between him and Bixby, and therefore once the inculpatory statements

[51] *State v. Lopez*, 156 N.H. 416, 420, 937 A.2d 905, 908–09 (2007).
[52] *State v. Douthart*, 146 N.H. 445, 448–49, 772 A.2d 1289, 1292 (2001).

> were admitted, the exculpatory statements were required in the interest of completeness. The State counters that the statements are remote in time and cannot be considered part of the same statement. We agree. The defendant's statements made prior to arrest and those made after the arrest simply are not part of the same conversation. The doctrine of completeness would be strained if we adopted the defendant's "on-going dialogue" theory.

The court in *State v. Mitchell* rejected the defendant's argument that the trial court erred in excluding a portion of his recorded custodial interview in which he offered to take a polygraph after the prosecution introduced other portions of the same interview in defendant's trial for aggravated felonious sexual assault and violation of a protective order.[53] The court found that the jury was not misled by the exclusion of the portion of the interview in which the defendant offered to take a polygraph because it heard other portions of the interview in which defendant adamantly denied his guilt. "The doctrine of completeness does not require the admission of otherwise inadmissible evidence simply to bolster a defendant's claim of innocence, but rather exists to correct misleading impressions by omission."

Similarly, the court in *State v. Botelho* held that a mother's statements during her recorded interview with a detective after the drowning death of her 12 month-old baby that she "didn't do this" and her emphatic narrative regarding her concern for her surviving child were not necessary to rebut portions of her redacted interview offered by the prosecution regarding the length of time that she left her children unattended in the bath to spend time on her computer under the doctrine of completeness.[54] The court found that there was no plausible link between the defendant's concern for her surviving child and her own perception of time she spent on her computer during the incident.

### *VIII. Oregon*

The Oregon Rule of completion seems internally conflicted. On the one hand, it embraces acts and oral conversations to achieve the broad fairness goals of the rule of completion. On the other, it expressly excludes completing evidence that is not otherwise admissible, thereby restricting completeness significantly.

> When part of an act, declaration, conversation or writing is given in evidence by one party, the whole on the same subject, *where otherwise admissible*, may at that time be inquired into by the other; when a letter is read, the answer may at that time be given; and when a detached act, declaration, conversation or writing is given in evidence, any other act, declaration, conversation or writing which is necessary to make it understood may at that time also be given in evidence.

Or. Rev. Stat. Ann. § 40.040 (West).

The 1981 conference committee commentary regarding the rule discusses the inclusion of oral statements and notes that the Oregon "Legislative Assembly considered but did not adopt

[53] *State v. Mitchell*, 166 N.H. 288, 94 A.3d 859 (2014).
[54] *State v. Botelho*, 165 N.H. 751, 83 A.3d 814 (2013).

Federal Rule of Evidence 106" because "[t]he federal rule applies only to a 'writing or recorded statement' [and] would exclude the possibility of admitting the remainder of any contemporaneous act, declaration or conversation." According to the commentary, "[t]his limitation is inconsistent with the broad purpose of the rule, which is one of fairness." The commentary also emphasizes that the Oregon rule only allows completion of any form of statement "if the remaining evidence is otherwise admissible."

Requiring that the remainder of a statement be otherwise admissible severely limits the doctrine of completion in Oregon and there are fewer appellate opinions concerning completion in Oregon than there are in other states that allow completion of oral statements. In *State v. Tooley,* the defendant challenged the exclusion of several potentially exculpatory statements he made during interviews with police following the admission of other inculpatory portions of those same interviews by the prosecution.[55] The Oregon Supreme Court rejected the defendant's completion argument without analyzing whether the State's initial presentation caused any distorted impression because defendant's exculpatory statements were otherwise inadmissible hearsay:

> As we have previously noted, OEC 106 "is designed to prevent evidence from being presented to a jury out of context." However, OEC 106 does not apply to allow admission of supplementary evidence that is otherwise inadmissible. Defendant concedes that the statements he sought to have introduced "were inadmissible hearsay." Therefore, OEC 106 did not supply a basis for their admission, and the trial court did not err in so ruling.

The doctrine of completeness worked to the advantage of the prosecution in *State v. Determann.*[56] In that case, the defendant offered oral statements he made to police following his arrest after he invoked his right to counsel, for the non-hearsay purpose of demonstrating diminished capacity. Specifically, the defendant offered his request to be photographed with the weapon he used to commit his crimes to support his contention that he was so intoxicated that he could not have had the requisite intent to commit the alleged crimes. Thereafter, the prosecution was permitted to question the defendant about otherwise inadmissible statements he made to the officer after invoking his right to counsel, to provide context for the statements the defendant admitted that were part of same interview. The court allowed the prosecution to present the remainder of defendant's statements pursuant to *Miranda* because the defendant opened the door:

> Here, defendant introduced his statements about wanting to be photographed with the knife to support his contention that he was so intoxicated that he could not have had the requisite intent to commit the alleged crimes. In response to that, the state asked about other statements that defendant made at that time, including his comment, "You guys got me." The state's inquiry was relevant to rebut defendant's contention, because it also related to his state of mind at that time. The trial court did not err in allowing the state to cross-examine Lind concerning the statements.

[55] *State v. Tooley*, 265 Or. App. 30, 47, 333 P.3d 348, 357 (2014).
[56] *State v. Determann*, 115 Or. App. 627, 631, 839 P.2d 748, 751 (1992), *decision clarified on reconsideration*, 122 Or. App. 480, 858 P.2d 171 (1993).

## *IX. Texas*

Texas is unique in that it has two rules relating to completion in its Evidence Code. Texas Rule 106 covers the completion of written or recorded statements only:

**Rule 106. Remainder of or Related Writings or Recorded Statements**
If a party introduces all or part of a writing or recorded statement, an adverse party may introduce, at that time, any other part--or any other writing or recorded statement--that in fairness ought to be considered at the same time. "Writing or recorded statement" includes depositions.

TX R EVID Rule 106.

Texas Rule 107, the rule of "optional completeness," also covers acts, declarations, and conversations:

**Rule 107. Rule of Optional Completeness**
If a party introduces part of an act, declaration, conversation, writing, or recorded statement, an adverse party may inquire into any other part on the same subject. An adverse party may also introduce any other act, declaration, conversation, writing, or recorded statement that is necessary to explain or allow the trier of fact to fully understand the part offered by the opponent. "Writing or recorded statement" includes a deposition.

TX R EVID Rule 107. The completion cases at the appellate level in Texas largely favor the prosecution.

### *A. Completion Not Required*

In *Lawson v. State*, the defendant was convicted of murdering his business partner after claiming self-defense at trial.[57] He argued on appeal that the trial court erred in excluding a portion of his recorded interview with police in which he stated that his business partner may have been involved in the Mexican drug trade before working with the defendant. The prosecution had admitted portions of the same recorded interview concerning what happened between the defendant and the victim at the time of the killing. The appellate court upheld the trial court's exclusion of the remainder of the defendant's recorded statement under the doctrine of completeness, finding that the defendant's statements related only to the chronology of the victim's work history and had no connection to the admitted portions of the interview dealing with the events leading to the victim's death:

> The rule of optional completeness applies only to compel admission of evidence on "the same subject" as the previously admitted portion. …In the instant cause, the excluded evidence does not appear to be on the subject of Leroy's death or appellant's claim of self-defense… This context indicates that appellant's excluded statements related only to the chronology of Leroy joining the business and did not indicate appellant's belief of Leroy's propensity for violence. Nor does appellant's belief that Leroy had been in a Mexican prison aid in the interpretation or completeness of his statement about what occurred on

[57] *Lawson v. State*, 854 S.W.2d 234, 237–38 (Tex. App. 1993).

> the boat. This belief is relevant only as it bears on whether appellant reasonably believed he was in danger from Leroy such that self-defense was justified. However, the asserted belief that Leroy had been convicted of drug smuggling, a nonviolent offense, is not probative evidence of a violent nature. The only purpose that this portion of the statement could have served would be to create prejudice against Leroy. We conclude that the trial court did not abuse its discretion in preventing the jury from viewing this portion of the videotaped statement.

In *Washington v. State*, a Texas appellate court rejected a capital defendant's argument that the trial court violated the rule of optional completeness by excluding his mother's testimony about oral conversations she had with the defendant.[58] Although the prosecution had admitted text messages and other conversations involving the defendant, the court found that the conversations with the defendant's mother were not part of the conversations and text messages introduced by the State and did nothing to correct any misimpression created by those previously admitted statements:

> The purpose of [rule 107] is to reduce the possibility of the jury receiving a false impression from hearing only a part of some act, conversation, or writing…. Here, appellant did not seek to introduce any missing portion of the text or phone conversations introduced by the State. Rather, appellant sought to introduce testimony from Ojeaga about separate phone calls she allegedly had with her son concerning a relationship with a woman Ojeaga never met. Appellant contends that Wolfford's testimony "opened the door" for Ojeaga's testimony. But appellant does not cite, and we have not located, anything in Wolfford's testimony that created any false impression concerning, or invited further discussion of, other conversations appellant may have had with his mother about Howard.

In *Sauceda v. State*, the Texas Court of Criminal Appeals reversed a defendant's conviction for the sexual assault of a minor because the trial court erred in ruling that the victim's entire videotaped statement would be admissible under the rule of optional completeness if the defendant called the interviewer as a witness to testify that the victim never mentioned weapons in her interview.[59] The court found that the video would not have corrected any misimpression because the victim *did not* mention weapons during her interview. Furthermore, the video contained prejudicial information about uncharged offenses committed by defendant:

> In light of the information before the trial court, there is no theory of law that would require the introduction of the entire videotape into evidence without any showing of necessity by the State. As a witness to the interview, Stephenson could have impeached M.S.'s credibility by testifying to a single, narrow matter. Because the information on the videotape was in no way necessary to make that testimony fully understood, as required by Rule 107, the videotape would not have been admissible.

[58] *Washington v. State*, No. 14-17-00595-CR, 2018 WL 6684294, at *13 (Tex. App. Dec. 20, 2018).
[59] *Sauceda v. State*, 129 S.W.3d 116, 124 (Tex. Crim. App. 2004).

### *B. Completion Required*

In *Mares v. State*, the prosecution was permitted to offer completing portions of an oral conversation between the victim and the defendant after the defendant asked the victim about part of the conversation during cross-examination.[60] The appellate court upheld the trial court's decision to allow the completion:

> During defense counsel's cross-examination of the complainant, the following questioning occurred:
> Q. Okay. And what was talked about at that time?
> A. He was asking me about my cousin Rick, if I knew where he was. Because he wanted to know if he was going to tell on him.
>
> This questioning opened the door to the subject of the conversation between Mares and the complainant about her cousin. The questioning pursued by the State was limited to the same subject. Therefore, the trial court did not abuse its discretion in allowing the questioning.

In *Pena v. State*, the defendant was convicted for marijuana possession.[61] At trial, the prosecution played a video of the defendant's arrest that did not include an audio recording of the conversation between the defendant and the arresting officer. The officer testified at trial about his recollection of the oral statements that defendant made to him during the encounter. The officer testified that the defendant had denied that the plant material he possessed was marijuana, but the officer testified that he could not recall whether the defendant had asked that the plant material be tested at that time. After the defendant was convicted, the defense learned that the prosecution indeed had an audio recording of the arrest that it had withheld from the defense. The defense claimed that the State violated *Brady* in withholding evidence of the audio recording. To find a *Brady* violation, the Texas appellate court had to find that the withheld evidence would have been admissible at trial and the court relied upon Rule 107 to find that the audio portion of the video recording would have completed the State's presentation and was thus admissible:

> In this case, while the audio portion of the videotape may be hearsay, it would be admissible under Rule 107. The State introduced and relied upon the visual portion of the videotape to prove its case. When the videotape was shown to the jury, Asby testified to the exchange that occurred between himself and Appellant during the traffic stop and Appellant's subsequent detention. Asby also referenced Appellant's denials that the plant material was marijuana, but he could not recall whether Appellant requested testing of the plant material. The audio portion of the videotape memorializes the conversation between Appellant and Asby. Hence, the audio is on the same subject as other statements introduced into evidence. In addition, the audio reflects that Appellant did indeed request testing, making the audio's disclosure necessary to clarify prior uncertainties in Asby's recollection and for the jury to have a full understanding of the case based on Appellant's own words delivered at the time of his arrest. Accordingly, the audio portion of the videotape would be admissible pursuant to Rule 107.

[60] *Mares v. State*, 52 S.W.3d 886, 890 (Tex. App. 2001).
[61] *Pena v. State*, 353 S.W.3d 797, 814–15 (Tex. Crim. App. 2011).

In *Hernandez v. State*, the court affirmed the trial court's decision to allow the State to introduce unrecorded oral statements made by the defendant to an interviewer after the defendant opened the door to those statements by cross-examining the interviewer about other oral statements he made during the same interview.[62] It appears that a Texas statute requiring recording of custodial interrogations limited the State's ability to use the defendant's unrecorded oral statements, but that the defendant's cross-examination opened the door under the rule of optional completeness:

> Appellant asked Breedlove to tell the jury about portions of his custodial interrogation with appellant and appellant's oral responses. Accordingly, the State was entitled to ask Breedlove about other portions of that same interrogation which were necessary for the jury to fully understand the conversation as a whole. Tex.R. Evid. 107…Thus, the trial court did not abuse its discretion in allowing Detective Breedlove to testify that appellant stated he may have used a flashlight to strike Karlos.

In *Wright v. State*, the Texas Court of Criminal Appeals upheld the trial court's ruling permitting the State to introduce the remainder of an oral conversation between a testifying officer and a third party in which the third party implicated the defendant in the crime.[63] The defense had previously questioned the officer about an oral statement by the third party in which the third party admitted owning the knife that killed the victim. Because the portion of the oral conversation explored by the defense may have created the false impression that the third party assumed responsibility for the killing, the remainder of that same oral conversation in which the third party claimed that defendant had stabbed murder victim was admissible to complete.

### *X. Wisconsin*

The rule of completion in Wisconsin provides for the completion of oral statements as follows:

**901.07. Remainder of or Related Writings or Statements**

> When any part of a writing or statement, whether recorded or unrecorded, is introduced by a party, an adverse party may require the party at that time to introduce any other part or any other writing or statement which ought in fairness to be considered contemporaneously with it to provide context or prevent distortion.[64]

[62] *Hernandez v. State*, No. 74,401, 2004 WL 3093221, at *2 (Tex. Crim. App. May 26, 2004).
[63] *Wright v. State*, 28 S.W.3d 526, 535–36 (Tex. Crim. App. 2000).
[64] Wis. Stat. Ann. § 901.07 (West).

Although the Wisconsin rule of completeness originally mirrored Federal Rule 106,[65] it was amended in 2017 to bring oral statements expressly within its reach.[66] This was done to bring the rule text in line with the Wisconsin cases, which have long permitted the admission of completing oral statements --- so that the entire rule of completeness would be accessible through the text of the rule. The Wisconsin courts originally found a right to complete oral statements in the remaining common law of Evidence following enactment of the Wisconsin Evidence Rules.[67] In 1998, the Wisconsin Supreme Court in *State v. Eugenio*,[68] evaluated the admissibility of oral statements through the rule of completion and found that the Wisconsin courts *"need not reach back to the common law rules of evidence for resolution of this inquiry.*"[69] Instead, the court found a right to complete oral statements to prevent distortion in Wisconsin's counterpart to Federal Rule of Evidence 611(a).[70] The court noted that the fairness rationale supporting completion of written and recorded statements applies equally when oral statements are presented to the fact finder out of context.[71] None of the Wisconsin cases reveal any dispute or other inefficiency about establishing the content of an oral statement.

In clarifying that the rule of completion extends to oral statements, the Wisconsin Supreme Court emphasized that the right to complete is a narrow one that applies only to avoid misleading the fact-finder:

> An out-of-court statement that is inconsistent with the declarant's trial testimony does not carry with it, like some evidentiary Trojan Horse, the entire regiment of other out-of-court statements that might have been made contemporaneously.[72]

The *Eugenio* court cautioned that the trial court possesses discretion to admit only those completing statements "necessary to provide context and prevent distortion" and further cautioned that trial courts should "closely scrutinize the proffered additional statements to avert abuse of the

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[65] *See State v. Eugenio*, 579 N.W.2d 642, n.6 (Wis. 1998) (noting that the then-existing version of the Wisconsin rule of completeness was "identical" to Fed. R. 106).
[66] 7 Wis. Prac., Wis. Evidence § 107.1, The rule of completeness generally: Written, recorded, and oral statements (4th ed.)("In 2017 the Wisconsin Supreme Court revised § 901.07 to explicitly include oral statements.").
[67] *See State v. Sharp*, 511 N.W.2d 316, 322 (Wis. App. 1993) (explaining that the rule of completeness was recognized in the common law of Wisconsin since at least 1872 and that the common law of completion was not limited to written statements, but encompassed conversations).
[68] 579 N.W.2d 642.
[69] *Id.* at 650.
[70] *Id.* (finding that Wisconsin Stat. § 906.11 authorizes trial judges to require completion of oral statements through the court's duty to "make the interrogation and presentation effective for the ascertainment of truth").
[71] *Id.* (quoting Daniel D. Blinka, *Wisconsin Practice: Evidence* § 107.1, at 32 (1991)).
[72] *Id.* at 651 (quoting *Wikrent v. Toys R Us, Inc.*, 507 N.W.2d 130 (Wis. App. 1993), *overruled on other grounds*, *Steinberg v. Jensen*, 534 N.W.2d 361 (Wis. 1995)).

rule."[73] Thus, the expansion of the Wisconsin rule of completeness to include oral statements in no way liberalized the circumstances in which the rule is triggered.

The defendant in *State v. Eugenio* was prosecuted for the sexual assault of a minor. At trial, the defense extensively cross-examined the victim about alleged inconsistencies in her prior oral statements to several individuals concerning the abuse. The alleged inconsistencies concerned matters, such as the time of year that the abuse occurred, the victim's grade in school, and the circumstances preceding the alleged abuse. In response, the *prosecution* sought to introduce the remainder of the victim's statements to these individuals to demonstrate their consistency with the victim's trial testimony concerning the sexual assault itself.[74] The trial court permitted the prosecution to admit the remainder of the statements through the rule of completion over a defense hearsay objection. In affirming the completion of the oral statements by the prosecution, the Wisconsin Supreme Court addressed the hearsay issue, as follows:

> [W]here the evidence is offered not to prove the truth of the matter asserted, but rather for some other purpose, such as providing a fair context on which the trier of fact can evaluate the evidence already offered by the opposing party, the evidence is by definition not hearsay… In other cases, where the evidence may fall within the classic definition of hearsay, the …court in its discretion may determine whether the fairness requirement of the rule of completeness outweighs the principles underpinning the exclusionary rules and permits the trier of fact to consider the additional offer of oral statements.[75]

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[73] *Id.* It appears that the language added to the text of the Wisconsin rule of completeness comes from this portion of the Wisconsin Supreme Court's opinion.

[74] *Id.; see also State v. Booker*, 704 N.W.2d 336 (Wis. App. 2005)(permitting State to offer other portions of the victim's prior consistent statements under the rule of completion after the defense "essentially argued that the victim 'engaged in a systematic pattern of lying about the event.'"), *reversed on other grounds*, 29 Wis.2d 43 (2006); *State v. Doyle*, 742 N.W.2d 74 (Wis. App. 2007) ("[w]here … there is the suggestion of improper influence and an attempt to create inconsistencies in the details of a child's various statements, evidence is admissible under the rule of completeness to provide the jury 'the opportunity to evaluate whether incompleteness or inconsistency within and among the interviews indicated improper influence on the child's testimony.'").

[75] *Id.* (citing Dale A. Nance, *A Theory of Verbal Completeness*, 80 Iowa L. Rev. 825, 840-41 (1995)). The Wisconsin courts also frequently cite Professor Dan Blinka's work in resolving evidentiary questions. About the "evidentiary status" of the completing evidence, Professor Blinka says the following:

> The better practice .. is to introduce the remaining parts on the same footing as those originally offered. Simply put, the additional evidence "which ought in fairness to be considered" is also admissible under the rule of completeness. Juries, like all people (even lawyers), are ill-equipped to draw tortured distinctions between statements offered for their "truth" and those admitted solely to provide "context." Nor does it seem necessary to carve out a unique rule for admissions by party opponents. The real protection is *Eugenio's* trenchant reminder that the rule of completeness is not an "unbridled opportunity" to waft inadmissible evidence before the jury: the trial judge should admit only those statements "which are necessary to provide context and prevent distortion." This standard suffices without resort to a meaningless limiting instruction. When applying the rule of completeness, the judge is, in effect, ruling that a balanced, fair presentation of the evidence includes those parts requested by objecting counsel. Doctrinal messiness dissipates by conceptualizing the evidence as a single admissible unit.

After explaining that completing oral statements could be admitted over a hearsay objection, the court did not specify whether the reminder of the victim's oral statements in this case were admissible for their truth.

In *State v. Sharp*, just a few years before the Wisconsin Supreme Court decided *Eugenio*, the Wisconsin Court of Appeals had also permitted the *prosecution* to admit a child victim's oral statements to witnesses concerning alleged sexual abuse under the rule of completion.[76] In that case, the defense suggested during cross-examination of the victim that her testimony concerning the abuse had been shaped by several witnesses who had questioned her about the abuse during the months after the assault. The court permitted the prosecution to ask those witnesses about the content of their conversations with the victim to address the defense's implications about their role in shaping testimony during those conversations.[77] Although the court acknowledged that the then-existing Wisconsin rule of completeness did not encompass oral statements, the court found that the common law continued to require completion of an oral statement where needed to "present fairly the 'substance or effect' and context of the statement."[78] Addressing the defense's hearsay objection to the victim's prior consistent statement, the court stated that "otherwise inadmissible evidence will be admissible" under the rule of completeness.[79]

In a case decided just one year after *Eugenio*, the Wisconsin Court of Appeals held that the trial court had erred in refusing to permit a defendant in a homicide prosecution to admit a completing portion of an oral statement he made to an investigator.[80] In that case, the victim had been thrown off a bridge by the defendant and another man. During the prosecution's case, the investigator testified about a conversation he had with the defendant about the moment when the victim was thrown off the bridge. The investigator reported that the defendant said "that [Moore]

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7 *Wisconsin Practice, Evidence* § 107.2 (4th ed. August 2019 update).

[76] 511 N.W.2d 316, 322 (Wis. App. 1993).

[77] *Id.*

[78] *Id.* at 323 (quoting *United States v. Castro*, 813 F.2d 571, 576 (2d Cir. 1987)). The Wisconsin cases also illustrate the confusion that currently exists concerning the proper basis for admitting completing oral statements in a regime where the rule of completeness itself applies only to written or recorded statements. The Wisconsin Court of Appeals found a right to complete oral statements in the continuing "common law" of Evidence, while the Wisconsin Supreme Court a few years later held that the right to complete oral statements emanates -- not from the common law -- but from Wisconsin's counterpart to Fed. R. Evid. 611(a). If appellate judges are perplexed as to the source of a right to complete oral statements, litigants surely are as well.

[79] *Id. Sharp* also illustrates the role that completion can play in admitting prior consistent statements of a testifying witness that are not otherwise admissible through the hearsay exemption for such statements. In *Sharp*, the defense argued that the victim's prior consistent statements during the interactions with the witnesses could not be admitted because the defense claimed that the child fabricated the assault allegations *prior* to the interactions. Thus, her statements to those witnesses were post-motive statements inadmissible through the hearsay exemption for prior consistent statements. Even though her statements were post-motive statements that could not be admitted through the hearsay exemption for prior consistent statements, they were admissible to complete after the defense's characterization of the victim's interactions with the witnesses.

[80] *State v. Anderson*, 600 N.W.2d 913 (Wis. App. 1999). Although the statements were made orally, they appear to have been later memorialized in a report.

had picked her up by the feet and that the 2 of them were walking towards the truck with [the defendant] walking backwards toward the truck…[and that] when they got near the bridge rail … [Moore] threw her over the railing." This statement was admitted against the defendant as a party opponent statement. The investigator omitted that the defendant had told him simultaneously that "it was his assumption that they were going to put [the victim] back in the back of the truck" when he picked her up. When the defendant sought to admit this omitted portion of his own statement, the trial court sustained the prosecution's hearsay objection and excluded it. The trial court found that the defendant had a right not to testify, but that he could not get his testimony in "by the back door" and avoid subjecting himself to cross-examination.

The Wisconsin appeals court found that the remainder of the defendant's statement to the investigator was needed to rectify the misimpression that arose when the partial statement was introduced. When read alone, the initial portion suggested that the defendant admitted carrying the victim to the rail of the bridge for the purpose of throwing her over. The remainder of the defendant's statement actually disclaimed such an intention. Accordingly, the court found that partial presentation of the defendant's statement was misleading as to his concessions. After finding that fairness required completion, the court addressed the hearsay issue, finding that the rule of completeness has a "trumping function" that requires courts to admit completing statements necessary to prevent distortion over a hearsay objection.[81] As for the government's concern about the defendant's presentation of his own completing statement in the absence of his cross-examination, the court found that a defendant's refusal to testify should play no role in the completion analysis, as follows:

> Once the court has determined that any additional portion of the statement is necessary under the *Eugenio* standard, it must permit the presentation of that additional portion … Fairness to the State does not require that the additional portion necessary under the completeness rule be excluded unless the defendant testifies, because the *Eugenio* test is sufficiently narrow to insure that only the additional portion necessary to avoid distortion is admissible. On the other hand, it would be unfair to the defendant to force him or her to choose between giving up the constitutional right not to testify and correcting a distorted impression of his or her prior statement presented by the State.[82]

The court ultimately concluded that the trial court's error in denying completion was harmless and affirmed the defendant's conviction, but took care to find that the exclusion of the remainder offered by the defendant was erroneous.

[81] *Id.* at 923 ("even when [the completing statement] would otherwise be inadmissible hearsay, it is admissible if the court has, in the exercise of its discretion, determined that the rule of completeness requires its admission.").
[82] *Id.* at 924-25.

Far more often, the Wisconsin courts reject a criminal defendant's attempt to complete partial statements. In *State v. Riley*, the appellate court affirmed the trial court's refusal to permit the defendant to complete his own oral statements, finding that they were not needed to prevent any distortion in the State's original presentation.[83] In *State v. Johnson*, the court also affirmed the trial court's refusal to allow the defendant to complete.[84] The defendant was prosecuted for participating in a heroin transaction involving a third party and an undercover police officer. At trial, the State offered evidence of oral statements made by the third party during the drug transaction to the defendant and to the undercover officer to describe the transaction and the defendant's participation in it. The defendant sought to offer post-arrest statements made by the third party in which he claimed not to remember the details of the drug transaction and in which he did not mention the defendant as having been involved. The appellate court affirmed the trial court's rejection of the defense attempt to complete, emphasizing that completion is a narrow doctrine and that the post-arrest statements in no way corrected any misimpression about the statements made during the transaction that were offered by the State.[85] In *State v. Briggs*, the appellate court also affirmed the trial court's refusal to allow the defendant in an insurance fraud prosecution to read 158 pages of his own deposition given in a prior civil action to complete the State's use of approximately 10 pages of that transcript under the former testimony hearsay exception.[86] The court found that the remainder of the transcript was not necessary to correct any unfairness from the State's partial presentation. In *State v. Wakefield*, the court rejected defendant's claim that the trial court committed a completeness error in refusing to require the prosecution to play an entire recorded phone call between the defendant and his domestic violence victim.[87] Where the prosecution played portions of the call to show that the defendant was attempting to appeal to the victim's sympathies and to coerce her into recanting, the court found that the remainder of the "casual" interaction the defendant had with the victim during the call failed to correct any misimpression in the portions offered by the State.

[83] 604 N.W.2d 33 (Wis. Ap. 1999).
[84] *State v. Johnson*, 616 N.W.2d 923 (Wis. App. 2000).
[85] *Id.* ("Here the State used the officer's testimony concerning Hall's comments during the transaction to prove Johnson participated in that transaction. Johnson sought to use Hall's subsequent statements not to remedy an unfair and misleading impression from that testimony, but to show that Hall's earlier statements may not have been made. That is not a recognized use of the rule of completeness.").
[86] *State v. Briggs*, 571 N.W.2d 881 (Wis. App. 1997).
[87] *State v. Wakefield*, 888 N.W.2d 23 (Wis. App. 2016); *see also State v. Hershberger*, 853 N.W.2d 586, 598 (Wis. App. 2014) (redacted holding order offered against defendant in a prosecution for violating order did not require completion with redacted factual basis – redactions did not create distorted impression of order that defendant violated and completeness did not require introduction of redacted factual basis); *In re Commitment of Sudgen*, 795 N.W.2d 456, 466 (Wis. App. 2010) (rejecting completion attempt by sex offender involuntarily committed; portion of expert report offered by the State showing that offender presented future danger was not misleading without omitted portion of report explaining that supervision could ameliorate dangerousness because supervision is statutorily irrelevant in commitment proceeding); *State v. McReynolds*, 757 N.W.2d 849 (Wis. App. 2008) (no completion error when court declined to admit separate post-arrest hearsay statement of co-conspirator after admitting pre-arrest co-conspirator statements by same declarant) .

# TAB 3C

**MEMORANDUM**

**TO:** Professor Richter

**FROM:** Taylor Peshehonoff

**DATE:** February 5, 2020

**RE:** Updated State Cases for Rule of Completion (Cases Updated as of 02/01/2020)

---

Professor Richter,

Of the ten relevant state statutes discussed in your memo, four states have not cited their particular statute at all since January 1, 2019. Those states are (1) Connecticut, (2) Montana, (3) New Hampshire, and (4) Wisconsin. Georgia has one new case that only discusses the rule in the context of a writing/recording.[1] Iowa's Court of Appeals discussed the issue in relation to a video.[2] Nebraska's courts decided three new cases dealing with the rule of completion, but all instances dealt with written or recorded conversations.[3] Oregon evaluated whether the rule of completion applied to actions, such as a defendant wanting the jury to know that he tried to withdraw his guilty plea.[4]

The two states with the most analysis on their respective rules of completion are California and Texas. Texas's cases are fairly straightforward, and twelve total cases cited to Rule 107 in the last year. Most dealt with recorded or written records and provided no new analysis on this evidentiary rule.

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[1] Castillo-Velasquez v. Georgia, 827 S.E.2d 257 (Ga. 2019).
[2] Lane v. Iowa, No. 18-2085, 2019 WL 6893942 (Iowa Ct. App. Dec. 18, 2019) (slip opinion).
[3] Nebraska v. Jackson, 923 N.W.2d 97 (Neb. 2019) (video); Nebraska v. Mrza, 926 N.W.2d 79 (Neb. 2019) (Snapchat messages); Schuemann v. Menard, Inc., No. A-18-1021, 2020 WL 283880 (Neb. Ct. App. Jan. 21, 2020) (recorded conversation).
[4] Oregon v. Smith, No. A160838, 2019 WL 6044654 (Or. Ct. App. Nov. 14, 2019).

One Texas case did, however, allow into evidence oral conversation to provide necessary context. In *Barlow v. Texas*, the defendant sought to prevent an officer from testifying as to what he learned while interviewing two other men on the scene.[5] On cross-examination, defense counsel asked the officer "whether the accounts [from the men] . . . 'sort of matched[?]' The deputy testified 'No[,]' and he explained that [the men's] accounts differed on the subject of why they were at the house without providing the jury with any additional detail."[6] On redirect, the state asked what the officer learned from the two men that night, and the defense objected on hearsay grounds.[7] The trial court allowed the hearsay into evidence in order to "complete [the officer's] testimony about whether their stories matched."[8] The appellate court held that because "the trial court could have believed that [the officer's] response (No) to the question . . . created the possibility the jury might have considered his response to mean their 'stories' did not match at all," the additional hearsay statements might have cleared up any false impression.[9] Thus, there was no abuse of discretion in allowing the statements into evidence.[10]

California courts have been much more active in evaluating the proper role of its rule of completion, with thirty-nine cases citing to the relevant statute. The majority of these cases only evaluated the rule of completion in the context of recorded or written statements. The courts did make a few substantive comments on the use of this rule, confirming the generally limited framework that must exist in order to exercise it. For instance, when the state entered several minutes of a prior recorded conversation into evidence, the court of appeals commented that the trial court should not have used the rule of competition to bring in the rest of the recording

[5] 586 S.W.3d 17, 21–22 (Tex. App. 2019).
[6] *Id.* at 21.
[7] *Id.* at 21–22.
[8] *Id.* at 22.
[9] *Id.* at 26.
[10] *Id.*

because "[t]he rule of completeness cannot be invoked after a witness is impeached with one or more inconsistencies within a statement to show the remainder of the witness's testimony was consistent with that statement."[11]

The California Court of Appeals has also affirmatively indicated that one cannot invoke the rule of completion unless the conversation or recording to be completed is actually admitted into evidence. In *California v. Scarber*, a recorded conversation was at issue but had never been offered into evidence.[12] "Evidence that there was such a recording and that the voices thereon were extremely loud and yelling, and the fact the subject of the recording was introduced through testimony, do not satisfy the threshold requirement of the statute."[13] Thus, the proponent for completion must actually seek to complete *admitted* evidence.

A recent example of the California Supreme Court finding the rule of completion to be applicable is in *California v. Armstrong*.[14] The defendant gave a statement to police in which he recounted that he approached the victim only after she had hurled racially-motivated statements at him.[15] The state sought to redact the racial comments from the police interview, arguing that it was layered hearsay, and the trial court agreed.[16] The California Supreme Court disagreed, finding that "[t]he yelling prompted [the defendant] to cross the street and confront the person who had shouted," and "[t]he redaction . . . allowed the prosecution to create a misleading impression" as to why the defendant crossed the street.[17]

[11] California v. Larin, F074997, 2019 WL 101855, *3 (Cal. Ct. App. Jan. 4, 2019).
[12] F068908, 2019 WL 5958004 (Cal. Ct. App. Nov. 13, 2019).
[13] *Id.* at *46.
[14] 433 P.3d 987 (Cal. 2019).
[15] *Id.* at 785.
[16] *Id.* at 786.
[17] *Id.*

One case that seemed to deal with oral statements but was never clear as to whether the statements were memorialized in some form is *California v. Quezada*.[18] The statement reviewed at the appellate level dealt with the defendant's supposed reasoning for punching the victim.[19] Evidently, the defendant disclosed this statement to the officer during a conversation after the incident,[20] but the opinion does not make clear whether the officer recorded the conversation at issue. The trial court precluded this statement from admission under the rule of completion because it did not contextualize anything for the jury.[21] The defendant argued on appeal that this statement contextualized his state of mind at the time of the incident and thus was admissible under the rule of completion.[22] Without determining whether the trial court properly excluded the statement, the court of appeals found that the "defendant ha[d] failed to establish that the error was prejudicial under state law."[23]

In *California v. Salvador Espinoza*, the evidence at issue was an oral conversation that occurred between the witness and the defendants immediately after a shooting.[24] The trial court decided a motion in limine, preventing the witness from testifying that one of the defendants implicated the other in the shooting.[25] The witness was allowed to share that one of the defendants "told her 'that's what [we] do,' and also that he told her not to say anything, and if questioned by the police to say her car had been stolen by a rival gang member."[26] The witness also "testified that [the defendant] never said anything about being the shooter, only that he had

[18] H044717, 2019 WL 397734 (Cal. Ct. App. Jan. 31, 2019).
[19] *Id.* at *5.
[20] *Id.*
[21] *Id.*
[22] *Id.* at *7.
[23] *Id.*
[24] B288107, 2019 WL 3821795, *9 (Cal. Ct. App. Aug. 15, 2019).
[25] *Id.*
[26] *Id.*

been at the scene when the shooting occurred."[27] The defendant wished to have the witness testify that part of the conversation included him saying that he had only been walking down the sidewalk when the shooting took place.[28] The appellate court acknowledged that this statement "related to the same subject matter but was not necessary to make the admitted portion of the conversation understandable."[29] Thus, it was not error for the court to exclude this additional statement.[30]

Finally, the California Court of Appeals reviewed another instance of non-recorded conversation in *California v. Gardner*.[31] The defendant was charged with theft after walking out of a retail store with supposedly stolen shoes.[32] The defendant's conversation with the officer on the scene invoked the rule of completion issue, as defense counsel wished to inquire on cross-examination whether the defendant had stated that he was "hoping to return the shoes."[33] The defendant maintained that the trial court's exclusion of this statement violated Evidence Code Section 356 "because he claim[ed] it was in response to Bays's question about whether he had a receipt, suggesting it was offered as an explanation and thus had some bearing upon or connection with the admitted statement appellant did not have a receipt."[34] The court held that the statement at issue had no "bearing upon or connection with the statement he did not have a receipt based on the context of the entire exchange between" the defendant and the officer.[35] After reviewing the information available in the record (from the first trial and the probation report), "[t]he record shows the statements regarding the return were not, as appellant claims,

[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] F076553, 2020 WL 57882 (Cal. Ct. App. Jan. 6, 2020).
[32] *Id.* at *2.
[33] *Id.* at *3.
[34] *Id.* at *4.
[35] *Id.*

'apparently immediate . . . follow-up responses' to the questions regarding whether appellant had a receipt or money."[36]

[36] *Id.*

# TAB 4

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**FORDHAM**

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Memorandum To: Advisory Committee on Evidence Rules
From: Daniel J. Capra, Reporter
Re: Possible Amendment to Rule 615
Date: October 1, 2020

The Committee has been reviewing a possible change to Rule 615, the rule governing sequestration of witnesses. Rule 615 currently provides as follows:

> **Rule 615. Excluding Witnesses**
>
> At a party's request, the court must order witnesses excluded so that they cannot hear other witnesses' testimony. Or the court may do so on its own. But this rule does not authorize excluding:
>
> **(a)** a party who is a natural person;
>
> **(b)** an officer or employee of a party that is not a natural person, after being designated as the party's representative by its attorney;
>
> **(c)** a person whose presence a party shows to be essential to presenting the party's claim or defense; or
>
> **(d)** a person authorized by statute to be present.

The purpose of Rule 615 is to prevent prospective witnesses from tailoring their testimony in response to the testimony of prior witnesses. Its importance was described in glowing terms by the court in *Opus 3 Ltd. v. Heritage Park, Inc.,* 91 F.3d 625, 628 (4th Cir.1996): "It is now well recognized that sequestering witnesses 'is (next to cross-examination) one of the greatest engines

that the skill of man has ever invented for the detection of liars in a court of justice.' " (quoting 6 *Wigmore on Evidence* § 1838, at 463).[1]

As the Committee is aware, there is a conflict in the courts about the extent of a Rule 615 order. The question in dispute is whether a Rule 615 order extends only to excluding witnesses from trial (as its language indicates) or whether it prohibits a prospective witness from obtaining or being provided trial testimony while excluded from the courtroom.

At its Spring, 2019 meeting, the Committee considered two alternatives: one that would automatically extend a Rule 615 order to prohibit prospective witnesses from accessing or being provided testimony outside the courtroom, and the other that would specify that the trial court has discretion to regulate such access outside the courtroom --- but must explicitly enter an order if it wishes to do so.

The Minutes of the Spring meeting indicate that the Committee opted for the discretionary provision:

> Committee members, after this discussion, generally agreed with the proposition that if an amendment to Rule 615 were to be proposed, it should contain a discretionary rather than mandatory provision for regulating prospective witnesses outside the courtroom.

Another problem for discussion arose at the last Committee meeting: whether a sequestration order prohibiting access to trial testimony outside the courtroom could or should apply to lawyers preparing witnesses. The Reporter's memo for that meeting surveyed the case law and concluded that there is a conflict in the courts over whether lawyers can be barred from preparing witnesses with trial testimony.

The Minutes of the Fall, 2019 meeting reflect the Committee's discussion about amending Rule 615 to address counsel's use of trial testimony to prepare witnesses:

> The Reporter explained that the three drafting alternatives for an amendment to Rule 615 included in the agenda materials varied only with respect to the treatment of counsel. One amendment option would prohibit counsel from conveying trial testimony to sequestered witnesses. Another would exempt counsel from any prohibition on conveying trial testimony to sequestered witnesses outside the courtroom. The third amendment alternative is silent as to the treatment of counsel, leaving courts to determine how to supervise counsel on a case-by-case basis.

[1] The practice of sequestration has existed since Biblical times. In The History of Susanna in the Apocrypha, Susanna was being tried before the assembly for adultery. She was accused by two Elders, whom she had rebuffed when they made sexual advances. Daniel separated the Elders and questioned them; they gave conflicting stories about the event. Susanna was acquitted. If the second Elder had been in the courtroom while the First testified, he could have avoided an inconsistency by tailoring his testimony. He could also have avoided death. Both Elders were beheaded for giving false testimony.

The Reporter explained that counsel's preparation of sequestered witnesses presents issues of professional responsibility as well as the Sixth Amendment right to effective counsel --- topics that are typically beyond the ken of the Evidence Rules. An amendment that is silent with respect to counsel was included as an alternative because it would be most hands-off as to the complicated policy issues. The Reporter explained that bracketed material was included in the draft Advisory Committee note to this third option to alert the parties and the court to the issues regarding counsel, but to take no position in the rule on counsel's use of trial testimony to prepare witnesses. * * *

The Federal Public Defender suggested that the Sixth Amendment right to confront witnesses should be added to the bracketed language in the draft Advisory Committee note discussing the issues raised by counsel's communication of trial testimony to sequestered witnesses --- and the Reporter agreed to add such language. * * *

Judge Campbell suggested that the amendment alternative that is silent as to counsel would address the current concerns about sequestration without getting embroiled in the counsel question. The Chair agreed, as did another Committee member. * * *

This memo is in four parts.[2] Part One discusses the conflict in the courts about whether a Rule 615 order extends *outside* the courtroom, and the importance of resolving that conflict by amending the rule to provide guidance on extending an order outside the courtroom. Part Two discusses whether court orders can or should prohibit lawyers from disclosing trial testimony to prospective witnesses --- what might be called the *Rhynes* issue. Part Three sets forth a draft amendment and Committee Note, and it also sets forth an alternative draft of the discretionary provision for the Committee to consider. Part Four discusses the possibility of an "add-on" amendment to clarify the right of entity-parties to designate an agent who is excepted from exclusion is limited to one agent.

## I. The Dispute in the Case Law About the Extent of a Rule 615 Order

The text of Rule 615 limits the court's order under that rule to one that excludes the witness from the courtroom. And that is how some courts have construed Rule 615, i.e., as it is written. As the court stated in *United States v. Sepulveda*, 15 F.3d 1161, 1175–77 (1st Cir. 1993), "while the common law supported sequestration beyond the courtroom, Rule 615 contemplates a smaller reserve; by its terms, courts must 'order witnesses excluded' only from the courtroom proper." It follows, under this construction, that nothing in Rule 615 prevents witnesses from talking to each

[2] Most of the material is from prior memos, but there are updates and adjustments to respond to comments from the prior meeting and the Standing Committee meeting. There is also a new drafting alternative. And Part IV is new.

other outside the courtroom; and nothing prevents an excluded prospective witness from obtaining, or being provided, the trial testimony.

It's pretty obvious that the effectiveness of Rule 615 is undermined if it is limited to exclusion of witnesses from the courtroom. As the court put it in *Miller v. Universal City Studios, Inc.,* 650 F.2d 1365, 1373–74 (5th Cir. 1981):

> The opportunity to shape testimony is as great with a witness who reads trial testimony as with one who hears the testimony in open court. The harm may be even more pronounced with a witness who reads a trial transcript than with one who hears the testimony in open court, because the former need not rely on his memory of the testimony but can thoroughly review and study the transcript in formulating his own testimony.

The problem of outside access to trial testimony by prospective witnesses is exacerbated by the ease with which a witness can, if so inclined, access that testimony. In the days of internet and social media, access to trial testimony is a snap. Moreover, even if a witness is not inclined toward such access, those who are at the trial can easily send that witness the trial testimony --- by email, etc. And now, when at least some trial proceedings might be virtual, the risks of disclosure are heightened even more. For example, Law 360, on August 6, 2020, reported that "McDermott Will & Emery LLP mistakenly allowed a restricted Zoom link for its client's trial to be distributed to individuals outside of the case."

The court in *Sepulveda* (a case in which three witnesses were incarcerated in the same cell during trial and discussed testimony that each gave), opined that the solution to disclosure of trial testimony outside the courtroom was for the court to use its common law powers that extend beyond Rule 615:

> [Rule 615] demarcates a compact procedural heartland, but leaves appreciable room for judicial innovation beyond the perimeters of that which the rule explicitly requires. Outside of the heartland, the district court may make whatever provisions it deems necessary to manage trials in the interests of justice, including the sequestration of witnesses before, during, and after their testimony, and compelling the parties to present witnesses in a prescribed sequence. Rule 615 neither dictates when and how this case-management power ought to be used nor mandates any specific extra-courtroom prophylaxis, instead leaving the regulation of witness conduct outside the courtroom to the district judge's discretion. See *United States v. Arias-Santana*, 964 F.2d 1262, 1266 (1st Cir. 1992) (explaining that a federal trial court may enter non-discussion orders at its discretion). This is not to say, however, that sequestration orders which affect witnesses outside the courtroom are a rarity. As a practical matter, district courts routinely exercise their discretion to augment Rule 615 by instructing witnesses, without making fine spatial distinctions, that they are not to discuss their testimony.

Judge Selya, in *Sepulveda*, made clear that if a party wants a sequestration order that goes further than the language of Rule 615, then it is up to the party to ask for it with specificity:

> Here, appellants moved in advance of trial for sequestration without indicating to the court what level of restraint they thought appropriate. The court granted the motion in its simplest aspect, directing counsel "to monitor sequestration" and ordering "that witnesses who are subject to [the court's] order are not to be present in the courtroom at any time prior to their appearance to render testimony." * * * On these facts, the district court's denial of relief must be upheld. The court's basic sequestration order, which ploughed a straight furrow in line with Rule 615 itself, did not extend beyond the courtroom. There has been no intimation that the witnesses transgressed this order.

Several other circuits are in agreement with the First Circuit's view that anything other than exclusion of witnesses from the courtroom must be regulated by a specific court order to that effect. See *United States v. Collier,* 932 F.3d 1067, 1077 (8th Cir. 2019) ("While Federal Rule of Evidence 615 authorizes the district court to sequester witnesses, sequestration orders do not forbid all contact with all trial witnesses at all times, *unless otherwise specified*.") (emphasis added); *United States v. Brown*, 547 F.2d 36, 37 (3d Cir. 1976) ("Rule 615 relates exclusively to the time testimony is being given by other witnesses. Its language is clear and unambiguous."). [3]

The arguable problem with the *Sepulveda* demarcation is that it may be a trap for the unwary. A party might think that a Rule 615 order is sufficient to protect against *all* possible tailoring, and might not be aware that the court must explicitly state that its order extends outside the courtroom --- that is, a statement that the court is invoking "the rule" or "Rule 615" is not enough. The contrary argument regarding a trap for the unwary is that the rule itself states its own limits, meaning that if you think it extends beyond the courtroom, you are not unwary, you are dumb.

But in fact in a majority of circuits you would be dumb to construe Rule 615 as it is written. Most courts construe Rule 615 orders as *automatically* extending to prevent disclosure of trial testimony to sequestered witnesses outside of court --- that is to say, they construe Rule 615 to do more than it actually says it is doing. *United States v. Robertson*, 895 F.3d 1206, 1214 (9th Cir. 2018), is a good example of this broader view. In *Robertson* a prospective witness for the government read a trial transcript. The trial judge had issued a sequestration order "under Rule 615." The government argued, citing *Sepulveda,* that Rule 615 does not, by its terms, preclude potential trial witnesses from reviewing trial transcripts --- the violation would only occur if the witness heard the testimony while attending trial. The *Robertson* court rejected this literal view of Rule 615, and stated that most of the circuits agreed with the court's position:

> In our view, an interpretation of Rule 615 that distinguishes between hearing another witness give testimony in the courtroom and reading the witness's testimony from a transcript runs counter to the rule's core purpose—"to prevent witnesses from tailoring their testimony to that of earlier witnesses." *Larson v. Palmateer*, 515 F.3d 1057, 1065 (9th

[3] See also *United States v. Teman*, 2020 U.S. Dist. LEXIS 99193 (S.D.N.Y. June 5, 2020) ("the Second Circuit has not held that Rule 615 extends beyond the courtroom to preclude out-of-court communications between witnesses during trial"). Though there is Second Circuit case law appearing to indicate that Rule 615 orders extend outside the courtroom. *United States v. Friedman*, 854 F.2d 535, 568 (2d Cir. 1988)(recognizing that "the reading of testimony may violate an order excluding witnesses issued by a district court under Rule 615")

> Cir. 2008). The danger that earlier testimony could improperly shape later testimony is equally present whether the witness hears that testimony in court or reads it from a transcript. An exclusion order would mean little if a prospective witness could simply read a transcript of prior testimony he was otherwise barred from hearing. Therefore, we join those circuits that have determined there is no difference between reading and hearing testimony for purposes of Rule 615. *See United States v. McMahon*, 104 F.3d 638, 642–45 (4th Cir. 1997) (affirming the district court's conclusion that a witness violated a Rule 615 exclusion order by reading daily trial transcripts); *United States v. Friedman*, 854 F.2d 535, 568 (2d Cir. 1988)(recognizing that "the reading of testimony may violate an order excluding witnesses issued by a district court under Rule 615"); *United States v. Jimenez*, 780 F.2d 975, 980, n.7 (11th Cir. 1986) (concluding that a witness violated a Rule 615 exclusion order by reading the testimony of another agent witness from a prior mistrial); *Miller v. Universal City Studios, Inc.*, 650 F.2d 1365, 1373–74 (5th Cir. 1981) (holding that providing a witness transcribed portions of another witness's testimony in preparation for his court appearance constitutes a violation of Rule 615). A trial witness who reads testimony from the transcript of an earlier, related proceeding violates a Rule 615 exclusion order just as though he sat in the courtroom and listened to the testimony himself.[4]

Note that the conflict in the courts about the extent of a Rule 615 order is *not* about whether the court *can* prevent prospective witnesses from talking to other witnesses or reading trial transcripts. The court clearly has the power to do so. The conflict is over whether a party must obtain a supplemental order (or supplemental language in a Rule 615 order) to prevent access to trial testimony --- or whether it is sufficient simply to invoke "the witness rule" or impose "a Rule 615 order." To some extent this is a technical question, but it is surely a meaningful one if the order you end up with is just an invocation of the rule, and is read not to prevent out-of-court

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[4] Beyond the cases cited, it appears that the law in the Tenth Circuit is that when the trial judge enters an order under Rule 615, it extends outside the courtroom. *See, e.g., Paradigm Alliance, Inc. v. Celeritas Technologies, LLC,* 722 F. Supp. 2d 1250 (D. Kan. 2010) (where the parties "invoked Rule 615" the court's order prohibited an excluded witness from obtaining trial testimony). See also *United States v. Greschner,* 802 F.2d 373, 376 (10th Cir. 1986)(identifying a risk of reversal where sequestered witnesses discuss testimony); *United States v. Johnston,* 578 F.2d 1352, 1355 (10th Cir. 1978)(requiring that district courts give instructions "making it clear that witnesses are not only excluded from the courtroom but also that they are not to relate to other witnesses what their testimony has been and what occurred in the courtroom"); *United States v. Baca,* 2020 WL 1325118 (D.N.M.) ("The Court agrees with those courts taking broad approaches to rule 615. Permitting witnesses to overhear the substance of others' testimony in argument or any other form would defeat rule 615's anti-tailoring, anti-fabrication, and anti-collusion aims.").

On the other hand, the *Robinson* court's citation of the Fourth Circuit case of *United States v. McMahon* is questionable. After *McMahon,* in *United States v. Rhynes,* 218 F.3d 310 (4th Cir. 2000), the en banc Fourth Circuit states that Rule 615's "plain language relates only to 'witnesses,' and it serves only to exclude witnesses from the courtroom." The holding in that case is that if the court is going to extend an order outside the courtroom, it must do so explicitly (and even then it cannot apply to counsel). So the Fourth Circuit should probably be considered as aligned with the First Circuit in the conflict about the extent of a Rule 615 order.

That means that the 1st, 3rd, 4th and 8th circuits are on one side of the issue, while the 2nd, 5th, 9th, and 11th circuits are on the other).

access, as in *Sepulveda*. And on the other hand it is also meaningful if a witness is precluded from testifying for violating a "Rule 615 order" by accessing trial testimony on the internet, and the witness contends that he had no idea that a "Rule 615 order" extended outside the courtroom.

The confusion about the extent of a Rule 615 order is exacerbated by the fact that many Rule 615 orders appear to be terse ("I am entering a Rule 615 order") or vague. An example of vagueness is the order in *United States v. Rhynes*, 218 F.3d 310 (4th Cir. 2000), where the entirety of the court's sequestration order is in the record as follows:

> *Well, I do grant the usual sequestration rule and that is that the witnesses shall not discuss one with the other their testimony and particularly that would apply to those witnesses who have completed testimony not to discuss testimony with prospective witnesses, and I direct the Marshal's Service, as much as can be done, to keep those witnesses separate from the- those witnesses who have testified separate and apart from the witnesses who have not yet given testimony who might be in the custody of the marshal.*

The lawyer for one of the defendants sought to have his investigator excepted from the sequestration order, and the court granted the exception "[s]o long as your investigator observes Rule 615 and does not talk to the witnesses about testimony that has just concluded or testimony that has concluded." After a prosecution witness testified and implicated a prospective defense witness in a crime, the defense attorney informed the witness of that accusation. The trial court found this to be a violation of Rule 615, and excluded the defense witness. The Fourth Circuit, in an en banc opinion, reversed the conviction. The whole episode, including the costs of reaching an en banc opinion, show the problem of a lack of clarity in the courts about how far Rule 615 extends. And in fact, the order in *Rhynes* was more explicit than that provided by many courts --- it is common for courts to simply issue an order "under Rule 615" or even "under the Rule."

The Ohio Advisory Committee Note to Ohio Rule 615 makes the following point about the vagueness of "Rule 615 orders" or "exclusion orders":

> In practice, it is most common for trial courts to enter highly abbreviated orders on the subject. Normally a party will move for the "separation" (or "exclusion") of witnesses, and the court will respond with a general statement that the motion is granted. This is usually followed by an announcement to the gallery that prospective witnesses should leave the courtroom and by a statement that the parties are responsible for policing the presence of their own witnesses. Though some courts then orally announce additional limitations on communications to or by witnesses, the far more usual approach is simply to assume that the generic order of "separation" adequately conveys whatever limitations have been imposed.
>
> Some courts, in Ohio and elsewhere, have suggested that at least some additional forms of separation are implicit even in generally stated orders. This approach, however, *entails significant issues of fair warning, since the "implicit" terms of an order may not be revealed to the parties or witnesses until after the putative violation has occurred.*

Given all these considerations, there is a good argument that something should be added to the Rule to specify the extent of a Rule 615 order --- especially given the conflict in the case law.

Assuming the Committee determines that the conflict in the courts over the extent of a Rule 615 order is worth rectifying in a rule amendment, it would seem that the better resolution is to provide in the text of Rule 615 that an order may or must extend outside the courtroom, to prevent excluded witnesses from being informed about or obtaining trial testimony. [5] It seems clear that the threat of tailoring from, say, reading trial testimony or talking to a witness who testified, is the same as the threat that arises from hearing it in court. Indeed the Supreme Court has so recognized. In *Sheppard v. Maxwell*, 384 U.S. 333, 359 (1966), the Court criticized the state court for allowing prospective witnesses to obtain trial testimony outside the courtroom:

> [T]he court should have insulated the witnesses. All of the newspapers and radio stations apparently interviewed prospective witnesses at will, and in many instances disclosed their testimony. A typical example was the publication of numerous statements by Susan Hayes, before her appearance in court, regarding her love affair with Sheppard. *Although the witnesses were barred from the courtroom during the trial the full verbatim testimony was available to them in the press. This completely nullified the judge's imposition of the rule.*

It is true that the two-step approach of *Sepulveda* (one Rule 615 order and another order under inherent power) does address the out-of-court danger. But that is so only if the party asks for the second step. And in any case it surely seems more efficient to have both concerns (out of court and in court) addressed under one Evidence Rule.

If the Committee agrees that Rule 615 should address the question of out-of-court access to trial testimony, there is little doubt that an amendment to the Rule is necessary. The existing text simply doesn't extend to out-of-court contexts, and the fact that many courts have so read it only means that they are going beyond the text to reach the better result. At any rate, some amendment would be necessary to resolve the conflict between the courts that read Rule 615 as it is written and those that do not.

Moreover, an amendment is necessary to assure that people subject to the order have notice about what the order entails. The Supreme Court has held that when a witness violates a sequestration order, the court may cite the witness for contempt. *Holder v. United States*, 150 U.S. 91, 92 (1893). Such a serious consequence must be contingent on clear notice. It follows that without an explicit statement of the extent of an order, the court will not be able to control out-of-

[5] See Carter, *Exclusion of Justice: The Need for a Consistent Application of Witness Sequestration Under Federal Rule of Evidence 615,* 30 Univ. Dayton L.Rev. 63 (2004): "Courts should apply a uniform approach to the witness sequestration rule by applying it broadly * * * . Most circuit courts, numerous scholars, and several states have supported an augmentation of the Rule so that the policies supporting it are extended to the fullest capacity."

court disclosures of trial testimony through the threat of sanction --- leading to the danger of tailoring that the Rule is designed to prevent.[6]

***Comment by Standing Committee Member***

After the January meeting of the Standing Committee, the Chair received a suggestion from a member of the Standing Committee, which he described as "just a thought." The member suggested that the rule could be amended to provide that exclusion would be the default rule --- in other words, in the *absence* of an order, the witnesses would be subject to an exclusion (unless excepted from exclusion under the Rule 615 exceptions). Under this suggestion, Rule 615 would provide that all witnesses are excluded from the courtroom unless the court orders otherwise.

The suggestion of exclusion by default runs contrary to the fact that enforceability of exclusion comes from a *court order* --- and sanctions for violation are grounded in the fact that the party or witness has violated a court order. The sanctions seem significantly less justified if a party violates a default rule. Moreover, how is a party to know, in the absence of a court order, whether any particular witness is within an exception from exclusion? Presumably that would come from a court order that provides an exception to the default rule. But what is the point of that? Why not just start with an order, that contains exceptions within the terms of the order?

Most importantly, the whole problem with the practice under Rule 615 is that parties and witnesses don't know the scope of an exclusion order. That problem would only be exacerbated if there is no order at all.

For all these reasons, it would appear that a default rule of exclusion would raise difficulties and is fundamentally inconsistent with the proposed amendment that the Committee has been considering for two years.

## II. Case Law on an Order Preventing Counsel from Disclosing Trial Testimony to Prospective Witnesses?

As the court stated in *United States v. Rhynes,* 218 F.3d 310 (4th Cir. 2000), Rule 615 on its face does not apply to lawyers: "It is clear from the plain and unambiguous language of Rule

[6] *See RMH Tech LLC v. PMC Industries,* Inc., 352 F.Supp.3d 164 (D.Conn. 2018) (sequestration order mentioned only Rule 615; the prospective witness sat in on strategy sessions that discussed trial testimony: "the Court notes that Mr. Bailey's conduct, as alleged, did not violate the express terms of the sequestration order"; " Rule 615 has been given a long-standing and consistent judicial construction of prohibiting all prospective witnesses from hearing, overhearing, being advised of, reading, and discussing, the previously given in-court testimony of witnesses on their own side as well as the opposite side"; but there was no intentional violation, given the limitations of the order that was issued).

615 that lawyers are simply not subject to the Rule. This Rule's plain language relates only to 'witnesses,' and it serves only to exclude witnesses from the courtroom." But that does not really answer the question of whether lawyers can be subject to an order that goes *beyond* Rule 615 to control conduct outside the courtroom.

As to that further point, the plurality in *Rhynes* states that even if a court extends an order outside the courtroom, it is *not* permitted to forbid a lawyer from preparing a witness with trial testimony.[7] While the *Rhynes* case involved a criminal defense lawyer, there is broad language in the opinion that extends protection to all lawyers involved in preparing witnesses.

It turns out, however, that the courts are divided on whether a court can prohibit counsel from preparing a sequestered witness with trial testimony. In fact, most courts have held that courts *can* prevent lawyers from explicitly disclosing trial testimony to a sequestered witnesses.

This discussion will begin with an in-depth analysis and critique of the plurality opinion in *Rhynes,* and then it will survey the other authority on the subject.

## *Rhynes's Reliance on Authority is Questionable*

*Rhynes* was a case in which a defense witness, Alexander, was subject to the ambiguous witness-focused order discussed above. Two days before Alexander was scheduled to testify, a government witness testified that Alexander was a drug dealer. Defense counsel then told Alexander about the testimony while he was preparing Alexander. Assuming the court's order reached such conduct, the question was whether a court had the power to prevent a lawyer from preparing a witness with trial testimony. The plurality held that a lawyer could not be prohibited from preparing an excluded witness with trial testimony.

The plurality confidently relied on authorities interpreting Rule 615, stating that "court decisions and the leading commentators, agree that sequestration orders prohibiting discussions between witnesses should, and do, permit witnesses to discuss the case with counsel for either party." But a close look indicates that there is not much support in the cited authorities for the proposition that courts *may not* prevent counsel from disclosing trial testimony while preparing sequestered witnesses. The *Rhynes* plurality cites four sources:

- "Sequestration requires that witnesses not discuss the case among themselves or anyone else, *other than the counsel for the parties*." *United States v. Walker*, 613 F.2d 1349, 1354 (5th Cir.1980) (emphasis added by the plurality) (citing *Gregory v. United States*, 369 F.2d 185 (D.C.Cir.1966)).

[7] The part of the *Rhynes* opinion that is pertinent to orders prohibiting counsel from disclosing trial testimony was joined by four members of a ten-member court. Three judges did not pass on the question. They found that even if the lawyer was subject to an order, the sanction of exclusion was unwarranted. Chief Judge Wilkinson and Judge Niemeyer, joined by Judge Traxler, dissented on the counsel question. So while a plurality, it was 4-3 for the holding that counsel cannot be precluded from preparing a witness with trial testimony.

But *Walker,* as well as *Gregory,* the case it cites, is not about lawyers preparing sequestered witnesses. The quote was just a general statement, in a case where the court found no violation of a sequestration order, and counsel was not involved --- rather it was a non-lawyer that disclosed the information. Moreover, discussing "the case" with counsel is not the same as having counsel disclose trial testimony to a sequestered witness.

- *United States v. Buchanan*, 787 F.2d 477, 485 (10th Cir.1986) ("The witnesses should be clearly directed, when [Rule 615] is invoked ... that they are not to discuss the case ... with anyone *other than counsel for either side*.") (emphasis added by the plurality).

But the plurality ignores that just below the snippet that it quotes, the *Buchanan* court provides support for a rule preventing disclosure of trial testimony that *covers* counsel:

> "The witnesses should be clearly directed, when the Rule is invoked, that they must all leave the courtroom (with the exceptions the Rule permits), and that they are not to discuss the case or what their testimony has been or would be or what occurs in the courtroom with anyone other than counsel for either side. See 3 Weinstein's Evidence 615–13. *Counsel know, and are responsible to the court, not to cause any indirect violation of the Rule by themselves discussing what has occurred in the courtroom with the witnesses*."

The court in *Buchanan* is addressing itself to the issue of witnesses talking to counsel (not another witness) about what *their testimony* has been or is going to be. They can talk *to* counsel because *counsel knows not to disclose trial testimony of others to sequestered witnesses*. But *Rhynes* is exactly the opposite situation, in which counsel is disclosing to a prospective witness. [8]

- 4 Jack B. Weinstein & Margaret A. Berger, Weinstein's Federal Evidence § 615.06 (Joseph M. McLaughlin, ed., 2d ed. 1998) ("[Sequestration] instructions, however, usually permit the witnesses to discuss their own or other witnesses' testimony *with counsel for either side* .") (emphasis added).

The treatise does not say that trial courts are *prohibited* from barring counsel from discussing trial testimony with sequestered witnesses. It says that orders usually allow it --- which implies that the matter is up to the court.

[8] Another case, *United States v. Guthrie,* 557 F.3d 243 (6th Cir. 2009), makes a similar distinction between talking to a witness and talking to them about prior trial testimony. In *Guthrie,* the defendant objected to a prosecutor talking to a victim during a break in the victim's testimony. He argued that this violated the Rule 615 order, or at least its "spirit." After stating that "[s]equestration orders, even when granted, do not prohibit witnesses from speaking with counsel" it emphasized that the prosecutor was instructed not to coach the witness or disclose trial testimony.

● 2 Charles A. Wright, Federal Practice & Procedure § 415 (2d ed. 1982) ("If exclusion is ordered, the witnesses should be instructed not to discuss the case with anyone *except counsel for either side.*") (emphasis added).

Again this quote is about discussing the case with a lawyer, it is not about the lawyer telling the witness about trial testimony. And the treatise does not say that courts may not prohibit a lawyer from discussing trial testimony with a sequestered witness.

Judge Niemeyer's take in his dissent on the plurality's reliance on authority seems to have a good deal of merit:

> To be sure, the cases and text relied upon by the plurality acknowledge that attorneys may discuss "the case" with witnesses, but this observation does not suggest that the attorneys may, in the face of a sequestration order, relate to a prospective witness the *testimony* that a prior witness has given.

## *There is Contrary Authority*

There are not many reported cases on subjecting counsel to orders prohibiting disclosure of trial testimony to sequestered witnesses. But the weight of the case law is that trial courts, in their discretion, can prevent lawyers from preparing sequestered witnesses with trial testimony.

Here are the cases:

● ***United States v. Binetti,*** 547 F.2d 265 (5th Cir. 1977): The court upheld an instruction on credibility against defense witnesses as a sanction, after the defense lawyer had lunch with defense witnesses and discussed the trial testimony. The court held that defense counsel was prohibited from discussing trial testimony with excluded witnesses even though the trial court's order did not mention counsel. The court states as follows:

> The witnesses had been advised not to discuss the case with one another during the course of the trial. Yet the defense attorney, the defendant and two witnesses discussed the trial at lunch. The defendant contends that the trial judge's instructions in invoking the rule were unclear, and did not put the defense on notice that it was prohibited to converse outside of the courtroom with the witnesses who had not yet testified. He claims the rule on its face applies only to exclusion of witnesses from the courtroom, and that he was not given the parameters of any expansion of that scope.
>
> The instruction given by the court upon invocation of the rule was sufficient. His remedial action of comment to the jury was within the discretionary power of the court.

● ***United States v. Robertson*****,** 895 F.3d 1206, 1214 (9th Cir. 2018), discussed *supra*: Prosecutors provided transcripts of witness testimony to prospective witnesses. The court upheld a finding that this was a violation of Rule 615.

● ***Jerry Parks Equip. Co. v. Southeast Equip. Co., Inc***., 817 F.2d 340, 342-43 (5th Cir.1987): Southeast invoked Rule 615, and all nonparty witnesses were ordered excluded from the courtroom. William Dann, a witness called by Southeast, testified on direct examination and when cross-examined he admitted that he had briefly discussed trial testimony with Southeast lawyers in preparation for his testimony. The trial judge struck the testimony and the court of appeals affirmed:

> The lunch table conversation by the president of Southeast, its counsel, and Dann violated the sequestration rule, which Southeast itself had invoked. Southeast challenges the court's decision to strike Dann's testimony as a sanction for the infraction. The trial court could have imposed lesser sanctions; indeed, lesser sanctions would appear more in order. But we are not prepared to say that in striking the testimony the trial court so clearly abused its discretion in selecting the remedy for violation of Rule 615 as to warrant reversal.

● ***Paradigm Alliance, Inc. v. Celeritas Technologies, LLC,*** 722 F. Supp. 2d 1250, 1273 (D. Kan. 2010): During the lunch recess, defendant's counsel prepared a defense witness for trial after the plaintiff's witness testified. During this preparation, defense counsel referred to an answer given by the plaintiff's witness during trial. The plaintiff argued this was a violation of Rule 615. As a response, the court struck a limited portion of the defense witness's testimony. The court declared as follows:

> It was clear from the manner in which Evans answered questions that his testimony was influenced by this pre-testimony preparation. To permit this specific type of pre-testimony preparation to influence a witness's testimony based on information obtained through the in-court testimony of another witness would ultimately serve to largely nullify the purpose for which Rule 615 exists.

● ***Weeks Dredging & Contracting, Inc. v. United States*****,** 11 Cl. Ct. 37 (1986): There was a continuous dialog between counsel and sequestered witnesses about trial developments. The court found a violation of its Rule 615 order and disqualified the witnesses. Defense counsel argued that it had a right to prepare witnesses. But the court stated that there was "no prohibition that will preclude either counsel from conferring with his witnesses. The prohibition is divulging to such witnesses who have not testified the testimony of any witness who has previously testified."

● ***Reeves v. Int'l Telephone and Telegraph Corp.***, 616 F.2d 1342, 1354 (5th Cir. 1980), rev'd on other grounds by McLaughlin v. Richland Shoe Co., 486 U.S. 128, 133–34 (1988): "Counsel for IT&T met for three hours with at least eleven prospective witnesses and discussed the case in preparation for testimony * * * . The meeting and discussion constituted a direct and flagrant violation of a previously entered sequestration and separation order. * * * In light of the willful nature of the violation on the part of the witnesses and counsel, we do not overturn the district court's order prohibiting any testimony from the violating witnesses."

● ***Zeigler v. Fisher-Price, Inc.,*** 302 F. Supp. 2d 999, 1018 (N.D. Iowa 2004) The court excluded a witness's testimony after attorneys violated a sequestration order when they "woodshedded" their witness, providing him testimony that was presented the day before the witness testified: "They used information they learned from testimony given by a witness called by the plaintiff during an offer of proof at trial to help their expert witness reshape his testimony to best address, in advance, a serious problem the witness otherwise would have had to face on cross-examination."

There are four reported cases that I could find on the *Rhynes* plurality's side of the issue:

● *R.D. v. Shohola, Inc.,* 2019 U.S. Dist. LEXIS 199841, at *3-4 (M.D. Pa. Nov. 19, 2019): The court ordered that all fact witnesses "shall be instructed not to discuss the case or their testimony with each other without the approval of the court" but declined to regulate witness preparation by counsel. The court did not say that it had no power to regulate counsel's use of trial testimony to prepare witnesses with trial testimony. It just declined to exercise its discretion to do so.

● *United States v. Cathey*, 2020 U.S. Dist. LEXIS 12932, at *7-8 (D.S.D. Jan. 27, 2020): The defendants moved for a new trial, alleging that the government violated the court's sequestration order by contacting one of its witnesses upon learning that she had offered false testimony. The court (citing *Rhynes,* a controlling precedent in the Fourth Circuit) stated that Rule 615 "does not by its terms forbid an attorney from conferring with witnesses during trial." In this case, contact with the witness was justified because "they were aimed at ensuring the government corrected the testimony it knew to be false." The court determined that "even if the conversation was improper under the sequestration order, the court would still have wide latitude in deciding how to respond to the impropriety." Here it did so by "limiting [the witness's] testimony to correcting her prior false

statements" in order to curtail any improper effects of the government's communication with the witness.

● *Cruz v. Maverick County,* 2018 WL 8897808 (S.D. Tex.): The court found no violation of Rule 615 even though witnesses on the second day of trial appeared to tailor their testimony based on testimony given on the first day of trial. The trial judge concluded that the excluded witnesses probably were apprised of the testimony after consulting with counsel. The court stated that "because the right to counsel, even in civil cases, is one of constitutional dimensions and should thus be freely exercised without impingement . . . [a]pplying FRE 615 to attorney-client communications would thus violate the Plaintiffs' due process right to retain counsel."

● *Minebea Co., Ltd. v. Papsti*, 374 F.Supp.2d 231, 237 (D.D.C. 2005): The court held that a lawyer could not be precluded from using courtroom testimony to prepare witnesses, though the court did caution that "if any lawyer in this case inappropriately 'coaches' a witness or helps a witness 'tailor' his testimony or fabricate or dissemble, there will be consequences." But the court declared that in the absence of any such improper influence, "courts must trust and rely on lawyers' abilities to discharge their ethical obligations, including their duty of candor to the court."

Finally, it should be noted that Maryland Rule 615 specifically prohibits lawyers from disclosing trial information to sequestered witnesses. **Maryland Rule 615(d) provides:**

(d) Nondisclosure.

(1) A party *or an attorney* may not disclose to a witness excluded under this Rule the nature, substance, or purpose of testimony, exhibits, or other evidence introduced during the witness's absence.

(2) The court may, and upon request of a party shall, order the witness and any other persons present in the courtroom not to disclose to a witness excluded under this Rule the nature, substance, or purpose of testimony, exhibits, or other evidence introduced during the witness's absence.[9]

[9] *See also Jones v. State*, 520 S.E.2d 454, 456 (Ga. 1999) ("The rule does not prohibit discussions between an attorney to the case and a prospective witness, at least so long as the attorney talks to him separately from the other witnesses *and does not inform him of previous testimony*.").

### *Policy Arguments on Whether Counsel Should Be Prohibited From Using Trial Testimony to Prepare Sequestered Witnesses*

What are the policy arguments for exempting trial counsel from a bar on disclosing trial testimony to sequestered witnesses? And what are the contrary arguments? The basic arguments on one side and the other were pretty well vetted by the plurality and dissenting opinions in *Rhynes.*

The plurality's argument was grounded in the right to effective assistance of counsel --- part of effectiveness is preparing witnesses, and an order prohibiting disclosure of trial testimony would hamper preparation. Here is how the plurality put it:

> Thorough preparation demands that an attorney interview and prepare witnesses before they testify. No competent lawyer would call a witness without appropriate and thorough pre-trial interviews and discussion. In fact, more than one lawyer has been punished, found ineffective, or even disbarred for incompetent representation that included failure to prepare or interview witnesses. (citations omitted)
>
> In this context, Mr. Scofield's actions were necessary in the exercise of his duties, both constitutional and ethical, as a lawyer. * * * Faced with an allegation that his prime supporting witness, Alexander, had been assisting, or participating in, a drug conspiracy with Rhynes, Mr. Scofield had ethical (and possibly constitutional) duties to investigate these allegations with Alexander before he put Alexander on the stand. Mr. Scofield was thus compelled to ascertain, if possible: (1) whether Davis's allegations were untrue (or, if true, whether Alexander intended to invoke his Fifth Amendment rights); (2) whether Alexander's denials were credible; and (3) why Davis would make potentially false allegations against Alexander. Put simply, Mr. Scofield needed to fully assess his decision to call Alexander as a witness, and, to fulfill his obligations to his client, Scofield was compelled to discuss Davis's testimony with Alexander.

The *Rhynes* plurality next addressed the government's argument that allowing the disclosure of trial testimony could lead to a counsel improperly coaching a witness:

> The Government asserts that Mr. Scofield's actions undermined the truthfulness of Alexander's testimony, which, in the Government's view, is surely an act that runs afoul of the sequestration order. On the contrary, lawyers * * * are officers of the court, and, as such, they owe the court a duty of candor, Model Rules of Professional Conduct Rule 3.3 (1995) ( "Model Rules"). Of paramount importance here, that duty both forbids an attorney from knowingly presenting perjured testimony and permits the attorney to refuse to offer evidence he or she reasonably believes is false. Id. Rule 3.3(a)(4), (c). Similarly, an attorney may not "counsel or assist a witness to testify falsely." Id. Rule 3.4(b). And, if an

attorney believes that a non-client witness is lying on the witness stand about a material issue, he is obliged to "promptly reveal the fraud to the court." Id. Rule 3.3, cmt. 4

* * *

Further, sequestration is not the only technique utilized to ensure the pursuit of truth at trial. Indeed, if an attorney has inappropriately "coached" a witness, thorough cross-examination of that witness violates no privilege and is entirely appropriate and sufficient to address the issue.

Judge Niemeyer, in dissent, basically argued that imposing a "counsel" exception to a prohibition on providing testimony to sequestered witnesses would essentially gut the rule:

[I]f Rule 615 precludes a person from acting as an intermediary to relate to one witness the testimony of another, how can we exempt an attorney from the proscription? Just as a discussion among witnesses outside the courtroom would frustrate the rule that one witness cannot hear the testimony of another, a discussion between a witness and an attorney about another witness' testimony frustrates the rule.

* * *

The lofty purpose of Rule 615 deserves greater deference than it would be given if it were allowed to be engulfed by an attorney exception for trial preparation. And the rule is forfeited altogether by arguing that even though the truth-seeking purpose of Rule 615 might be debased by an attorney exception, cross-examination will fill the gap.

With regard to witness preparation, Judge Niemeyer argued that an attorney could effectively prepare a witness without directly referring to trial testimony. To take the example from *Rhynes* itself, Niemeyer noted that even the defense counsel admitted that he could have prepared the witness without referring to the trial testimony. The goal was to ask the witness whether he was a drug dealer. All he had to do was ask that question. He didn't have to say, "a witness yesterday testified that you were a drug dealer, now what do you have to say for yourself?"

The plurality, in response to Judge Niemeyer's argument, stated that it was too fine a distinction to say that it would be okay to ask "You sold drugs to Davis in August 1997, isn't that true?" but not to ask "Davis testified that you sold drugs to Davis in August 1997. Is that testimony true?" The plurality stated that Judge Niemeyer's distinction "fails because it is simply---and unnecessarily---splitting hairs."[10]

[10] One judge in the plurality oddly wrote a separate opinion saying that he "may not agree" with the plurality's rejection of Judge Niemeyer's distinction. I have no idea what that means.

### *Analysis*

It seems to be a strong argument that a "witness preparation" exception to Rule 615 could be an exception that swallows the rule. In one of the reported cases above, a prospective witness spent several days in a war room, and trial testimony was discussed virtually in real time with counsel. It seems hard to dispute that this should be considered a violation of an order prohibiting disclosure of trial testimony to prospective witnesses. Of course it is true that the action of defense counsel in *Rhymes* was significantly milder. But finding it a violation would not necessarily, or even likely, result in exclusion of the witness after such a mild event. Indeed, the other holding in *Rhynes* is that even if there was a violation of a sequestration order, the trial judge abused discretion in excluding the witness, as the punishment did not fit the crime.

Is it really splitting hairs to allow counsel to say "are you a drug dealer" but not to allow counsel to say "a witness testified that you are a drug dealer, is that true"? The danger regulated by sequestration is the tailoring that occurs from *listening to what others have said at trial*. A direct question from a lawyer about a fact probably does not raise the same degree of risk of tailoring from witness testimony. Of course it is true that direct questions from a lawyer could, in some cases, constitute impermissible coaching, but that is a separate wrong, not related to Rule 615. Simply put, if the witness is not hearing what was said at trial, there is no risk of tailoring that is regulated by Rule 615. To the extent this is splitting hairs, then it can be said that splitting hairs is what lawyers do, especially under the Evidence Rules.

Of course it is possible that a wily witness would figure out from a lawyer's question that the lawyer must have got the information from trial testimony. But surely figuring out whether such circumstances are a violation of an order should be left to the discretion of the court. The fact that a lawyer might take advantage of a "just the facts" exception does not mean that there should be a broader exception that allows a lawyer to directly and without limitation disclose trial testimony to a prospective witness.

Finally, it should be emphasized that there is no law that says trial judges, in entering a Rule 615 order, are *required* to apply it against counsel. The only question is whether trial courts have the discretion to do so. Given the long-recognized importance of preventing tailoring of testimony, it seems logical to allow the court to have the discretion to prevent possible tailoring through counsel. That is to say, it appears that the weight of authority has it right --- a court has discretion to prohibit trial counsel from disclosing trial testimony to a sequestered witness.

## *Must the Counsel Question Be Addressed in an Amendment to Rule 615?*

While it is true that the counsel question raises a conflict in the courts, it does not at all follow that it needs to be addressed in an amendment to Rule 615. Even if an order *can* be applied against counsel, such an order raises complex questions of professional responsibility; and in criminal cases it raises thorny questions about the right to effective assistance of counsel. At the last meeting there appeared to be agreement that issues grounded in professional responsibility and

the right to effective assistance of counsel are generally beyond the ken of evidence rulemaking. These sensitive issues are probably best dealt with on a case-by-case basis, without having an evidence rule seeking to control or influence their resolution. Moreover, the "hair-splitting" referred to above --- allowing preparation with a fact or allegation but without attributing it to trial testimony --- could be hard to impart in rule text.

It is important to remember that the counsel question has arisen infrequently, at least in the reported cases. As seen in this memo, there are only a handful of cases discussing the question. Thus it could be looked at as a niche problem which is removed from the basic reason for amending Rule 615 --- to remedy a conflict about the extent of a Rule 615 order, which is a question that can arise every day.

## III. Draft of Proposed Amendment

As stated above, the Committee has rejected a draft that automatically extends Rule 615 protection outside the courtroom. Assuming an amendment is to be proposed, the Committee has opted for a provision referencing the court's discretion to extend protections outside the courtroom – if the court so specifies. ***(But see below for an alternative draft on the discretionary provision).***

On the counsel issue, the sense of the Committee at the last meeting (again, assuming an amendment is to be proposed) was that the text not be amended to discuss the applicability of Rule 615 to counsel, but that reference to the problem would be included in the Committee Note.

**Rule 615. Excluding Witnesses<u>; Preventing Access to Trial Testimony by Excluded Witnesses</u>**

**<u>(a) Exclusion and Exceptions.</u>** At a party's request, the court must order witnesses excluded so that they cannot hear other witnesses' testimony. Or the court may do so on its own. But this rule does not authorize excluding:

~~**(a)**~~ **<u>(1)</u>** a party who is a natural person;

~~(b)~~ **(2)** an officer or employee of a party that is not a natural person, after being designated as the party's representative by its attorney;

~~(c)~~**(3)** a person whose presence a party shows to be essential to presenting the party's claim or defense; or

~~(d)~~ **(4)** a person authorized by statute to be present.

**(b) Additional Orders.** The court may issue further orders to prohibit excluded witnesses from learning about, obtaining or being provided with trial testimony.

## *Draft Committee Note*

Rule 615 has been amended to clarify that the court, in entering an order under this rule, may also prohibit excluded witnesses from learning about, obtaining, or being provided with trial testimony. Many courts have found that a "Rule 615 order" extends beyond the courtroom, to prohibit excluded witnesses from obtaining access or being provided with trial testimony. But the terms of the rule did not so provide; and other courts have held that a Rule 615 order was limited to exclusion of witnesses from the trial. On the one hand, the courts extending Rule 615 beyond courtroom exclusion properly recognized that the core purpose of the rule is to prevent witnesses from tailoring their testimony to the evidence presented at trial --- and that purpose can only be effectuated by regulating out-of-court exposure to trial testimony as well as in-court presence. *See United States v. Robertson*, 895 F.3d 1206, 1214 (9th Cir. 2018) ("The danger that earlier testimony could improperly shape later testimony is equally present whether the witness hears that testimony in court or reads it from a transcript."). On the other hand, a rule extending an often vague "Rule 615 order" outside the courtroom raised questions of fair notice, given that the text of the Rule itself was limited to exclusion of witnesses from the courtroom. Under the amendment, the court may by order prevent excluded witnesses from obtaining, learning about, or being provided with trial testimony --- but in the interest of fair notice, the court's order must so specify.

The amendment does not address the question whether the court can or should prohibit counsel from disclosing trial testimony to a sequestered witness. An order governing counsel's disclosure of trial testimony to prepare a witness raises difficult questions of professional responsibility and effective assistance of counsel, as well as the right to confrontation in criminal cases, and is best addressed by the court on a case-by-case basis.

### *Alternative Draft --- Requiring an Order Extending Beyond the Courtroom, but Giving the Court Discretion as to the Details*

As discussed above, the Committee previously voted to leave it to the discretion of the court to extend Rule 615 protection outside the courtroom. Thoughts expressed by Committee members were that the question of access to trial testimony outside the courtroom were much more complex than the simple question and remedy of kicking prospective witnesses out of the courtroom. That is certainly true, but what was not considered was a middle ground: requiring the court to issue an order that extends outside the courtroom, but leaving it to the trial court to figure out the details of that order.

There are good reasons to consider this compromise approach, most of them already discussed. If the trial court imposes no restrictions on access outside the courtroom, then a prospective witness is free to access a live feed of the trial (which some courts are doing under Covid), or seek out information on social media, or simply take a witness who testified out to lunch. Most courts have recognized that Rule 615 is essentially toothless unless there are protections against access to trial testimony by prospective witnesses when outside the courtroom. Therefore there is much to be said for a requirement that the court at least address the risks of tailoring testimony after prospective witnesses are excluded.

There is also much to be said to leaving it up to the court to figure out the *details* of such an order. Anything in the rule as to those details is likely to be overinclusive and underinclusive. For example, adding language such as "the order must prevent prospective witnesses from talking to witnesses who have testified" 1) barely scratches the surfaces of all the risks to address, meaning that it would probably have to be part of a long laundry list, and 2) "talking" wouldn't prevent an email, but then again, preventing them from "having any contact" could be very overbroad. And allowing contact so long as it does not involve discussions about the testimony is a concept that is hard to draft and will create line-drawing questions. The whole concept of preventing access to testimony by prospective witnesses outside the court bespeaks a case-by-case approach and the use of judicial discretion.

**What follows is a drafting alternative that requires the court to enter an order to control out of court access to trial testimony, but leaves it to the court to figure out the details.**

**Rule 615. Excluding Witnesses<u>; Preventing Access to Trial Testimony by Excluded Witnesses</u>**

**<u>(a) Court orders.</u>** At a party's request, the court must<u>:</u>

**<u>(1)</u>** order witnesses excluded so that they cannot hear other witnesses' testimony<u>; and</u>

**(2)** order protections that the court finds necessary to prohibit excluded witnesses from learning about, obtaining or being provided with trial testimony.

**(b) Court acting on its own.** The court may issue orders on its own.
~~Or the court may do so on its own. But this rule does not authorize excluding:~~

**(c) Exceptions from Exclusion.** This rule does not authorize excluding the following persons from the courtroom:

**~~(a)~~ (1)** a party who is a natural person;

**~~(b)~~ (2)** an officer or employee of a party that is not a natural person, after being designated as the party's representative by its attorney;

**~~(c)~~(3)** a person whose presence a party shows to be essential to presenting the party's claim or defense; or

**~~(d)~~ (4)** a person authorized by statute to be present.

## *Draft Committee Note*

Rule 615 has been amended to clarify that the court, in entering an order under this rule, must also enter an order to address the risk that excluded witnesses may obtain or be provided access to trial testimony during the time they are excluded. Many courts have found that a "Rule 615 order" extends beyond the courtroom, to prohibit excluded witnesses from obtaining access or being provided with trial testimony. But the terms of the rule did not so provide; and other courts have held that a Rule 615 order was limited to exclusion of witnesses from the trial. On the one hand, the courts extending Rule 615 beyond courtroom exclusion properly recognized that the core purpose of the rule is to prevent witnesses from tailoring their testimony to the evidence presented at trial --- and that purpose can only be effectuated by regulating out-of-court exposure to trial testimony as well as in-court presence. *See United States v. Robertson*, 895 F.3d 1206, 1214 (9th Cir. 2018) ("The danger that earlier testimony could improperly shape later testimony is equally present whether the witness hears that testimony in court or reads it from a transcript."). On the other hand, extending an often vague "Rule 615 order" outside the courtroom raised questions of fair notice, given that the text of the Rule itself was limited to exclusion of witnesses from the courtroom.

Under the amendment, the court in entering an order under the Rule must address both exclusion from the courtroom and the risks that an excluded witness may obtain or be provided access to trial testimony.

The actual risk that an excluded witness will hear about or be provided access to trial testimony will vary from case to case. Therefore, the rule leaves the details of the order to the discretion of the court. But the court must enter an order addressing the question of out-of-court access, because the risk of tailoring testimony is not fully addressed by simply excluding witnesses from the courtroom, and because parties and witnesses are entitled to fair notice of regulated conduct.

The amendment does not address the question whether the court can or should prohibit counsel from disclosing trial testimony to a sequestered witness. An order governing counsel's disclosure of trial testimony to prepare a witness raises difficult questions of professional responsibility and effective assistance of counsel, as well as the right to confrontation in criminal cases, and is best addressed by the court on a case-by-case basis.

## IV. Postscript: A Possible Split of Authority Over Rule 615(b)

Rule 615 provides the following exceptions from exclusion:

> But this rule does not authorize excluding:
>
> (a) a party who is a natural person;
>
> (b) an officer or employee of a party that is not a natural person, after being designated as the party's representative by its attorney;
>
> (c) a person whose presence a party shows to be essential to presenting the party's claim or defense; or
>
> (d) a person authorized by statute to be present.[11]

There appears to be some confusion regarding subdivision (b), on whether the party-entity is limited to one immune representative or is allowed more than one.[12] That possible conflict is discussed by the United States District Court for the Middle District of Alabama in *United States v. McGregor,* 2012 WL 235519 (M.D.Ala. 2012), a case in which the government sought to designate multiple agents as immune from sequestration under subdivision (b):

> The circuit courts are divided as to which provision of Rule 615 permits multiple agents. The Fourth and Sixth Circuit Courts of Appeals have limited the government to one representative under Rule 615(b) and one "essential-presence" agent under Rule 615(c). *United States v. Pulley*, 922 F.2d 1283, 1286 (6th Cir.1991); *United States v. Farnham*, 791 F.2d 331, 335-36 (4th Cir.1986). By contrast, the Second Circuit Court of Appeals has permitted multiple representatives under Rule 615(b). *United States v. Jackson*, 60 F.3d 128, 134-35 (2d Cir.1995). The distinction between the two subsections is not merely academic. Rule 615(b) is a mandatory exception, whereas Rule 615(c) requires the government to make a showing that the second agent is essential to the presentation of its case.

I say above that this is a possible conflict, because I am not sure that the *McGregor* court has it exactly right. The court cites the Second Circuit case of *Jackson,* but the court there holds that there can be multiple agents under the "necessary" exception, Rule 615(c). It's not a holding allowing multiple agents under (b). And *Pulley* allows only one agent under (b). So I think that the Alabama court might be overstating the holdings of both cases. The *Pulley* case cites a case from

[11] This last provision was added in 1998 in response to victims' rights legislation in Congress that provided crime victims a statutory right to attend trial proceedings.

[12] References to "subdivision (b)" are to the current rule. If the amendment regarding the scope of a Rule 615 order were to be adopted, subdivision (b) would be renumbered to (a)(2). See the draft amendment above.

the Fifth Circuit in which two agents were allowed to testify, but the Fifth Circuit did not say that they were both allowed to testify under (b). Rather it said, confoundingly, that subdivision (b) allowed multiple representatives, within the discretion of the judge, but that the trial court did not abuse discretion because "adequate grounds existed for excusing both Clark and Beaupre *under the second and third excepti*ons to the rule." *United State v. Alvarado,* 647 F.2d 537 (5th Cir. 1981).

There is some wayward language in both the Second and Fifth Circuit cases --- for example, the *Jackson* court says that there is no bar on multiple representatives even though (b) is written in the singular --- but there is no actual holding that multiple witnesses can be designated under (b).

There are other cases that not only declare but seem to hold that (at least) two witnesses can be protected under (b). For example, in the unpublished decision of *United States v. Lach,* 1995 U.S. App. LEXIS 6064, at *9 (9th Cir. 1995), the court allowed two case agents to be exempt, in the following analysis:

> Lach first challenges the court's decision to permit two government agents to sit at counsel table. Lach concedes that the presence of one government agent is permissible under the exception to the mandatory exclusion rule for "an officer or employee of a party which is not a natural person designated as its representative by its attorney." Fed. R. Evid. 615. We have read this provision, however, to permit two individuals to represent a party at counsel table. *Breneman,* 799 F.2d at 474; see also *United States v. Alvarado*, 647 F.2d 537, 540 (5th Cir. Unit A June 1981) (permitting more than one government agent at counsel table); *United States v. Spina*, 654 F. Supp. 94, 96 (S.D. Fla. 1987), aff'd 881 F.2d 1086 (11th Cir. 1989) (same).

The *Lach* court relied on *Breneman,* but the holding in that case was that the government could swap out one representative for another, after the designation had been made --- so it was not a case involving multiple representatives. *Lach* relied on the dictum in *Alvarado.* And it relied on *Spina,* where the court declared (relying on *Alvarado*) that it had the discretion to allow multiple representatives under (b), but then held that "Special Agents McBride and Mortellaro are not be sequestered pursuant to Rule 615(b) and (c)."

In other words, the case for finding a true conflict in Rule 615(b) regarding the number of representatives allowed is weak. A large majority of courts have applied Rule 615(b) the way it is read --- only one representative gets immunity from exclusion. [13]

[13] *See, e.g., United States v. Pulley,* 922 F.2d 1283 (6th Cir. 1991) (one representative only); *United States v. Green*, 293 F.3d 886, 892 (5th Cir. 2002) (multiple agents must be qualified as necessary under Rule 615(b)); *United States v. Farnham*, 791 F.2d 331, 335 (4th Cir. 1986) (noting reliance on the singular phrasing of the Rule 615(b)); *Oliver B. Cannon & Son, Inc. v. Fid. & Cas. Co.,* 519 F. Supp. 668, 679 (D. Del. 1981) ("[T]he exception is clearly framed in the singular and the Court concludes, in the contextof this case, that it does not permit counsel to designate more than one person to be present as a corporation's representative."); *Capeway Roofing Sys. v. Chao,* 391 F.3d 56, 59 (1st Cir. 2004) ("[T]he bare language of Rule 615 suggests that only one [agent] should have stayed."); *United States v. Williams*, 1993 U.S. App. LEXIS 9786, at *5 (10th Cir.) (indicating that an entity party could only have designated one representative out of two potential witnesses); *United States v. White-Kinchion*, 2013 U.S. Dist. LEXIS 59201, *2-3 (D. Kan.) (refusing to permit multiple representatives under 615(b).

Nonetheless, it is fair to state that there is at least some inconsistency and confusion in the case law on Rule 615(b). That confusion is probably not in itself enough to warrant an amendment of Rule 615. For one thing, even if a court does designate more than one representative under (b), and assuming that is error, it would be harmless if the protected witness could fit the "necessary" requirements of (c), which will often be the case; therefore an amendment specifying that (b) is for one person only might not affect many cases as a practical matter.[14]

But the question at this point in the Committee's Rule 615 adventure is not whether an amendment to Rule 615(b) is justified on its own. The question is whether it is worth it to propose a "tag-along" improvement to the Rule if the Committee decides that it is going to propose an amendment regarding the extent of a Rule 615 order. There is a good deal of precedent for "tagalong" amendments. For example, the recent amendment to Rule 404(b) makes a change to the placement of the word "other" --- from "crimes, wrongs, or other acts" to "other crimes, wrongs, or acts." There is no way that this slight change would have been a standalone amendment. But it does represent an improvement to the Rule that was already being amended (because it emphasizes that Rule 404(b) applies only to acts other than those at issue). Tagalong amendments can make a lot of sense because you don't get to amend the same rule very frequently. You might as well do your best when you are amending it.

So let's assume that there is a problem worth amending in Rule 615(b). What should the amendment be? It seems clear that Rule 615(b) should be limited to one representative --- with the overflow allotted to (c). The only argument in favor of multiple representatives has been stated by Weinstein's treatise and a couple of courts cited above: "Courts should have discretion to allow for more representatives under (b)." [Which is not so much an argument as it is a conclusion.]

***But there are a number of counterarguments to that conclusory statement:***

● What does discretion mean in this circumstance? How is it to be guided, in terms of criteria to apply? *There are no standards in Rule 615(b) to apply* to determine whether a representative should be allowed to sit at trial. The party gets to designate and that is that. So if there is no specific numerical limit, how is a court to decide whether the entity-party can have two, or three, or 600 of its prospective witnesses sitting at trial and tailoring their

[14] *See, e.g., United States v. Cooper*, 949 F.3d 744 (D.C. Cir. 2020): The trial judge permitted one IRS agent, the lead investigator, to remain exempt from sequestration along with another agent who testified at trial. The court in a footnote stated the following:

> Rule 615 does not authorize excluding an officer or employee of a party that is not a natural person, after being designated as the party's representative by its attorney. Fed. R. Evid. 615(b). This exception appears to cover Special Agent Milne [the lead investigator]. Another exception to Rule 615 allows a witness to attend the trial if the party shows that he is 'essential to presenting the party's claim or defense.' Fed. R. Evid. 615(c). It may be that the government intended Special Agent LaRose to be covered by this exception. See *United States v. Pulley*, 922 F.2d 1283, 1286 (6th Cir. 1991) ('Where the government wants to have two agent-witnesses in attendance throughout the trial, it is always free to designate one agent as its representative under subpart [b] and try to show under subpart [c] that the presence of the second agent is 'essential' to the presentation of its case.'); *United States v. Farnham*, 791 F.2d 331, 335 (4th Cir. 1986).

testimony? The Weinstein treatise says that the court should consider factors such as the importance of the agent and the risk of tailoring. But, first of all, these factors are just made up --- they do not stem from any language in the rule. And second, they make little sense. The importance of the agent is surely relevant to the "necessity" standard of (c) --- why not just apply it there? And as to the risk of tailoring, the main reason that the Advisory Committee (and Wigmore) gave for giving parties a right to sequestration is that it is the parties and not the court who is going to know about the risk of tailoring. Allowing court discretion as to Rule 615(b) designations is inconsistent with the subdivision's grant of a unilateral right to designate immunity.

● The policy justification for Rule 615(b) is that, for purposes of avoiding exclusion, entities should be treated the same as individual parties. Individual parties cannot be excluded, for obvious reasons. The Advisory Committee Note to Rule 615 justifies the subdivision "[a]s the equivalent of the right of a natural-person party to be present, a party which is not a natural person is entitled to have a representative present." If entities did not have an absolute right to designate an agent, they would have a disadvantage as compared to individuals.[15] But that very reason for having Rule 615(b) indicates that it should be limited to a single agent. Otherwise, *individual parties will be disadvantaged* because entities could have multiple witnesses exempt from exclusion and individual parties would not.

**For all these reasons, if an amendment to Rule 615(b) is to be proposed, it should limit the number to one agent. This will be a pretty easy drafting exercise. It can be done as follows:**

But this rule does not authorize excluding:

(1) a party who is a natural person;

(2) ~~an~~ one officer or employee of a party that is not a natural person, ~~after being~~ who is designated as the party's representative by its attorney;

* * *

Note that this amendment is completely independent from the proposal regarding the extent of a Rule 615 order. Exceptions to exclusion are not relevant to orders that extend outside of court, because the witness within an exception will not be excluded in the first place, and so will hear the trial testimony first-hand.

[15] Tellingly, the Committee Note states that "[m]ost of the cases have involved allowing *a* police officer who has been in charge of an investigation to remain in court despite the fact that he will be a witness."

**If the Committee decides that an amendment to Rule 615(b) should be added to the existing proposal, the Committee Note would have to be altered. Here is a possible draft, with the reference to 615(b) at the end (with the same change possible should the Committee prefer the alternative draft to Rule 615(b) that requires a court to extend the order outside the courtroom):**

## Draft Committee Note, combining language about the extent of an order and language about entity representatives

Rule 615 has been amended for two purposes. Most importantly the amendment clarifies that the court, in entering an order under this rule, may also prohibit excluded witnesses from learning about, obtaining, or being provided with trial testimony. Many courts have found that a "Rule 615 order" extends beyond the courtroom, to prohibit excluded witnesses from obtaining or getting access to trial testimony. But the terms of the rule did not so provide; and other courts have held that a Rule 615 order was limited to exclusion of witnesses from the trial. On the one hand, the courts extending Rule 615 beyond courtroom exclusion properly recognized that the core purpose of the rule is to prevent witnesses from tailoring their testimony to the evidence presented at trial --- and that purpose can only be effectuated by regulating out-of-court exposure to trial testimony as well as in-court presence. See United States v. Robertson, 895 F.3d 1206, 1214 (9th Cir. 2018) ("The danger that earlier testimony could improperly shape later testimony is equally present whether the witness hears that testimony in court or reads it from a transcript."). On the other hand, a rule extending an often vague "Rule 615 order" outside the courtroom raised questions of fair notice, given that the text of the Rule itself was limited to exclusion of witnesses from the courtroom. Under the amendment, the court may by order prevent excluded witnesses from obtaining, learning about, or being provided with trial testimony --- but in the interest of fair notice, the court's order must so specify.

Nothing in the amendment is intended to create an expectation that the court should issue orders controlling conduct outside the courtroom. The rule leaves the question of the extent of the order within the discretion of the court. It simply states that if the court does want the order to extend to conduct outside the courtroom, it must so provide.

The amendment does not address the question whether the court can or should prohibit counsel from disclosing trial testimony to a sequestered witness. An order governing counsel's disclosure of trial testimony to prepare a witness raises difficult questions of professional responsibility and effective assistance of counsel, as well as the right to confrontation in criminal cases, and is best addressed by the court on a case-by-case basis.

Finally, the rule has been amended to clarify that the exception from exclusion for entity representatives is limited to one designated agent per entity. This limitation, which has been followed by most courts, provides parity for individual and entity parties. If an entity seeks to have more than one agent protected from exclusion, it is free to argue that the agent is essential to presenting the party's claim or defense under subdivision (a)(2).

# TAB 5

**FORDHAM**

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Memorandum To: Advisory Committee on Evidence Rules
From: Daniel J. Capra
Re: COVID, the CARES Act, an Emergency Rule, and the Federal Rules of Evidence
Date: October 1, 2020

It goes without saying that the COVID crisis has challenged the courts, and has raised the question of whether the National Rules can, in their current state, accommodate trials and other proceedings that are affected by a pandemic or a similar emergency. In that regard, the CARES Act contains a provision that directs the Judicial Conference to consider whether rules changes are necessary to deal with a future emergency. In March, the Advisory Committees were each tasked with the question of whether an emergency rule should be proposed (and these proposals, if any, would be coordinated and presented on a somewhat accelerated schedule).

The other Advisory Committees are dealing with issues such as service by mail; proceedings required under current rules to be in "open court"; grand jury proceedings; the right to a public trial; sentencing proceedings; how jury trials can work; and on and on. The Evidence Rules, however, deal only with the admission of proffered evidence, so there is really only one question: are changes needed in order to allow evidence to be admissible, if the trial must be adjusted to emergency conditions? As applied to evidence rules, that really means whether the rules are flexible enough to allow for the presentation of testimony and other evidence *remotely.*

Each of the other Advisory Committees are working on a draft emergency rule. The template comes from the Criminal Rules Committee. At this writing, the Criminal Rules Committee emergency rule reads as follows:

**Rule 62. Emergency Rule.**

**(a) Conditions for a Rules Emergency**. A rules emergency may be declared when:

**(1)** extraordinary circumstances relating to public health or safety, or affecting physical or electronic access to a court, substantially impair the ability of a court to perform its functions in compliance with these rules; and

**(2)** no viable alternative measures would eliminate such substantial impairment within a reasonable time.

**(b) Declaring a Rules Emergency**.

**(1)** ***Authority to Declare.*** The Judicial Conference of the United States may declare a rules emergency upon finding that the conditions in (a) are met in one or more courts.

**(2)** ***Contents.*** Each declaration must identify:

**(A)** the court or courts affected;

**(B)** any restrictions in addition to those in [the subdivision(s) setting forth those rules that can be suspended or altered] on the authority to modify the rules; and

**(C)** a date, no later than 90 days from the date of the declaration, on which it will terminate.

**(3)** ***Additional Declarations; Early Termination***. The Judicial Conference of the United States may

**(A)** issue additional declarations if emergency conditions change or persist; and

**(B)** terminate a declaration for one or more courts before its stated termination date when it finds a rules emergency affecting those courts no longer exists.

**(c) Authority to Depart from These Rules After a Declaration**

[This section lists the rules that are subject to suspension in an emergency, and it will specify what courts are allowed to do in the absence of the rule.]

**(d) Authority to Use Video Teleconferincing and Teleconferencing After a Declaration**

[This section will list the proceedings that may occur by video or telephone conferencing in an emergency --- trials are not on this list. The rules effected cover public access to a proceeding, election of bench trials, sentencing proceedings, issuing summonses, etc.]

**(e) Effect of a termination.** Terminating a declaration for a court ends its authority to depart from these rules. But if a particular proceeding is already underway and complying with these rules for the rest of the proceeding would be infeasible or work an injustice, that it may be completed as if the declaration had not terminated.[1]

---

[1] At this writing, the Civil Rules Committee has prepared a draft emergency rule, but so few rules were found necessary to suspend for an emergency that the Committee is considering whether or not to propose an emergency rule at all. The alternative would be to amend the affected rule—which as of this writing appears to be Rule 4 only. The Committee came to the conclusion that the vast majority of Civil Rules are broad and flexible enough to cover any emergency. That was essentially the finding of the Chair and Reporter of this Committee regarding the Evidence Rules. See text infra. The Bankruptcy Rules Committee's proposal has the same structure as that of the Criminal Rules--- the only rules that would be effected are those that deal with deadlines. The Appellate Rules version would simply allow for suspension of any of the rules in an emergency. The expressed rationale for that broad doctrine is that Appellate Rule 2 already allows for the suspension of any rule by order in any case.

In March, the Chair of the Standing Committee contacted the Reporter and the former Chair, Judge Livingston, to provide an opinion on whether an emergency rule is necessary in the Evidence Rules. After substantial research, and a canvassing of a number of law professors, lawyers and judges, the Chair and Reporter responded that they did not see a reason for an emergency rule to be added to the Rules of Evidence.[2]

This memo explains the Chair and Reporter's reasoning for concluding that an emergency rule was unnecessary for the Evidence Rules. It also discusses whether existing Evidence Rules might be amended, not to accommodate emergencies, but to recognize the possibility of remote trials in the future, even in the absence of an emergency. This latter question is not Covid-related, but we all know that one of the consequences of Covid is the call from some for the increasing use of remote testimony even after the pandemic is over. If that is a good thing, at least in some cases, this memo considers as a preliminary matter whether any Evidence Rules should be amended to accommodate the regular use of remote testimony.

## I. Should an Emergency Rule Be Added to the Federal Rules of Evidence?

As applied to the Evidence Rules, the basic question of the impact of an emergency boils down to the possibility of having to proffer (or wanting to proffer) evidence remotely. Of course there are many trial-related issues that arise with remote proceedings: managing the jury, voir dire, challenges to jurors, managing juror deliberations, the right to a public trial, and possible difficulties in assessing witness credibility are some of the issues that have been discussed. But none of these issues of trial management, or even of jurors able to assess witness credibility, are covered by the Evidence Rules. The only question that appears to tread upon the Evidence Rules is whether the rules permit the use of virtual presentation of evidence.

In terms of written information, such as documents and other writings, the question is easy: Rule 101(b)(6) provides that all written information is equally admissible in electronic form. As to physical evidence, such as a gun or drugs, there is simply nothing in the Evidence Rules that governs the form in which that evidence must be presented.

What about witness testimony? Is there is there anything in the Evidence Rules requiring that testimony must be given in the courtroom?

[2] Consequently, unlike the other Committees, Judge Livingston did not find it necessary to appoint an emergency rule subcommittee.

## A. Rules on "Testimony"

It turns out that none of the references to "testimony" in the Evidence Rules require testimony to be made physically in the courtroom.[3] "Testifying" or "testimony" is referred to in the following rules, and just reading these rules one can see that there is nothing that requires that testimony be made physically in the courtroom:

● **Rule 103(d): Cross-Examining a Defendant in a Criminal Case.** By testifying on a preliminary question, a defendant in a criminal case does not become subject to cross-examination on other issues in the case.

● **Rule 405(a): By Reputation or Opinion.** When evidence of a person's character or character trait is admissible, it may be proved by testimony about the person's reputation or by testimony in the form of an opinion.

● **Rules 413-14 notice provision: Disclosure to the Defendant.** If the prosecutor intends to offer this evidence, the prosecutor must disclose it to the defendant, including witnesses' statements or a summary of the expected testimony. (Similar language in Rule 415 for civil cases).

● **Rule 602: Need for Personal Knowledge**

> A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness's own testimony. This rule does not apply to a witness's expert testimony under Rule 703.

● **Rule 603: Oath or Affirmation to Testify Truthfully**

> Before testifying, a witness must give an oath or affirmation to testify truthfully. It must be in a form designed to impress that duty on the witness's conscience.

● **Rule 605: Judge's Competency as a Witness**

[3] Unlike the Evidence Rules, Civil Rule 43 requires that testimony be in the courtroom, but it provides an exception that will be triggered by a serious emergency. The Civil Rules Subcommittee has determined that Rule 43 is flexible enough to cover an emergency and so has not included it in the list of rules that would be suspended in an emergency. The situation on the Criminal side is more complicated because of the constitutional right to face-to-face confrontation --- discussed later in this memo.

The presiding judge may not testify as a witness at the trial. A party need not object to preserve the issue.

● **Rule 606(a): Juror's Competency as a Witness**

**(a) At the Trial.** A juror may not testify as a witness before the other jurors at the trial. If a juror is called to testify, the court must give a party an opportunity to object outside the jury's presence.

● **Rule 606(b): (1) Prohibited Testimony or Other Evidence**.

During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment. The court may not receive a juror's affidavit or evidence of a juror's statement on these matters.

**(2) Exceptions.** A juror may testify about whether * * * .

● **Rule 608(a): Reputation or Opinion Evidence.**

A witness's credibility may be attacked or supported by testimony about the witness's reputation for having a character for truthfulness or untruthfulness, or by testimony in the form of an opinion about that character. But evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked.

● **Rule 608(b): Specific Instances of Conduct.**

Except for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness. But the court may, on cross-examination, allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness of:

(1) the witness; or

(2) another witness whose character the witness being cross-examined has testified about.

By testifying on another matter, a witness does not waive any privilege against self-incrimination for testimony that relates only to the witness's character for truthfulness.

● **Rule 612(a): Writing Used to Refresh a Witness's Memory**

**(a) Scope.** This rule gives an adverse party certain options when a witness uses a writing to refresh memory:

(1) while testifying; or

(2) before testifying, if the court decides that justice requires the party to have those options.

● **Rule 612(b): Adverse Party's Options; Deleting Unrelated Matter.**

Unless 18 U.S.C. § 3500 provides otherwise in a criminal case, an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness about it, and to introduce in evidence any portion that relates to the witness's testimony.

● **Rule 612(c): Failure to Produce or Deliver the Writing.**

If a writing is not produced or is not delivered as ordered, the court may issue any appropriate order. But if the prosecution does not comply in a criminal case, the court must strike the witness's testimony or — if justice so requires — declare a mistrial.

● **Rule 615: Excluding Witnesses**

At a party's request, the court must order witnesses excluded so that they cannot hear other witnesses' testimony.[4]

● **Rule 701: Opinion Testimony by Lay Witnesses**

If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:

(a) rationally based on the witness's perception;

(b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and

[4] It is true that Rule 615 contemplates physical exclusion from a courtroom for prospective witnesses. But it doesn't say that the testimony that prospective witnesses are excluded from must be made in court. The Committee's work on an amendment to Rule 615 in fact addresses the possibility of a remote trial because it would specify that the court needs to consider the possibility of specifying that the order should extend outside the courtroom.

(c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

**● 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:

**(a)** the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

**(b)** the testimony is based on sufficient facts or data;

**(c)** the testimony is the product of reliable principles and methods; and

**(d)** the expert has reliably applied the principles and methods to the facts of the case.

**● Rule 703: Bases of an Expert's Opinion Testimony**

An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.

**● Rule 705: Disclosing the Facts or Data Underlying an Expert's Opinion**

Unless the court orders otherwise, an expert may state an opinion — and give the reasons for it — without first testifying to the underlying facts or data. But the expert may be required to disclose those facts or data on cross-examination.

**● Rule 706(b): Expert's Role.**

The court must inform the expert of the expert's duties. The court may do so in writing and have a copy filed with the clerk or may do so orally at a conference in which the parties have an opportunity to participate. The expert:

**(1)** must advise the parties of any findings the expert makes;

**(2)** may be deposed by any party;

**(3)** may be called to testify by the court or any party; and

**(4)** may be cross-examined by any party, including the party that called the expert.

● **Rule 801(c):** "Hearsay" means a statement that:

**(1)** the declarant does not make while testifying at the current trial or hearing; and

**(2)** a party offers in evidence to prove the truth of the matter asserted in the statement.

● **Rule 801(d)(1):** A statement that meets the following conditions is not hearsay:

**(1)** ***A Declarant-Witness's Prior Statement.*** The declarant testifies and is subject to cross-examination about a prior statement, and the statement:

**(A)** is inconsistent with the declarant's testimony and was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition;

**(B)** is consistent with the declarant's testimony and is offered to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or

**(C)** identifies a person as someone the declarant perceived earlier.

● **Rule 803(6)(D):** all these conditions[5] are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification;

● **Rule 803(10):** ***Absence of a Public Record.***

Testimony — or a certification under Rule 902 — that a diligent search failed to disclose a public record or statement if the testimony or certification is admitted to prove that:

**(A)** the record or statement does not exist; or

[5] The reference is to the foundation requirements for a business record.

**(B)** a matter did not occur or exist, if a public office regularly kept a record or statement for a matter of that kind;

● **Rule 803(18):** ***Statements in Learned Treatises, Periodicals, or Pamphlets*****.**

A statement contained in a treatise, periodical, or pamphlet if:

**(A)** the statement is called to the attention of an expert witness on cross-examination or relied on by the expert on direct examination; and

**(B)** the publication is established as a reliable authority by the expert's admission or testimony, by another expert's testimony, or by judicial notice.

If admitted, the statement may be read into evidence but not received as an exhibit.

● **Rule 804(a): Criteria for Being Unavailable.**

A declarant is considered to be unavailable as a witness if the declarant:

**(1)** is exempted from testifying about the subject matter of the declarant's statement because the court rules that a privilege applies;

**(2)** refuses to testify about the subject matter despite a court order to do so;

**(3)** testifies to not remembering the subject matter;

**(4)** cannot be present or testify at the trial or hearing because of death or a then-existing infirmity, physical illness, or mental illness; or

**(5)** is absent from the trial or hearing and the statement's proponent has not been able, by process or other reasonable means, to procure:

**(A)** the declarant's attendance, in the case of a hearsay exception under Rule 804(b)(1) or (6); or

**(B)** the declarant's attendance or testimony, in the case of a hearsay exception under Rule 804(b)(2), (3), or (4).

But this subdivision (a) does not apply if the statement's proponent procured or wrongfully caused the declarant's unavailability as a witness in order to prevent the declarant from attending or testifying.[6]

[6] Note that the rule actually distinguishes between physically attending the trial and testifying. This point will be discussed in the next section.

● **Rule 804(b)(1): *Former Testimony*.** Testimony that:

**(A)** was given as a witness at a trial, hearing, or lawful deposition, whether given during the current proceeding or a different one;[7] and

**(B)** is now offered against a party who had — or, in a civil case, whose predecessor in interest had — an opportunity and similar motive to develop it by direct, cross-, or redirect examination.

● **Rule 806: Attacking and Supporting the Declarant's Credibility**

When a hearsay statement — or a statement described in Rule 801(d)(2)(C), (D), or (E) — has been admitted in evidence, the declarant's credibility may be attacked, and then supported, by any evidence that would be admissible for those purposes if the declarant had testified as a witness. The court may admit evidence of the declarant's inconsistent statement or conduct, regardless of when it occurred or whether the declarant had an opportunity to explain or deny it. If the party against whom the statement was admitted calls the declarant as a witness, the party may examine the declarant on the statement as if on cross-examination.

● **Rule 901(b)(1): Examples.** The following are examples only — not a complete list — of evidence that satisfies the requirement [of authentication]:

**(1)** ***Testimony of a Witness with Knowledge*.** Testimony that an item is what it is claimed to be.

● **Rule 903: Subscribing Witness's Testimony**

A subscribing witness's testimony is necessary to authenticate a writing only if required by the law of the jurisdiction that governs its validity.

● **Rule 1005: Copies of Public Records to Prove Content**

The proponent may use a copy to prove the content of an official record — or of a document that was recorded or filed in a public office as authorized by law — if these conditions are met: the record or document is otherwise admissible; and the copy is certified as correct in accordance with Rule 902(4) or is testified to be correct by a witness who has compared it with the original.

[7] Note again the distinction between the concept of "testimony" and physically testifying at the trial.

- **Rule 1007: Testimony or Statement of a Party to Prove Content**

  The proponent may prove the content of a writing, recording, or photograph by the testimony, deposition, or written statement of the party against whom the evidence is offered. The proponent need not account for the original.

---

This journey through the use of the word "testimony" and its derivatives indicates that nothing in the Evidence Rules requires testimony to be made physically in the courtroom. Of course there are other references throughout the rules to "witness" (see, e.g., Rules 803(5), 804(b)(6), 901(b)(3)); "cross-examination" (see, e.g., Rules 608 and 611(b); "disclose to the jury" (see, e.g., Rule 703); "questions" (see, e.g., Rule 611(c)), and other terms related to the process of providing testimony. But having gone through all of those references, it seems very safe to say that none of them even refer to, much less mandate, a physical in-court location.[8]

## B. Possible Problem Areas:

### *1. Rule 1006*

One rule that could be read as raising an "in court" issue that is unrelated to testimony. Rule 1006 states that summaries of admissible evidence can be admitted if the underlying information "cannot be conveniently examined *in court*." And it further states that the court may order that the proponent of the summary produce the underlying information "in court." But even this rule does not specifically state that "in court" means physically in a courtroom. It would be odd to read the rule as requiring a summary to be excluded in a virtual trial because, by definition, the material cannot be conveniently examined physically in the courtroom. Surely, in a virtual trial, the question of convenience is whether the material can be conveniently examined over an electronic platform. And surely electronic availability of the information during a virtual trial would suffice to make the information presented "in court."

It may be that Rule 1006 could usefully be amended to allow summaries if they cannot be conveniently produced "in court or remotely." Likewise an amendment could provide for

[8] Compare Civil Rule 43(a): "At trial, the witnesses' testimony *must be taken in open court* unless a federal statute, the Federal Rules of Evidence, these rules, or other rules adopted by the Supreme Court provide otherwise. For good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location." (There is an argument that Rule 43 does not require testimony to be made physically in court. One could construe testimony given in a virtual trial to be taken "in open court.")

inspection of the underlying records can be provided "in court or remotely." Both of these tweaks might be useful in going forward if virtual trials become a reality. But surely this is a niche question and does not itself justify an amendment that would add a general rule about emergencies to the Evidence Rules.

***2. Hearsay?***

Another possible concern is that remote testimony might somehow be hearsay because it is not being made physically at the trial. Yet that concern is handled by Rule 801(c), which defines hearsay as a statement that "the declarant does not make while testifying at the current trial or hearing." With remote testimony, the declarant *is* testifying at the current trial or hearing. And there is no case that I know that has found a hearsay problem in remote testimony given in real time at a trial.

***3. Authenticity?***

A concern that has been expressed recently is that the rules on authenticity must be changed to accommodate remote trials. But while it is true that authenticating documents remotely provides some challenges, none of those challenges are imposed by the Evidence Rules as applied to authentication of items at a virtual trial. That is to say, nothing about the Evidence Rules makes items harder to authenticate in a virtual trial than in an old school trial. For example, authenticating a video usually requires testimony of a person with knowledge of how the video was prepared, etc. Nothing in Rule 901 requires that the foundation testimony be made physically in a courtroom. The same authenticating witness that would testify in person would testify remotely and give the same testimony.

It should be emphasized that many of the authentication rules make it easier to authenticate evidence without any testimony at all. That is what Rule 902 is all about, and as you know, Rule 902 has been amended to allow authentication by a certificate (in lieu of testimony) with respect to business records (Rules 902(11) and (12)) and digital information (Rules 902(13) and (14)).

***4. The Right to Face to Face Confrontation in Criminal Cases***

Of course, in a criminal trial, remote testimony offered against the accused does raise special concerns, but again this is not because of the Evidence Rules. If a prosecution witness testifies remotely, the defendant has a viable claim that it violates his right to face to face confrontation. *See Coy v. Iowa,* 487 U.S. 1012 (1988) ("We have never doubted . . . that the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact."). Even where the defendant and the witness can see each other over Zoom, there is a strong argument that this right to "virtual" face to face confrontation is not automatically

sufficient.[9] It can also be argued that cross-examining a witness virtually is not as effective as cross-examining them in court --- and that jurors might have more difficulty assessing how cross-examination affects a witness's credibility if the questioning is virtual.

But even assuming that all the points about cross-examining virtually are valid, and thus the right to face to face confrontation is potentially violated by remote testimony, there are two responding points. First, the right to face to face confrontation is not absolute. Remote testimony is permitted if the court finds that critical interests of the state require virtual testimony. That is the holding of *Maryland v. Craig,* 497 U.S. 836 (1990), where the court upheld closed circuit testimony of a child witness, after the trial court found that the child would be traumatized if required to testify in the presence of the defendant.

There is certainly an argument to be made that the pandemic or a similarly serious public health emergency raises state interests in the physical protection of witnesses that is every bit as weighty as the interest in child protection at stake in *Craig. Craig* requires a case-by-case determination of state interests, but in a public health emergency, it is probably likely that the government will be able to show the risks of physically producing a witness to testify in the courtroom in most cases. And there is Covid case law which has held that the right to face-to-face confrontation was qualified by the risks that a witness would hazard by traveling and testifying in person --- and therefore that remote testimony did not violate the defendant's right to face-to-face confrontation. *See United States v. Donziger,* 2020 WL 5152162 (S.D.N.Y. Aug. 31, 2020) ("There is no question that limiting the spread of COVID-19 and protecting at-risk individuals from exposure to the virus are critically important public policies" and allowing a 70 year-old witness to testify remotely "rather than in person, which would require boarding a plane and spending at least two weeks in New York City, is needed to promote those important public policies.").[10]

The second responsive point to the right to face to face confrontation issue is that the question before the Committee is whether any *Evidence Rules n*eed to be amended to adjust to remote testimony. On that question, it appears that there would be very little for the Committee to do in addressing the limits of the Confrontation Clause on remote testimony, in an emergency or otherwise. The whole matter would be controlled by the Confrontation Clause, not by the Evidence Rules. And the issue for the Committee is whether certain evidence rules need to be *suspended* in an emergency --- not whether the Constitution prohibits the application of any Evidence Rules.

In sum, it is unlikely that an amendment addressing the constitution's impact on remote testimony in a criminal trial would be useful, and especially not so as part of any effort to address an emergency.

---

[9] See Justice Scalia's comment about the proposal to amend the Criminal Rules to allow for remote testimony at the government's election: "Virtual confrontation might be sufficient to protect virtual constitutional rights; I doubt whether it is sufficient to protect real ones." Order of the Supreme Court, 207 F.R.D. 89, 93 (2002).

[10] Covid has also been found a sufficient reason under *Craig* to justify an order that witnesses at a criminal trial wear a facemask. See *United States v. Crittenden*, 2020 WL 4917733 (M.D. Ga. Aug. 21, 2020)

## C. Positive Indications in the Evidence Rules Regarding Remote Testimony

So far the argument has been that nothing in the Evidence Rules specifically prohibits remote testimony. But there is more to it than that. In fact there are a number of affirmative indications in certain Evidence Rules that appear to embrace or at least to contemplate remote testimony.

### 1. Rule 611(a)

The most important Rule supporting the possibility of remote testimony is Rule 611(a), which provides as follows:

> **Rule 611. Mode and Order of Examining Witnesses and Presenting Evidence**
>
> **(a) Control by the Court; Purposes.** The court should exercise reasonable control over the ***mode*** and order of examining witnesses and presenting evidence so as to:
>
> **(1)** make those procedures effective for determining the truth;
>
> **(2)** avoid wasting time; and
>
> **(3)** protect witnesses from harassment or undue embarrassment.

The specific reference in Rule 611(a) to the "mode" of examining witnesses and presenting evidence appears to provide the court substantial discretion in deciding whether to permit remote testimony. The rule has been cited in pre-pandemic cases as a source of authority for allowing remote testimony on a showing of substantial need. For example, in the civil case of *Parkhurst v. Belt,* 567 F.3d 995 (8th Cir. 2009), the court held that the trial court was within its discretion under Rule 611(a) to allow for closed circuit television testimony to protect a child witness from trauma. As discussed above, the witness safety interests that are implicated in a public health emergency can be as serious as those associated with witness trauma. And there is other pre-pandemic case law relying on Rule 611(a) to allow remote testimony. *See, e.g., Jennings v. Bradley,* 419 Fed. App'x 594, 598 (6th Cir. 2011) (remote testimony allowed where three witnesses posed security threats while fourth witness would be deprived of necessary mental health support if forced to testify in person)); *Meirs v. Cashman,* 2018 WL 9815834 (W.D. Mich.) (allowing live video testimony from a witness who was incarcerated more than 100 miles from the courthouse; the court finding that live remote testimony was preferable to a *de bene esse* deposition).

So it is not surprising that there is authority under Rule 611(a) for ordering remote testimony during the pandemic. See *In re RFC & ResCap Liquidating Tr. Action*, 444 F. Supp. 3d 967 (D. Minn. 2020) (ordering remote testimony in light of Covid concerns of witnesses and counsel; relying on the good cause exception to Civil Rule 43 and stating that "the Court's discretion on this question is supplemented by its wide latitude in determining the manner in which

evidence is to be presented under the Federal Rules of Evidence" and citing Rule 611(a)). *See also Argonaut Insurance Company v. Manetta Enterprises, Inc.,* 2020 WL 3104033 (E.D.N.Y.) (relying on Rule 611(a) to order virtual testimony over the defendant's objection, due to the pandemic).

It follows that an emergency rule is not needed in the Evidence Rules, because Rule 611(a) gives the court discretion to adapt to an emergency by allowing remote testimony.

***Rule 611(a) Looking Forward***

All that said, the Committee might wish to consider a review of Rule 611(a) to see if any more structure and definition should be put into that rule --- as opposed to having a giant heaping mass of discretion allowing a court to do pretty much what it wants. One possibility that might be addressed to Covid-like situations is to *add* authority for judges to "protect the health or safety of the witnesses or other participants in the trial or hearing." By specifying more of what judges can do, there can be thought given to, perhaps, controlling some of the exercises of authority under Rule 611(a) that have been allowed. ***None of this means that an emergency rule is required.*** But perhaps the Committee can give some thought to how Rule 611(a) is working and whether it provides any limitations at all.

Per the Chair's request, the Reporter will prepare a memorandum on Rule 611(a) for the next meeting.

**2. Rule 804(a)(4) and (5)**

These provisions establish two grounds of unavailability for the Rule 804 exceptions. Rule 804(a)(4) provides a ground of unavailability for a declarant who "***cannot be present or testify*** at the trial or hearing because of . . . a then-existing infirmity [or] physical illness . . ." Thus the rule distinguishes between testimony and physical presence in the courtroom. What it means is that if a declarant is too infirm to travel to testify, that declarant is not unavailable if she can still provide remote testimony.[11]

Rule 804(a)(5) also distinguishes between "testimony" and physical presence in the courtroom. As such it affirmatively supports the argument that the Evidence Rules do not require all testimony to be made in the courtroom. Rule 804(a)(5) provides for a ground of unavailability for absence. It requires a showing that the declarant:

[11] This may be true even in criminal cases. If the witness is too infirm to be physically produced, remote testimony is likely to be permissible under the "state interest" analysis of *Craig*. *See United States v. Gigante*, 166 F.3d 75 (2nd Cir. 1999) (admission of witness's testimony via two-way, closed-circuit television from a remote location did not violate the defendant's Sixth Amendment right of Confrontation, where witness was fatally ill and could not travel). Also, if it is the accused who is arguing that a prosecution witness is not unavailable because he could testify remotely, that argument would probably be a waiver of the right to confrontation.

**(5)** is absent from the trial or hearing and the statement's proponent has not been able, by process or other reasonable means, to procure:

**(A)** the declarant's attendance, in the case of a hearsay exception under Rule 804(b)(1) or (6); or

**(B)** the declarant's ***attendance or testimony***, in the case of a hearsay exception under Rule 804(b)(2), (3), or (4).

So assume that a party has a hearsay statement that would be admissible as a declaration against interest under Rule 804(b)(3), and the party seeks to establish absence as the ground of unavailability. The party argues that the declarant is absent because he is unable to procure the declarant's physical attendance, as the declarant is outside the subpoena power. That argument is insufficient to establish absence, because the party must show that he is unable to procure physical presence ***or testimony.*** So if the declarant can be compelled to, or agrees to, testify remotely, the declarant is not absent. Thus, Rule 804(b)(5) posits that "testimony" can be presented outside the courtroom --- at least in the situation of Rule 804. More broadly, the distinction between "testimony" and physical presence in the courtroom shows an affirmative indication that the Evidence Rules pose no bar on remote testimony.

**3. Rule 804(b)(1)**

The hearsay exception for prior testimony also provides an affirmative indication that the Evidence Rules contemplate that "testimony" need not be testimony in the courtroom at the current trial. The rule provides an exception for "[t]estimony that . . . was given as a witness at a trial, hearing, or lawful deposition, whether given during the current proceeding or a different one."

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In sum, there is nothing in the Evidence Rules that requires witness testimony to be made physically in the courtroom. And there are some affirmative indications in the Evidence Rules that trial courts have discretion to order or allow remote testimony. That is why the Chair and Reporter concluded that the Evidence Rules did not need to be amended to cover emergencies like the pandemic.

## II. Looking Ahead to the Possibility of More Frequent Use of Remote Testimony

A question that has been much-discussed is whether virtual trials should continue to be held post-pandemic. Many have argued that virtual trials are a positive good in that they are cheaper, with no significant falloff in terms of fair adjudication. Without taking a position on the

merits of that contention, it is worth considering whether any Evidence Rules might need to be amended in the future to accommodate remote testimony *in a non-emergency situation*. [12]

On a first take, all the arguments in Part One are equally applicable to the question of virtual trials in a non-emergency: nothing in the Rules require testimony to be made physically in a courtroom, and Rule 611(a) provides the court broad discretion to allow remote testimony. So it would appear that no amendment is required to the Evidence Rules for the use of virtual testimony as a ready option even in the absence of an emergency. There would be hurdles on other fronts, though. Thus, Civil Rule 43 would have to be amended before remote testimony can become routine. Civil Rule 43 allows remote testimony only for good cause in "compelling circumstances and with appropriate safeguards." And of course in criminal cases the constitutional guarantee of the right to face to face confrontation would have a lot to say about routine use of remote testimony. Under *Coy*, supra, it is extremely unlikely that remote testimony offered against a criminal defendant will be admissible in a case that does not evolve an emergency or some other important state interest.

But let us assume that the Civil Rules are amended to allow more frequent use of remote testimony, and as to criminal cases, the question of remote testimony arises as to the defendant's witnesses. If virtual testimony is a ready option, is there anything in the Evidence Rules that must be adjusted?

One possibility would be to add language to Rule 611(a) that would specifically include remote testimony as a "mode" that the court could authorize. A counter to that proposal is that Rule 611(a) is intentionally written in very general language, to cover a myriad of issues in the presentation of evidence that the court may encounter (from allowing jurors to ask questions, to allowing illustrative aids, to altering the order of proof, etc.). It could be inconsistent with that general approach to add "ordering testimony by remote means" to the text. Second, it doesn't seem necessary given the fact that Civil Rule 43 would already have to be amended to allow for more frequent use of remote testimony – if the Civil Rule opens the floodgates, it would probably be duplicative for the Evidence Rules to add similar language.

Another possibility is to add to the definitions of Rule 101, in the manner that electronic information was addressed. See Rule 101(b)(6). It might read something like this:

> "A reference to any kind of witness testimony includes testimony given remotely [or, outside the courtroom]."

That amendment would need to be thought about carefully, because it ends up to be a complete equation of in-court and remote testimony. Arguably a trial court should have the

[12] It should be noted that virtual trials as a usual practice is not a near-future thing in the federal courts. Civil Rule 43 allows for remote testimony only upon good cause and in extraordinary circumstances, like a pandemic. There are no moves afoot to amend Rule 43 to allow for remote testimony as a matter of routine. And rules amendments take three years minimum to get enacted. And the timeline for criminal trials is surely longer, given concerns about the right to face-to-face confrontation.

So, what follows is essentially a thought experiment. You don't need to read any further if you are tired.

discretion (under Rule 611(a)) to require in-court testimony where it is convenient and more effective under the circumstances.

There are, however, two rules that might profit from an amendment if the use of remote testimony becomes more prevalent. In each of these rules, the choice would be not between remote and in-person testimony. Rather the choice would be between remote testimony and hearsay.

One such rule is Rule 804(a). One ground of unavailability should be narrowed if virtual testimony is a viable alternative to hearsay offered under Rule 804. Under Rule 804(a)(5), the ground of absence, a deposition is admissible as prior testimony if the proponent is unable to procure the declarant's "attendance." This is unlike the rule for declarations against interest, where absence is found by the absence of "testimony." If remote testimony becomes a thing, then there is a good argument that a deposition should not be admitted as prior testimony if the declarant at the time of trial is able to provide remote testimony. An amendment along these lines might look something like this:

> (5) is absent from the trial or hearing and the statement's proponent has not been able, by process or other reasonable means, to procure~~:~~
>
> ~~(A) the declarant's attendance, in the case of a hearsay exception under Rule 804(b)(1) or (6); or~~
>
> ~~(B)~~ the declarant's attendance or <u>remote</u> testimony~~, in the case of a hearsay exception under Rule 804(b)(2), (3), or (4)~~.

The second rule that might be affected by a ready possibility of remote testimony is Rule 807, the residual exception to the hearsay rule. Rule 807 admits trustworthy hearsay only if it is "more probative than any other evidence reasonably available." When that other evidence is from a witness, the argument that currently can be made is that the witness cannot be produced physically to testify, so the residual hearsay should be admitted. But if remote testimony is a viable alternative, then the statement offered as residual hearsay should not be admissible --- because the alternative is "reasonably available" when the witness could testify remotely. The question would then be whether Rule 807 should be amended to account for the possibility that remote testimony could be a reasonably available alternative. The answer is probably not --- the rule speaks to "reasonably available" alternatives and there is nothing in the text of that rule that would prevent a court from finding that remote testimony is reasonably available. Compare Rule 804(a)(5), which refers to "attendance" --- a word in text that would need to be amended to accommodate remote testimony.

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It must be emphasized that the effect of widespread remote testimony on the Evidence Rules is the subject of a long-term investigation --- it anticipates that remote testimony will become coin of the realm (which is not a foregone conclusion) and it is dependent on changes outside the Evidence Rules. But the bottom line appears to be that the Evidence Rules are in large part flexible enough to accommodate regular use of remote testimony, with at most one minor rule requiring some possible adjustment.

# TAB 6

**FORDHAM**

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Memorandum To: Advisory Committee on Evidence Rules
From: Daniel J. Capra, Reporter
Re: Circuit Splits on Interpreting Evidence Rules
Date: October 1, 2020

In 2002, the Evidence Rules Committee undertook a project to discover and analyze circuit splits in courts' interpretation of the Federal Rules of Evidence. The rationale for the project was that if there is a circuit split on a particular rule of evidence, that may well be a good reason for proposing an amendment for rectifying a split. After all, they are supposed to be the *Federal* Rules of Evidence, and one of the main reasons for codification was to provide uniform rules for the entire country. [1]

The 2002 project uncovered about 15 rules on which the circuits reached different interpretations. The Advisory Committee found that the benefits of rectifying most of those splits was outweighed by the dislocation costs of proposing an amendment --- mostly this was because the problem that gave rise to the split did not arise very often. The project did lead to the amendment of several rules, however. Rules 404, 406, 606(b), and 608 were amended in the period between 2003 and 2006. Other splits recognized back then took longer to rectify --- Rule 804(b)(3) was amended in 2010, and Rule 801(d)(1)(B) was amended in 2014. And one of the splits raised

[1] Indeed Judge Becker's famous article on circuit splits under the Federal Rules of Evidence was instrumental in Chief Justice Rehnquist's decision to reconstitute the Advisory Committee, after it had been disbanded in 1975. *See* Edward R. Becker & Aviva Orenstein, *The Federal Rules of Evidence After Sixteen Years: The Effect of "Plain Meaning" Jurisprudence, the Need for an Advisory Committee on the Rules of Evidence, and Suggestions for Selective Revision of the Rules*, 60 Geo. Wash. L. Rev. 857, 892 (1992).

in the 2002 project --- the conflict regarding the rule of completeness, Rule 106 --- is being considered by the Committee right now.[2]

Because the rules currently being considered by the Committee --- 106, 615, and 702 --- are nearing a final resolution, I thought it might be useful to revisit the question of circuit splits to see if there are any rules that might be put on the agenda going forward.[3]

This memo provides a short-ish introduction to the circuit splits that I have found in the current rules.[4] The goal is to let the Committee know about the split and to provide some preliminary analysis --- and where appropriate to set out some possible language for an amendment, to assist the Committee in its review. If the Committee decides that any of these splits justifies further inquiry, then a full memo on the subject will be prepared for the next meeting.[5]

## I. Expert Testimony on the Unreliability of Identification Evidence

There are conflicting decisions among the circuit courts as to the admissibility of expert testimony on eyewitness identification. The applicable rules are 403 and 702. Under Rule 403, the question is whether the probative value of the expert testimony is substantially outweighed by its prejudicial and confusing effect on juries. The question under Rule 702 is whether the expert is testifying to a subject matter on which the jury needs assistance.

A number of circuits have upheld their trial courts' exclusion of this type of expert testimony under either Rule 403 or 702.[6] In many instances, the Rule 403 analysis is bolstered by a trial judge's comprehensive jury instruction as a less costly alternative to expert testimony about the unreliability of identification evidence.[7] Other courts have found that expert testimony on eyewitness identification can fail under Rule 702 alone without need for a Rule 403 balancing ---

[2] They say one of the virtues of the rulemaking process is that it is deliberate, meaning slow. The history recounted here is a testament to that.

[3] Many thanks to Cameron Molis, Columbia '21, for his outstanding work on this project.

[4] There may well be others. Whether there is a "split" is often a matter of judgment.

[5] This memo does not discuss the circuit splits involving Rules 106, 615 and 702 --- as those splits are currently being considered by the Committee.

[6] *See, e.g.*, *United States v. Fosher,* 590 F.2d 381, 383–84 (1st Cir. 1979) (finding the trial court's 403 balancing was not an abuse of discretion); *United States v. Rincon*, 28 F.3d 921, 923–26 (9th Cir. 1994) (holding it was not error for district court to exclude under Rules 403 and 702); *United States v. Kime*, 99 F.3d 870, 884 (8th Cir. 1996) (same)); *United States v. Curry,* 977 F.2d 1042, 1052 (7th Cir. 1992) (same).

[7] *See Fosher*, 590 F.2d at 382; *Rincon*, 28 F.3d at 925-26; *Kime*, 99 F.3d at 883.

because the topic of identification is purportedly one on which the jury does not need assistance.[8] Courts also express concern that expert testimony about identification might intrude on the jury's prerogative of determining the credibility of identification witnesses.[9]

Other circuits reach the opposite conclusion, either upholding admission or finding error in exclusions of expert testimony on eyewitness identification.[10] While it is possible that these opposing outcomes are indicative of a split in the courts, some cases on this side of the divide make an effort to distinguish their facts from cases which resulted in the exclusion of eyewitness experts. In *United States v. Smith* for example,[11] the Sixth Circuit declared that the trial court's expert did not have the same shortcomings as the excluded expert in *United States v. Fosher*[12] because this expert provided a far more specific analysis of eyewitness identification reliability in situations identical to facts of the instant case and offered evidence to support the scientific acceptance of his research.[13] But some of the dispute is not fact-based. Thus, in *United States v. Downing*, 753 F.2d 1224, 1243 (3d Cir. 1985), the Third Circuit explicitly identified its disagreement with cases like *Thevis* and *Fosher* when it noted that the concern over the creation of a "cottage industry" of psychological experts battling it out in criminal court was not a sufficient reason to exclude experts on the unreliability of identification evidence. Added to the mix is a report from the National Academy of Sciences advocating that expert testimony on the unreliability of identification methods should be admitted more often than it is by federal courts, because it is based on reliable studies, and it could assist the jury in assessing the reliability of the identification.[14]

It is fair to state that there are differing attitudes in the courts about the admissibility of expert testimony on the unreliability of identifications. While this is a problem, it is unclear whether it should be remedied by an amendment to the Evidence Rules. It would surely be problematic to amend either Rule 403 or 702 to treat identification testimony specifically. Just two

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[8] *See, e.g.*, *Curry*, 977 F.2d at 1051 (noting that "the jury is generally aware of the problems with identification."); *United States v. Lumpkin*, 192 F.3d 280, 289 (2d Cir. 1999) (district court did not err in excluding expert testimony on Rule 702 grounds); *United States v. Thevis*, 665 F.2d 616, 641 (5th Cir. 1982) (same).

[9] *See Rincon*, 28 F.3d at 926; *Lumpkin*, 192 F.3d at 289.

[10] *See United States v. Mathis,* 264 F.3d 321, 339–40 (3d Cir. 2001) (reversing trial court's decision to exclude such testimony as abuse of discretion); *United States v. Smith*, 736 F.2d 1103, 1107 (6th Cir. 1984) (finding potential error in excluding expert but also finding any error to be harmless).

[11] 736 F.2d 1103 (6th Cir. 1984).

[12] 590 F.2d 381 (1st Cir. 1979).

[13] *See Smith*, 736 F.2d at 1106–07.

[14] See https://www.innocenceproject.org/national-academy-of-sciences-issues-landmark-report-on-memory-and-eyewitness-identification/

years ago, the Committee decided that it would not propose a rule that would cover forensic evidence specifically, as that is not what the Evidence Rules do. And testimony on identifications is even narrower than testimony on forensics.

Perhaps the Committee should start thinking about adding another Article to the Evidence Rules that would address very specific problem areas. Sometimes it might be necessary to solve specific problems that can't be solved in the broad language of the existing rules.

It should be noted that many of the states have rules on particularized matters that are not treated in the Federal Rules of Evidence. Specifically with regard to identification evidence, **Utah Rule of Evidence 617** provides as follows:

> In cases where eyewitness identification is contested, the court shall exclude the evidence if the party challenging the evidence shows that a factfinder, considering the factors in this subsection (b), could not reasonably rely on the eyewitness identification. In making this determination, the court may consider, among other relevant factors, expert testimony and other evidence on the following:
>
> (1) Whether the witness had an adequate opportunity to observe the suspect committing the crime;
>
> (2) Whether the witness's level of attention to the suspect committing the crime was impaired because of a weapon or any other distraction;
>
> (3) Whether the witness had the capacity to observe the suspect committing the crime, including the physical and mental acuity to make the observation;
>
> (4) Whether the witness was aware a crime was taking place and whether that awareness affected the witness's ability to perceive, remember, and relate it correctly;
>
> (5) Whether a difference in race or ethnicity between the witness and suspect affected the identification;
>
> (6) The length of time that passed between the witness's original observation and the time the witness identified the suspect;
>
> (7) Any instance in which the witness either identified or failed to identify the suspect and whether this remained consistent thereafter;
>
> (8) Whether the witness was exposed to opinions, photographs, or any other information or influence that may have affected the independence of the witness in making the identification; and

(9) Whether any other aspect of the identification was shown to affect reliability.

On the merits, there is much to be said for allowing more expert testimony on the unreliability of identification evidence. First, the contention that the jury understands that identification testimony can be unreliable has not been verified by any study and in fact is undermined by the many wrongful convictions based on eyewitness testimony. But even if that general proposition is true, an expert's testimony can still be helpful. The expert can explain *why* the identification procedure used in the case raises reliability questions. This type of expert testimony is used in many state courts, and as stated above, the National Academies of Science advocates more widespread use of expert testimony in identification cases. Moreover, as the Rule 702 memo to the Committee notes, the courts are quite receptive to rather dubious forensic expert testimony offered by the government. It seems inconsistent to have a restrictive attitude to expert testimony offered by the defendant on the unreliability of identification evidence, which is based on dozens of valid empirical studies.

If the Committee is interested in pursuing either an amendment on identification evidence, or more broadly a new Evidence article on specific rules, I will prepare a detailed memo for the next meeting.

## II. Rule 407 --- Does It Exclude Subsequent Changes in Contract Cases?

The courts are divided on whether changes in contract or policy language should be protected by Rule 407 as a subsequent remedial measure. To take an example, assume that an employee has signed a form contract, and claims that a certain clause supports his claim for overtime. The employer disagrees with that interpretation. The employee wishes to introduce the fact that after he brought his breach of contract action, the employer changed the language of the form contract to sharpen it, in a way that would have terminated the plaintiff's claimed interpretation. This is offered as proof that the employer recognized the strength of the plaintiff's interpretation. The Third, Fourth, Seventh, and Tenth Circuits have held that Rule 407 does apply to altered contract or policy language in breach of contract or warranty cases.[15] These courts have viewed changes in advertised language on a website, policy language in a contract, and terms in

[15] *See Reynolds v. Univ. of Pa*., 483 F. App'x 726, 733 (3d Cir. 2012) (finding no abuse of discretion in applying FRE 407 to evidence of changed website language in a breach of contract claim); *Dennis v. Cty. of Fairfax*, 55 F.3d 151, 153–54 (4th Cir. 1995) (applying FRE 407 to exclude evidence that a payment limitation was discontinued in a case alleging breach of contract due to an unjustified application of the limitation); *Pastor v. State Farm Mut. Auto. Ins. Co.*, 487 F.3d 1042, 1045 (7th Cir. 2007) (applying Rule 407 to evidence of a changed insurance policy in a breach of contract claim).

insurance offerings as subsequent remedial measures excludable by FRE 407. By contrast, the Eighth Circuit and district courts from the First, Seventh, and Eleventh Circuits have all refused to exclude this type of changed language in breach of contract or warranty cases, because such financial injuries do not appear to be within the concern of Rule 407, which speaks in the tort-based terms of "fault." [16]

On the merits, there is an argument that the policy of Rule 407 should apply to contractual changes. The policy of Rule 407 is to avoid a disincentive to fix something for fear that the fix will be used against you at trial. In contract cases, the drafter of the contract may be deterred from improving it for fear that the improvement will be used against him at trial. On the other hand, the policy basis of Rule 407 is probably pretty weak in most cases, because defendants would fix things anyway --- even without the protection of the rule --- for fear that not fixing them will lead to future injuries. So there is an argument that it is a bad idea to extend a weak policy basis to a different fact situation --- to throw good money after bad, so to speak.

There is also a distinction in the context of tort and contract claims as applied to Rule 407. In the tort case, the plaintiff is saying, "if you fixed it before, I wouldn't have lost my leg in the lawnmower." In the contract case, the plaintiff is saying, "if you fixed the contract, I wouldn't have had a breach of contract" but what he is also saying is that "if you fixed the contract, I wouldn't have the right I am claiming now." Which is weird.

If the rule were to be amended to specifically cover contract actions, it might look like this:

**Rule 407. Subsequent Remedial Measures**

When measures are taken that would have made an earlier injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove:

- negligence;
- culpable conduct;
- a defect in a product or its design; ~~or~~
- a need for a warning or instruction; or
- a breach of contract.

[16] *See R.W. Murray, Co. v. Shatterproof Glass Corp.*, 758 F.2d 266, 274 (8th Cir. 1985) (finding 407 inapplicable where no negligence or culpable conduct finding is required); *Mowbray v. Waste Mgmt. Holdings, Inc.*, 45 F.Supp.2d 132, 141 (D. Mass. 1999) (finding Rule 407 to be inapplicable to breach of warranty cases because no proof of culpability or mental state are required); *All the Chips, Inc. v. OKI Am., Inc.,* 1990 WL 36860, at *4 (N.D. Ill.) (holding that since breach of contract requires no showing of any sort of fault, it negates the operation of Rule 407); *Smith v. Miller Brewing Co. Health Benefits Program*, 860 F. Supp. 855, 857 n.1 (M.D. Ga. 1994) ("[W]hen the dispute concerns the terms of a contract, changes in the language that make the intent of the drafter clearer, the court should consider that change in evaluating the disputed term.").

But the court may admit this evidence for another purpose, such as impeachment or — if disputed — proving ownership, control, or the feasibility of precautionary measures.

Another possibility would be to amend Rule 407 to *preclude* its use in contract actions. You could start the rule with a qualifier like, "In personal injury actions" --- for example.

## III. Rule 609(a), Theft-based Convictions

Rule 609(a)(2) provides that felonies involving a "dishonest act or false statement" are automatically admissible to impeach the character for truthfulness of any witness. Crimes covered under this subdivision obviously include perjury and fraud. You have to lie to be convicted of those crimes. The Committee Note to the 1990 amendment to Rule 609 (which corrected an error about how the rule would apply in civil cases) mentions that some decisions had taken "an unduly broad view of 'dishonesty'--- admitting convictions such as for bank robbery or bank larceny." The Note indicates, however, that the Committee had decided not to amend the rule to address those decisions, even though they were wrong. It concluded that the legislative history provided sufficient guidance, because it states that admissibility under Rule 609(a)(2) is for crimes that require a lie for conviction.

Rule 609 was subsequently amended in 2006 (to prevent convictions from being automatically admitted merely because the witness lied at some point in committing the crime). The Committee Note to the 2006 amendment to the Rule emphasizes that the crimes covered by Rule 609(a)(2) are only those "in which the ultimate criminal act was itself an act of deceit."

Despite these two Committee Notes, there is still a small minority of courts that have held that theft-based crimes are automatically admissible, even though a person does not have to lie to commit them. [17] But the vast majority of courts has found that theft-based crimes are not automatically admissible under Rule 609(a)(2), and so are admissible only if they satisfy the balancing tests of Rule 609(a)(1) (and are felonies, as required by that subdivision).[18]

[17] *See United States v. Carden,* 529 F.2d 443, 446 (5th Cir. 1976) (conviction for petty larceny is automatically admissible under Rule 609(a)(2)); *United States Xpress Enters. v. J.B. Hunt Transp.*, 320 F.3d 809, 816-817 (8th Cir. 2003) (conviction for receipt of stolen property is automatically admissible under Rule 609(a)(2)); *United States v. Brown,* 603 F.2d 1022 (1st Cir. 1979) (burglary and petty larceny are automatically admitted under Rule 609(a)(2)).

[18] *See United States v. Grandmont*, 680 F.2d 867, 871 (1st Cir. 1982) ("We agree with defendant that robbery per se is not a crime of dishonesty within the meaning of 609(a)(2)."); *United States v. Hayes*, 553 F.2d 824, 827 (2d Cir. 1977) (crimes of stealth --- burglary and petty larceny --- are not within Rule 609(a)(2)); *United States v. Foster*, 227

On the merits, it is clear that theft convictions should not be automatically admissible. There is plenty in the legislative history, and the common law, to indicate that automatic admissibility is for crimes involving active lying only. A strict construction of Rule 609(a)(2) is sound policy: Because almost every criminal act is in some sense a dishonest act in either preparation or execution, a broad construction of Rule 609(a)(2) would swallow up Rule 609(a)(1) and would lead to mandatory admission of almost all prior convictions --- even though many of these convictions would have slight probative value as to the witness's character for truthfulness, and would carry significant prejudicial effect. Given the predominance of the Rule 403 balancing approach throughout the Federal Rules and the general grant of discretion that the rules provide to trial judges, it makes sense to limit where possible a rule that mandates admission and thus prohibits the use of judicial discretion and balancing. As the D.C. Circuit Court of Appeals has stated:

> Rule 609(a)(2) is to be construed narrowly; it is not carte blanche for admission on an undifferentiated basis of all previous convictions for purposes of impeachment; rather, precisely because it involves no discretion on the part of the trial court, Rule 609(a)(2) must be confined to a narrow subset of crimes—those that bear directly upon the accused's propensity to testify truthfully.

*United States v. Fearwell,* 595 F.2d 771, 777 (D.C. Cir. 1978).

The question is whether Rule 609(a)(2) should be amended to clarify that theft-based crimes are not included. Cutting against an amendment is the fact that the Advisory Committee twice passed on dealing with the problem even though it was amending the rule in other respects. The case law is not different now than it was back then --- there are only a few reported cases in which theft-based crimes have been found automatically admissible. However, if the Committee thinks that it is finally time to treat theft-based convictions specifically in the rule, in might be amended like this:

> (2) for any crime regardless of the punishment, the evidence must be admitted if the court can readily determine that establishing the elements of the crime required proving — or the witness's admitting — a dishonest act or false statement. <u>For purposes of this rule, an act of theft may not be treated as a dishonest act or false statement.</u>

F.3d 1096, 1100 (9th Cir. 2000) (holding that like shoplifting, burglary, grand theft, and bank robbery, receipt of stolen property is not per se a crime of dishonesty for purposes of Rule 609(a)(2)); *United States v. Smith*, 179 U.S. App. D.C. 162, 551 F.2d 348, 362 (1976) (attempted robbery does not involve dishonesty or a false statement); *United States v. Washington*, 702 F.3d 886 (6th Cir. 2012) (theft of services was not automatically admissible to impeach, because it was a crime of stealth, not a crime involving an active element of misrepresentation); *United States v. Johnson,* 388 F.3d 96 (3d Cir. 2004) (conviction for purse snatching was improperly admitted under Rule 609(a)(2)).

## IV. Rule 609(b), Timing of the Conviction

Rule 609(b) provides a more exclusionary test for old convictions that are offered to impeach a witness's character for truthfulness. Admitting an old conviction requires the court to find that "its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect." (This is the reverse of the Rule 403 test.)

Timing is important because if the conviction is covered by Rule 609(b), the balancing test is tilted toward exclusion. But if the conviction is instead covered by Rule 609(a), then: 1) falsity-based convictions are automatically admissible; 2) non-falsity based convictions against a criminal defendant are admissible if the probative value outweighs prejudice; and 3) non-falsity based convictions of all other witnesses are covered by the inclusive Rule 403 test.

"Old" in Rule 609(b) means that "more than 10 years have passed since the witness's conviction or release from confinement for it, whichever is later." So we know what the starting point is. But the rule does not speak to the endpoint. In response to this ambiguity, courts have adopted at least three different approaches for marking the endpoint. The Third, Fifth, Seventh, Eighth, and Ninth Circuits have each stated that the endpoint is the date the trial in question begins.[19] In contrast, the Fifth Circuit (in conflict with another panel) and various district courts have ended the measuring period on the date the relevant witness testifies.[20] Finally, the Seventh and Eighth Circuit have also, on occasion, marked the endpoint as the date on which the offense being litigated was committed.[21]

This is a pretty narrow question. It clearly does not come up often --- it involves only a witness whose conviction's timing is so close to ten years as to fall off the 609(a) cliff somewhere between the offense and the testimony.

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[19] *See United States v. Hans,* 738 F.2d 88, 93 (3d Cir. 1984) (measuring whether conviction/release "occurred within 10 years of the trial"); *United States v. Rubio-Gonzalez*, 674 F.2d 1067, 1075 (5th Cir. 1982) (measuring "ten years prior to trial"); *United States v. Thompson*, 806 F.2d 1332, 1339 (7th Cir. 1986); United States v. Cobb, 588 F.2d 607, 612 n.5. (8th Cir. 1978) (measuring until "the date of [defendant's] trial"); *United States v. Portillo*, 633 F.2d 1313, 1323 n.6. (9th Cir. 1980) (measuring until "the time of trial").

[20] *See United States v. Cathey*, 591 F.2d 268, 274 (5th Cir. 1979); *United States v. Pettiford*, 238 F.R.D. 33, 37 (D.D.C. 2006); *Kiniun v. Minn. Life Ins. Co.*, 2013 U.S. Dist. LEXIS 196081, at *12 n.10 (N.D. Fla.); *United States v. Bro*wn, 409 F. Supp. 890, 894 (W.D.N.Y. 1976).

[21] *See United States v. Foley*, 683 F.2d 273, 277 (8th Cir. 1982); *Rodriguez v. United States,* 286 F.3d 972, 983 (7th Cir. 2002).

If, however, the Committee is interested in clarifying the timing question, it would seem that the date of the witness's testimony is the best fit with the policy of Rule 609. Rule 609 allows convictions for impeachment of the witness's character for truthfulness – the relevant time for that assessment by the factfinder is *when the witness testifies.* It is true that a person's character for truthfulness is unlikely to change much between the time the trial starts and the time she testifies. But Congress made two relevant determinations: 1. The older the conviction, the less probative it is of the witness's character for truthfulness at the time she testifies; and 2. Instead of having the date of the conviction factor into its probative value in every case, it was better to have a bright-line ten-year rule, whereupon probative value falls off a cliff. So given those determinations, it seems appropriate to assess the age of the conviction at the time the witness testifies. (Certainly setting the timing as of the crime charged in the case makes no sense).

There is a risk, though, if the relevant date is the date of testimony. A party who has a witness with a 9 year 360 day-old conviction and wants to protect their witness may delay their testimony until after the 10-year clock runs out. But that same strategic thinking might occur with the trial date. And in any case, this is a scenario that would seem quite rare.

If the Committee does wish to deal with the Rule 609(b) timing question, the change might look like this:

**(b) Limit on Using the Evidence After 10 Years.** This subdivision (b) applies if, on the day the witness first testifies, more than 10 years have passed since the witness's conviction or release from confinement for it, whichever is later. Evidence of the conviction is admissible only if:

**(1)** its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect; and

**(2)** the proponent gives an adverse party reasonable written notice of the intent to use it so that the party has a fair opportunity to contest its use.

## V. Rule 613(b) --- Laying a Foundation with the Witness

Under common law, a party seeking to impeach a witness with a prior inconsistent statement was required to lay a foundation for the statement before introducing it. This was referred to as "the rule in Queen Caroline's case." That rule required the cross-examining party to

confront the witness directly on cross-examination with the inconsistent statement. At that point, the witness would have an opportunity to admit, explain, repudiate, or deny the statement. If the witness denied making the statement, then the trial court could in its discretion permit the cross-examining party to prove through extrinsic evidence that the statement was made.

Rule 613(b), on its face, changes the common-law foundation requirements. The rule provides that when a witness is examined concerning a prior statement, this statement need not be shown to the witness at the time of the examination. However, extrinsic evidence of the statement may not be introduced unless the witness is given some opportunity, *at some point in the trial*, to explain, repudiate, or deny the statement.[22] Assuming such an opportunity has been provided, extrinsic evidence of the statement is admissible subject to Rule 403.[23]

Despite the language of the rule and the apparent intent of the drafters, many federal courts have held that Rule 613(b) *does not* abolish the traditional common-law requirement of laying a foundation with the witness prior to the introduction of a prior inconsistent statement. [24] Other federal courts apply the rule as written and hold that a prior foundation is not required.[25] Yet even

[22] *See, e.g., United States v. McCall*, 85 F.3d 1193 (6th Cir. 1996) (no error when the government in rebuttal introduced extrinsic evidence of a defense witness's prior inconsistent statement; while the prosecution did not confront the witness with the prior statement, the defense could have recalled the witness and did not, choosing instead to argue that the government's impeachment attempt was a failure); *United States v. Hudso*n, 970 F.2d 948 (1st Cir. 1992) (foundation for admitting extrinsic evidence of a prior inconsistent statement does not require that the witness have an opportunity to explain or deny the statement before it is introduced; all that is required is that the witness at least be available for recall during the course of the trial; a trial court can exercise its discretion to require a prior confrontation, but here the court labored under a misapprehension of law that a prior confrontation was always required; therefore it was reversible error to exclude a prior inconsistent statement of a government witness on the ground that the witness was not confronted with the statement before it was proffered).

[23] *See, e.g., United States v. Watkins*, 591 F.3d 780 (5th Cir. 2009) (after a witness denies making a statement during cross-examination, evidence may be introduced to prove the statement was made, subject to Rule 403); *United States v. Mez*a, 701 F.3d 411, 426 (5th Cir. 2012) (no error in allowing the prosecution to introduce extrinsic evidence of a prior inconsistent statement where the witness conceded making the statement but attempted to explain it away: Rule 613(b) "makes no exception for prior inconsistent statements that are explained instead of denied").

[24] The following cases are among those that retain the common-law rule: *United States v. DiNapoli*, 557 F.2d 962 (2d Cir. 1977); *United States v. Su*tton, 41 F.3d 1257 (8th Cir. 1994) (the trial judge properly excluded testimony as to inconsistent statements by a prosecution witness on the ground that the witness had not been given an opportunity to explain or deny the prior statement while on the witness stand); *United States v. Cutler*, 676 F.2d 1245 (9th Cir. 1982); *United States v. Bonnett*, 877 F.2d 1450, 1462 (10th Cir. 1989) ("before a prior inconsistent statement may be introduced, the party making the statement must be given the opportunity to explain or deny the same").

[25] The following cases are among those holding that Rule 613(b) dispenses with a general prior foundation requirement: *United States v. McGuire*, 744 F.2d 1197 (6th Cir. 1984); *United States v. Young*, 86 F.3d 944 (9th Cir. 1996) (rejecting the argument that an inconsistent statement was inadmissible because no foundation was laid on cross-examination; all that is required is that the witness have an opportunity to explain or deny the statement at

those courts that read the rule to dispense with a prior foundation requirement nonetheless recognize that a trial court has the power to control the order of proof under Rule 611(a), and that this power can be exercised on a case-by-case basis to require a prior foundation before admitting extrinsic evidence of an inconsistent statement. As the First Circuit stated in *United States v. Hudson,* 970 F.2d 948, 956 n.2 (1st Cir. 1992): "Rule 611(a) allows the trial judge to control the mode and order of interrogation and presentation of evidence, giving him or her the discretion to impose the common-law prior foundation requirement when such an approach seems fit." The *Hudson* Court concluded that Rule 613 "was not intended to eliminate trial judge discretion to manage the trial in a way designed to promote accuracy and fairness." *See also United States v. Marks,* 816 F.2d 1207, 1211 (7th Cir. 1987) (trial judge is entitled despite Rule 613 "to conclude that in particular circumstances the older approach should be used in order to avoid confusing witnesses and jurors").

In the end, given the discretion allowed under Rule 611(a), there is not much daylight between the courts that retain the common law approach and the courts that follow the more liberal approach of the text of Rule 613(b). And as a practical matter, in most cases of prior inconsistent statement impeachment, the foundation will be developed in the same manner as it is in the traditional common-law jurisdiction. That is because laying the foundation while the witness is on the stand testifying will usually prove to be the most efficient way of proceeding. For one thing, presenting the statement to the witness may be needed to satisfy authentication or best evidence concerns. And at any rate it may be risky to dispense with a prior foundation, because the witness could become unavailable before the statement is proffered. If that occurs, the admissibility of the extrinsic evidence is subject to the discretion of the court; and that discretion is rarely exercised in favor of a party who had a chance to confront the witness with the statement and did not do so.[26]

The Eleventh Circuit noted the prudence of adhering to the common-law procedure as a practical matter in *Wammock v. Celotex Corp.,* 793 F.2d 1518, 1522 (11th Cir. 1986):

> Rule 613(b) does not supplant the traditional method of confronting a witness with his inconsistent statement prior to its introduction as the preferred method of proceeding. In fact, where the proponent of the testimony fails to do so, and the witness subsequently

some point, and such an opportunity can be provided by recalling the witness); *Wammock v. Celotex Corp.,* 793 F.2d 1518 (11th Cir. 1986) (noting, however, that prior foundation is the preferred method).

[26] See, e.g., *United States v. Schnapp,* 322 F.3d 564 (8th Cir. 2003) (no error in prohibiting the defendant from introducing an inconsistent statement from a prosecution witness; counsel had not asked the witness about the statement either on cross-examination or when recalled by the defense, and it was well within the judge's discretion not to permit deviation from the traditional procedure of providing a witness an opportunity to explain or deny the statement); *In re Nautilus Motor Tanker Co.*, 862 F. Supp. 1251 (D.N.J. 1994) (inconsistent statements are not admissible where the plaintiff did not try to offer them until the end of the trial, and at that point there was no opportunity to recall the witnesses; the court chose not to exercise its discretion to dispense with the witness's explanation or denial).

becomes unavailable, the proponent runs the risk that the court will properly exercise its discretion to not allow the admission of the prior statement. For this reason, most courts consider the touchstone of admissibility under rule 613(b) to be the continued availability of the witness for recall to explain the inconsistent statements.

On the merits, the more flexible foundation requirements established by the text of Rule 613(b) were a good faith attempt to deal with some legitimate problems. The common-law rule is in some cases a trap for the unwary: (1) statements might be excluded due to an inadvertent failure to lay a foundation at the time the witness testifies; (2) problems are presented when inconsistent statements are discovered after the witness testifies; and (3) there is the danger under the common-law rule of prematurely alerting collusive witnesses to the evidence available for impeachment.

However, these problems could probably be better handled by adding to the standard common-law rule a sentence allowing the trial court the discretion to dispense with the traditional foundation requirement when that is necessary in the interests of justice. This would be a solution similar to that provided in Rule 611(b), which recognizes the merits of the common-law rule of scope limitations on cross-examination, but which nonetheless permits the trial court in its discretion to dispense with the rule in appropriate circumstances.

Moreover, for whatever problems arise in the common-law regime, the prior foundation requirement has its virtues. For example, it avoids the cost and delay of providing extrinsic evidence of the prior inconsistent statement if the witness, when confronted with it, admits having made it. Also, it avoids a certain type of trial-by-ambush. Judge Selya, concurring in *United States v. Hudson*, 970 F.2d 948, 959 (1st Cir. 1992), has summarized the virtues of the common-law approach as follows:

> [The common-law rule] works to avoid unfair surprise, gives the target of the impeaching evidence a timely opportunity to explain or deny the alleged inconsistency, facilitates judges' efforts to conduct trials in an orderly manner, and conserves scarce judicial resources. At the same time, insistence upon a prior foundational requirement, subject, of course, to relaxation in the presider's discretion if the interests of justice otherwise require, does not impose an undue burden on the proponent of the evidence.

If the Committee decides to consider come kind of amendment to deal with whatever dispute in the courts exists regarding Rule 613(b), the question is what such an amendment might look like. If the problem is that some courts are not adhering to the explicit language of the rule, and the Committee thinks that they should be doing so, then there is not really much to be done

about that.[27] But if the problem is that the Rule itself has made the wrong choice, and that there should be a return to the common-law rule (while allowing for some flexibility) then the rule might be amended as follows:

> **(b) Extrinsic Evidence of a Prior Inconsistent Statement.** Extrinsic evidence of a witness's prior inconsistent statement ~~is admissible only if~~ should not be admitted unless the witness is given an opportunity to explain or deny the statement before it is introduced. But the court may in its discretion delay the witness's opportunity to explain or deny the statement. ~~and an adverse party is given an opportunity to examine the witness about it, or if justice so requires~~. This subdivision (b) does not apply to an opposing party's statement under Rule 801(d)(2).

## VI. Rule 701 – The Line Between Lay and Expert Testimony

In 2000, Rule 701 was amended to address the problem of parties calling expert witnesses but styling them as lay witnesses. The Advisory Committee determined that it was an abuse to evade the requirements of Rule 702 (and its accompanying disclosure requirements) by offering expert testimony in lay clothing. Rule 701 was amended to provide that testimony of a fact witness was regulated by Rule 702 to the extent that it was based on "scientific, technical, or other specialized knowledge" --- drawing that phrase from Rule 702. The Committee was quite aware that the line between expert and lay testimony is often fuzzy --- and that the term "specialized knowledge" was subject to differing interpretations. The Committee Note to the 2000 amendment attempted to provide some guidance:

> Rule 701 has been amended to eliminate[28] the risk that the reliability requirements set forth in Rule 702 will be evaded through the simple expedient of proffering an expert in lay witness clothing. Under the amendment, a witness' testimony must be scrutinized under the rules regulating expert opinion to the extent that the witness is providing testimony based on scientific, technical, or other specialized knowledge within the scope of Rule 702. *See generally Asplundh Mfg. Div. v. Benton Harbor Eng'g,* 57 F.3d 1190 (3d Cir. 1995). By channeling testimony that is actually expert testimony to Rule 702, the amendment also ensures that a party will not evade the expert witness disclosure requirements set forth in Fed.R.Civ.P. 26 and Fed.R.Crim.P. 16 by simply calling an expert witness in the guise of a layperson. See Joseph, Emerging Expert Issues Under the 1993

[27] The situation is unlike the problem with Rule 702, where some courts have ignored the fact that the admissibility requirements must be proved by a preponderance of the evidence. The preponderance of the evidence standard is not explicitly placed in the text of Rule 702.

[28] That turned out to be overly optimistic.

Disclosure Amendments to the Federal Rules of Civil Procedure , 164 F.R.D. 97, 108 (1996) (noting that "there is no good reason to allow what is essentially surprise expert testimony," and that "the Court should be vigilant to preclude manipulative conduct designed to thwart the expert disclosure and discovery process"). See also *United States v. Figueroa-Lopez*, 125 F.3d 1241, 1246 (9th Cir. 1997) (law enforcement agents testifying that the defendant's conduct was consistent with that of a drug trafficker could not testify as lay witnesses; to permit such testimony under Rule 701 "subverts the requirements of Federal Rule of Criminal Procedure 16 (a)(1)(E)").

The amendment does not distinguish between expert and lay witnesses, but rather between expert and lay testimony. Certainly it is possible for the same witness to provide both lay and expert testimony in a single case. *See, e.g., United States v. Figueroa-Lopez*, 125 F.3d 1241, 1246 (9th Cir. 1997) (law enforcement agents could testify that the defendant was acting suspiciously, without being qualified as experts; however, the rules on experts were applicable where the agents testified on the basis of extensive experience that the defendant was using code words to refer to drug quantities and prices). The amendment makes clear that any part of a witness's testimony that is based upon scientific, technical, or other specialized knowledge within the scope of Rule 702 is governed by the standards of Rule 702 and the corresponding disclosure requirements of the Civil and Criminal Rules.

The amendment is not intended to affect the "prototypical example[s] of the type of evidence contemplated by the adoption of Rule 701 relat[ing] to the appearance of persons or things, identity, the manner of conduct, competency of a person, degrees of light or darkness, sound, size, weight, distance, and an endless number of items that cannot be described factually in words apart from inferences." *Asplundh Mfg. Div. v. Benton Harbor Eng'g,* 57 F.3d 1190, 1196 (3d Cir. 1995).

For example, most courts have permitted the owner or officer of a business to testify to the value or projected profits of the business, without the necessity of qualifying the witness as an accountant, appraiser, or similar expert. *See, e.g., Lightning Lube, Inc. v. Witco Corp*. 4 F.3d 1153 (3d Cir. 1993) (no abuse of discretion in permitting the plaintiff's owner to give lay opinion testimony as to damages, as it was based on his knowledge and participation in the day-to-day affairs of the business). Such opinion testimony is admitted not because of experience, training or specialized knowledge within the realm of an expert, but because of the particularized knowledge that the witness has by virtue of his or her position in the business. The amendment does not purport to change this analysis. Similarly, courts have permitted lay witnesses to testify that a substance appeared to be a narcotic, so long as a foundation of familiarity with the substance is established. *See, e.g., United States v. Westbrook,* 896 F.2d 330 (8th Cir. 1990) (two lay witnesses who were heavy amphetamine users were properly permitted to testify that a substance was amphetamine; but it was error to permit another witness to make such an identification

where she had no experience with amphetamines). Such testimony is not based on specialized knowledge within the scope of Rule 702, but rather is based upon a layperson's personal knowledge. If, however, that witness were to describe how a narcotic was manufactured, or to describe the intricate workings of a narcotic distribution network, then the witness would have to qualify as an expert under Rule 702. *United States v. Figueroa-Lopez, supra*.

The amendment incorporates the distinctions set forth in *State v. Brown*, 836 S.W.2d 530, 549 (1992), a case involving former Tennessee Rule of Evidence 701, a rule that precluded lay witness testimony based on "special knowledge." In *Brown*, the court declared that the distinction between lay and expert witness testimony is that lay testimony "results from a process of reasoning familiar in everyday life," while expert testimony "results from a process of reasoning which can be mastered only by specialists in the field." The court in *Brown* noted that a lay witness with experience could testify that a substance appeared to be blood, but that a witness would have to qualify as an expert before he could testify that bruising around the eyes is indicative of skull trauma. That is the kind of distinction made by the amendment to this Rule.

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It is definitely fair to state that there is a conflict in the courts in navigating the line between lay and expert testimony. Obviously the cases are highly fact-dependent, but in the hundreds of reported cases on this point since 2000, you can definitely find similar fact situations decided differently --- that is to say, one case holds that the opinion should have been evaluated as expert testimony and another says the same opinion was properly admitted as lay witness testimony. Most of the cases in the criminal context are about law enforcement witnesses testifying to matters such as drug code, gang structure, drug conspiracy operations, etc. So as an example of conflict, several circuits have permitted non-expert testimony on the meaning of codewords or ambiguous statements, with the witness having only reviewed transcripts and intercepted calls (i.e., without personal knowledge of the code), and relying for their opinion on their general experience.[29] But others have barred lay testimony derived from a review of information gathered during an investigation because the witness did not participate in or observe the relevant conversation as it was occurring, and did not have personal knowledge of the facts they relayed.[30] These latter courts

[29] *See United States v. El-Mezain*, 664 F.3d 467, 515 (5th Cir. 2011); *United States v. Rollins*, 544 F.3d 820, 831–33 (7th Cir. 2008); *United States v. Freeman*, 498 F.3d 893, 904–05 (9th Cir. 2007).

[30] *See United States v. Johnson*, 617 F.3d 286, 293–294 (4th Cir. 2010)( law enforcement agent's purported lay opinion testimony regarding his interpretation of wiretapped telephone calls was erroneously admitted, as the agent did not participate in surveillance that produced wiretapped calls, did not personally observe events and activities

properly distinguish between "knowledge derived from previous professional experience" (which is expert testimony) and "knowledge derived from the investigation at hand" (which is lay testimony).[31] And then there are courts that distinguish problematically between specialized lay testimony and specialized expert testimony --- despite the fact that testimony based on "specialized knowledge" is covered by Rule 702. *See, e.g., United States v. Savage,* 970 F.3d 217 (3rd Cir. 2020) ("We require lay testimony to be grounded either in experience or specialized knowledge.").

If the Committee is interested in revisiting the line between lay and expert testimony, one solution that might be considered is to provide, in rule text, some guidance in the rule rather than simply to replicate the language of Rule 702 ("scientific, technical or specialized knowledge") as the 2000 amendment did. In 2000, there was a lot of helpful guidance in the Committee Note, but maybe the situation can be improved if some of the relevant considerations are lifted to rule text.

In terms of guidance, the Committee might consider a test that would try to distinguish how expert and lay witnesses differ in how they come to their conclusions. One possible solution has been offered by Professor Ed Imwinkelried, who is The Man on all things Evidence. In his view, what differentiates lay witness testimony from expert testimony is the *reasoning process* that underlies each. Professor Imwinkelried elaborates as follows:

> When any witness, lay or expert, forms an opinion about the significance of a fact or facts in the case, he or she is making a comparative judgment. One term of the comparison is a generalization such as the normal appearance of a particular author's handwriting style or the symptomatology of a certain disease. The other term of the comparison is a case-specific fact such as a questioned document or a set of case-specific facts such as a patient's case history. Both lay and expert witnesses reason to their opinions by comparing the case-specific fact or facts to the generalization. However, . . . the two types of witnesses differ fundamentally with respect to: (1) how they derive the generalization they rely on, and (2) how they acquire their information about the case-specific fact or facts. Although a lay witness must rely on a generalization resting exclusively or primarily on his or her personal knowledge, an expert witness is likely to [and permitted to] draw on a wide range of sources, including much hearsay, lectures by

discussed in recordings, and the opinions were based on post-hoc assessments of calls rather than his own perceptions); *United States v. Peoples*, 250 F.3d 630, 639–42 (8th Cir. 2001) ("Agent Neal lacked first-hand knowledge of the matters about which she testified. Her opinions were based on her investigation after the fact, not on her perception of the facts. Accordingly, the district court erred in admitting Agent Neal's opinions about the recorded conversations."). *See also United States v. Malagon,* 964 F.3d 657 (7th Cir. 2020) ("As a party to the conversation, [the witness's] testimony as to the meaning of the words used by the parties in the conversation falls within Rule 701" and "[n]othing in his testimony indicates that his testimony is based on specialized knowledge, as opposed to his understanding of the conversation as a participant in it.").

[31] The quoted language, and the distinction, is found in *United States v. Cristerna-Gonzalez,* 962 F.3d 1253 (10th Cir. 2020) (finding testimony about movement of drugs and meaning of coded terms to be expert testimony because it was "based on prior training and experience rather than what was learned in the investigation of the drugs in the [car]."

his or her teachers, statements in textbooks, reports of experiments and experiences of others in the same field. And, of course, lay witnesses must also derive knowledge of the case-specific fact from personal observation.

> [T]o draw the line and intelligently analyze the admissibility of lay and expert opinions, the judge should focus on the reasoning processes underlying the two types of opinions. . . . [T]here are fundamental epistemological differences between the two types of opinions. While lay witnesses form their generalizations primarily through firsthand knowledge, out of necessity experts rely on other, hearsay sources of information. Like Newton, to some extent, every expert stands on the shoulder of the giants who preceded him or her. Furthermore, although lay witnesses must acquire their information about the case-specific facts to be evaluated exclusively through personal knowledge, Federal Rule of Evidence 703 permits experts to draw on a much wider range of sources of information. Once the judge appreciates the basic differences between the reasoning process underlying a lay opinion and that supporting an expert opinion, the analysis is fairly straightforward. By carefully dissecting the reasoning process underpinning the witness's opinion, the courts will not only improve the courts' ability to distinguish between lay and expert opinions * * * [T]he judge ought to ask: What is the warrant for that conclusion? How did you reason to that opinion?

Edward J. Imwinkelried, *Distinguishing Lay from Expert Opinion: The Need to Focus on the Epistemological Differences Between the Reasoning Process Used by Lay and Expert Witnesses,* 68 SMU L. REV. 73, 85–86 (2015).

If an amendment were to be proposed along the lines of Professor Imwinkelried's reasoning, it might look like this:

> **Rule 701. Opinion Testimony by Lay Witnesses**
> If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:
> **(a)** rationally based on the witness's perception;
> **(b)** helpful to clearly understanding the witness's testimony or to determining a fact in issue; ~~and~~
> **(c)** not based on scientific, technical, or other specialized knowledge within the scope of Rule 702; and
> **(d)** drawn from the witness's involvement with the specific facts at issue.

But on the other hand, because the line between lay and expert witnesses is so fuzzy, and because the term "specialized knowledge" is not exactly precise, this might be one of those areas in evidence that are better left alone. It is possible that no text change will be able to fix it any better

than it was fixed in 2000. Maybe the best plan is to do a more in-depth workup of the cases and problems so that the Committee can decide whether to dive in further.

## VII. Rule 801(d)(2) --- Prior Statements of Experts

Assume that an expert report contains a statement that the opposing party wants to offer as proof of a fact. This is hearsay. But might it be admissible as the statement of an agent of the party-opponent? Some courts have held that a retained expert is an agent of the party-opponent.[32] But other courts have disagreed. The leading case to the contrary is Judge Becker's opinion in *Kirk v. Raymark Indus.,* 61 F.3d 147, 164 (3d Cir. 1995). Judge Becker reasoned as follows:

> [D]espite the fact that one party retained and paid for the services of an expert witness, expert witnesses are supposed to testify impartially in the sphere of their expertise. Thus, one can call an expert witness even if one disagrees with the testimony of the expert. Rule 801(d)(2)(C) requires that the declarant be an agent of the party-opponent against whom the admission is offered, and this precludes the admission of the prior testimony of an expert witness where, as normally will be the case, the expert has not agreed to be subject to the client's control in giving his or her testimony. See *Sabel v. Mead Johnson & Co.*, 737 F.Supp. 135, 138 (D.Mass.1990). Since an expert witness is not subject to the control of the party opponent with respect to consultation and testimony he or she is hired to give, the expert witness cannot be deemed an agent. See Restatement (Second) of Agency § 1 cmt. a (1958) ("The relation of agency is created as the result of conduct by two parties manifesting that one of them is willing for the other to act for him subject to his control, and that the other consents so to act.").

This description of the "conflict" in the case law with regard to experts as agents is not as stark as it seems. Many of the cases holding that experts are agents involve experts who actually were hired by the principal to investigate or provide recommendations regarding a matter --- eventually they were called to testify to what they found. Judge Becker describes one opinion as follows:

[32] *See Collins v. Wayne Corp*., 621 F.2d 777, 780 (5th Cir. 1980) (admitting the statement under 801(d)(2)(C)); *Hanford Nuclear Reservation Litig. v. E.I. DuPont de Nemours & Co. (In re Hanford Nuclear Reservation Litig.)*, 534 F.3d 986, 1016 (9th Cir. 2008) (same); *Aliotta v. AMTRAK,* 315 F.3d 756, 762–63 (7th Cir. 2003) (admitting the statement under 801(d)(2)(D)).

> In that case the court made a finding that the expert witness was an agent of the defendant and the defendant employed the expert to investigate and analyze the bus accident. The court determined that in giving his deposition, the expert was performing the function that the manufacturer had employed him to perform. As such, the court concluded that the expert's report of his investigation and his deposition testimony in which he explained his analysis and investigation was an admission of the defendant.[33]

A similar result would occur if the expert was an employee. The expert's opinion would be admissible over a hearsay objection under Rule 801(d)(2)(C)/(D).

Given the fact-dependent nature of the question, it is not clear that any amendment would be useful in delineating when an expert is an agent of the principal and when she is not for purposes of Rule 801(d)(2). It would seem inappropriate to institute a bright-line rule that an expert is either always or never an agent of the principal. And drafting language for some middle, case-by-case determination seems to be getting into the kind of weeds that are usually avoided in drafting the Evidence Rules. But if the Committee disagrees and wishes to investigate the matter further, a memorandum and draft amendment will be prepared for discussion at the next meeting.

## VIII. Admissibility of Hearsay Statements by Government Agents under Rule 801(d)(2)(D)

There is some dispute in the courts about whether a government official's hearsay statement is admissible against the government under Rule 801(d)(2)(D). In one of the earliest cases on this subject, Judge Bazelon reasoned that the federal government is a defendant's party-opponent in a criminal trial, and therefore statements made by government agents can be admitted against that opponent.[34] Similarly, the Ninth Circuit found statements from a Department of Transportation memorandum to be admissible against the government under FRE 801(d)(2)(D).[35]

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[33] The case described is *Collins v. Wayne Corp*., 621 F.2d 777, 780 (5th Cir. 1980).

[34] *See United States v. Morgan,* 189 U.S. App. D.C. 155 n.10., 581 F.2d 933, 937 (1978).

[35] *See United States v. Van Griffin*, 874 F.2d 634, 638 (9th Cir. 1989).

The Second Circuit has used similar reasoning to hold that a prosecutor's hearsay statements can be offered against the government as party-opponent statements --- at least in cases in which the prosecutor is directly involved.[36]

Other courts disagree, holding that in criminal cases, government employees and agents cannot "bind the sovereign."[37] So there is some broad language running around, but parsing through the cases there appears to be a case-by-case approach on attributing statements to the government on the basis of agency. The line in most cases appears to be that statements made in and to a court are admissible over a hearsay objection, while statements that are not formally directed to a court are usually excluded. [38] Decisions consistent with this line include exclusion of a report issued by an Inspector General not attendant to a litigation,[39] and exclusion of statements made by a government informant.[40]

There may be some value in providing guidance on when statements of a government agent can be attributed to the government. There also may be value in expanding the notion of attribution. There is an argument that it is unfair for private parties litigating against the government to have all manner of their agents' statements admissible against them, while the statements of the government agents are barred. But the argument against any amendments are three, at least: 1) attribution is largely a case-by-case approach that will be hard to describe; 2) in the end there is not that much of a difference among the cases; and 3) writing a rule specifically for government agents --- even one that says simply "including government agents" --- gets into the weeds that the Evidence Rules usually avoid.

[36] *See, e.g.*, *United States v. Salerno*, 937 F.2d 797, 811–12 (2d Cir. 1991).

[37] *See United States v. Pandilidis*, 524 F.2d 644, 650 (6th Cir. 1975); *United States v. Zizzo*, 120 F.3d 1338, 1351 n.4 (7th Cir. 1997) (suggesting without deciding that a prosecutor cannot bind the sovereign and acknowledging the divergence from other courts); *United States v. Kampiles,* 609 F.2d 1233, 1246 (7th Cir. 1979) ("Because the agents of the Government are supposedly disinterested in the outcome of a trial and are traditionally unable to bind the sovereign, their statements seem less the product of the adversary process and hence less appropriately described as admissions of a party. Nothing in the Federal Rules of Evidence suggests an intention to alter the traditional rule and defendant has cited no truly contrary case indicating such a trend.").

[38] *See United States v. Yildiz,* 355 F.3d 80, 82 (2d Cir. 2004).

[39] *See United States v. Garza*, 448 F.3d 294, 298-99 (5th Cir. 2006).

[40] *See Lippay v. Christos,* 996 F.2d 1490, 1497-98 (3d Cir. 1993).

## IX. Rule 803(3) --- State of Mind Statements Offered to Prove the Conduct of a Non-Declarant

In *Mutual Life Insurance Co. v. Hillmon*, 145 U.S. 285 (1892), the state of mind exception to the hearsay rule was applied to admit a party's statement of intent to travel to a location, as evidence that he subsequently traveled toward that destination. The opinion went on to say in dicta that a statement mentioning a traveling companion would likewise be admissible to show that the *companion* had traveled with the declarant.

The use of a state of mind statement to prove the conduct of a non-declarant is problematic, so it is not surprising that there is a split in the courts on the subject. The rationale for extending the state of mind exception to prove the conduct of a non-declarant is dubious. The Committee Note to Rule 803(3) states that the basis for admitting state of mind statements is that the declarant has a unique perspective into his own state of mind. This rationale obviously does not apply to the declarant's conclusion about the state of mind of *someone else.* A declarant might have unique perception of his own state of mind, but he has no special perspective into the thoughts and feelings of another person.

The report of the House Judiciary Committee regarding Rule 803(3) stated that the Committee intended that Rule 803(3) be construed to limit the *Hillmon* doctrine "so as to render statements of intent by a declarant admissible only to prove his future conduct, not the future conduct of another person." The Senate Report made no mention of this limitation. And no such limitation was specifically set in the rule.

The federal courts have interpreted this ambiguous legislative history in differing ways. Some courts have adopted the House limitation and refused to admit a statement that the declarant intended to meet with a third party as proof that the declarant and the third party did indeed meet.[41] One court has permitted the declarant's statement to be used to show another's conduct, at least where the trial court gives a limiting instruction that the statement cannot be used to prove the intent or conduct of another but can only be used for the inference that the declarant carried out his intended action (though that instruction seems to work at cross-purposes with the holding that the state of mind statement can be used to prove the conduct of a non-declarant).[42] The Second Circuit has taken a compromise approach, allowing a declarant's statement of intent to be admitted to prove the conduct of a non-declarant only "when there is independent evidence which connects

[41] *See, e.g., Gual Morales v. Hernandez Vega*, 579 F.2d 677 (1st Cir. 1978) (a witness's statement that "I intend to see [the defendant]" was not admissible when offered to prove that the witness met with the defendant); *United States v. Jenkins*, 579 F.2d 840 (4th Cir. 1978) (accepting the House limitation on *Hillmon*).

[42] *See, e.g., United States v. Astorga-Torres*, 682 F.2d 1331 (9th Cir. 1982).

the declarant's statement with the non-declarant's activities."[43] Thus as to state of mind statements, the Second Circuit has incorporated a corroborating circumstances requirement, akin to that in Rule 804(b)(3), without any textual support for doing so.

On the merits, the best result without doubt is that a state of mind statement should not be admissible to prove the conduct of a non-declarant. Just because somebody knows their own state of mind (a dubious prospect to start with) doesn't mean that they have any special insight into the state of mind (much less conduct) of another person. Potentially, the hearsay rule is rendered a nullity if state of mind statements are admitted to prove the conduct of another --- because every person's statement is in some way reflective of a state of mind.

The compromise measure of the Second Circuit --- allowing such statements to prove the conduct of another if there are corroborating circumstances indicating trustworthiness --- is questionable for at least three reasons. First, it is subject to being applied in a flimsy way. Second, it is lifted from Rule 804(b)(3), but it obviously only applies there if the declarant is unavailable. As applied to Rule 803(3), a state of mind statement could be offered to prove the conduct of a non-declarant without the proponent having to try to produce the declarant. And third, the declaration against interest exception is based on a more solid ground of reliability to start with --- that people don't say disserving things unless they are true. The basis for the state of mind exception --- that people know their own state of mind --- is dubious.[44]

If an amendment were proposed to preclude a state of mind statement from being offered to prove the conduct of a non-declarant, it might look like this:

> **(3)** ***Then-Existing Mental, Emotional, or Physical Condition.*** A statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but not including:

[43] *United States v. Delvecchio,* 816 F.2d 859, 863 (2d Cir. 1987) (an informant's statement that he was going to meet Delvecchio to complete a drug transaction was inadmissible where there was no independent evidence of Delvecchio's presence at the meeting). *Compare United States v. Sperling*, 726 F.2d 69 (2d Cir. 1984) (an informant's statement that he planned to meet Sperling to complete a drug transaction was admissible where the declarant's statement of intent to meet with the defendant was confirmed by later eyewitness testimony that the meeting actually took place).

[44] For more on the use of state of mind statements to prove the subsequent conduct of another, see Lynn McLain, *"I'm Going to Dinner with Frank": Admissibility of Nontestimonial Statements of Intent to Prove the Actions of Someone Other Than the Speaker—and the Role of the Due Process Clause as to Nontestimonial Hearsay,* 32 Cardozo L. Rev. 373 (2010) (advocating that the state of mind exception should not be used to prove the conduct of a non-declarant).

**(A)** a statement of memory or belief to prove the fact remembered or believed unless it relates to the validity or terms of the declarant's will; and

**(B)** a statement offered to prove the state of mind or conduct of someone other than the declarant.

## X. Rule 803(3) --- A Spontaneity Requirement for State of Mind Statements

Rule 803(3) does not guarantee that the declarant's state of mind will be spontaneous in any meaningful sense. All it requires in text is that the statement be one that is "then-existing" --- meaning a statement like "I love my spouse" is admissible to prove that the declarant was in love with the spouse at the time of the statement, whereas "I loved my spouse yesterday" is not admissible to prove that fact under Rule 803(3).[45] But this "then-existing" requirement is different from a "spontaneity" requirement --- there is a substantial risk under the rule that a declarant will make a statement about a fabricated state of mind. For example, in *United States v. Lawal*, 736 F.2d 5 (2d Cir. 1984), the defendant arrived at Customs after a flight from Nigeria, and drugs were found in his luggage. At that point, the defendant made a "spontaneous" statement of anger at being "set up" and duped by a person in Nigeria. At trial, the defendant offered this statement to prove that he had no intent to smuggle drugs. The trial court excluded the statement on the ground that it was unreliable. But the Court of Appeals held that this was error. The court reasoned that the statement expressed the declarant's then-existing state of mind (of innocence), and this is all that the Rule requires. The court concluded that statements that fit the definition of Rule 803(3) cannot be excluded as hearsay, even if they are self-serving and made under untrustworthy circumstances; the court does not have the discretion to exclude untrustworthy statements unless there is language in the rule supporting that exclusion. Thus, the actual untrustworthiness of a statement of the declarant's existing state of mind goes to the weight and not the admissibility of the statement. *See also United States v. DiMaria*, 727 F.2d 265, 271 (2d Cir. 1984) (Friendly, J.) (exculpatory statement of state of mind made under untrustworthy circumstances is admissible under Rule 803(3): "False it may well have been but if it fell within Rule 803(3), as it clearly did if the words of that rule are read to mean what they say, its truth or falsity is for the jury to determine."); *United States v. Peak*, 856 F.2d 825 (7th Cir. 1988) (an exculpatory statement by the defendant was held admissible under Rule 803(3) despite the contention that the defendant had an opportunity to fabricate a then-existing state of mind).

[45] *See, e.g., United States v. Hayat*, 710 F.3d 875 (9th Cir. 2013) (statement by the defendant that he had never intended to go to a terrorist training camp was not admissible under Rule 803(3) because it was referring to a past, not a present, state of mind).

Despite the rule text, some courts have held that statements of a state of mind made without spontaneity and with the likelihood of fabrication are not admissible.[46] They reason that spontaneity is an inherent part of the rationale for the exception, albeit not stated in the text of the rule. Exclusion in these courts is particularly likely with respect to exculpatory statements of criminal defendants made under circumstances in which the defendant has a reason to lie. The problem with courts requiring spontaneity is that, while trustworthiness may be a part of the rationale for Rule 803(3), the rule as written does not contain a provision for excluding untrustworthy statements that would otherwise fall within the hearsay exception—in contrast to some other hearsay exceptions such as Rule 803(6), which contain specific language excluding untrustworthy statements. All that is required under Rule 803(3) is that the statement must be of a "then-existing" state of mind; and the defendant's statement in a case like *Lawal* clearly meets this requirement ("I feel so innocent right now"). Courts are not allowed, outside the rulemaking process, to impose textual limitations on hearsay exceptions.

If the Committee is interested in exploring an amendment, there are two possibilities: One is to codify *Lawal* more explicitly, and the other is to add a spontaneity or trustworthiness requirement to the exception. The latter approach seems preferable, because the language of Rule 803(3) is simply inadequate to guarantee the trustworthiness that the hearsay exceptions are supposed to provide. A trustworthiness add-on might look like this:

> **(3)** ***Then-Existing Mental, Emotional, or Physical Condition.*** A statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), made under trustworthy circumstances --- but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the validity or terms of the declarant's will.

## XII. Rule 803(4) --- Statements by Children Regarding Sexual Abuse

[46] *See, e.g., United States v. Reyes*, 239 F.3d 722 (5th Cir. 2001) (no error in excluding an exculpatory statement by a criminal defendant; the defendant suspected that the person he was speaking to was a government informant and that the conversation was being monitored; the defendant's statements were more self-serving than candid, and lacked the spontaneity required for admission under Rule 803(3)); *United States v. Faust*, 850 F.2d 575 (9th Cir. 1988) (an exculpatory letter written by the defendant was not admissible under Rule 803(3) because the defendant had time to reflect in drafting the letter, and thus any evidence of state of mind provided by the letter was unreliable).

Rule 803(4) provides a hearsay exception for statements made for, and reasonably pertinent to, "medical diagnosis or treatment." The intent of the Advisory Committee was to preclude statements attributing fault --- the example given in the original Advisory Committee Note is that a statement "a car hit me after running a red light" would not be admissible to show that the driver was negligent. That said, courts have admitted under this exception the accusatory statements of children who relate acts of sexual abuse. So, a statement like "my dad sexually abused me," made to medical personnel, has been admitted under Rule 803(4) to prove that the father did the act. The reasoning is that the accusation is pertinent to treatment, because the doctor's treatment includes protecting the child from further harm.

The conflict in the case law is not about the admissibility of a child's accusation per se. All courts who have addressed the question have held that such an accusation can be covered by the "pertinent to medical treatment" language of Rule 803(4). The conflict is that some circuits have added an additional requirement intended to preserve the reliability of the hearsay exception in the case of child victims. In these circuits, the prosecution must show that the child understood that she was speaking to medical personnel and appreciated that telling the truth was necessary in order to get properly treated. The leading case for this point of view is *United States v. Renville*, 779 F.2d 430, 438 (8th Cir. 1985) (child's statement attributing fault is admissible under Rule 803(4) only "where the physician makes clear to the victim that the inquiry into the identity of the abuser is important to diagnosis and treatment, and the victim manifests such an understanding."). A good application of the *Renville* standards is found in *United States v. Sumner*, 204 F.3d 1182, 1185 (8th Cir. 2000), where the court found that a child's statement to a doctor accusing the defendant of sexual abuse was erroneously admitted under Rule 803(4):

> Although Dr. Zitzow explained that he was a doctor, he did not discuss with [the victim] the need for truthful revelations or emphasize that the identification of the abuser was important to Dr. Zitzow's attempts to help her overcome any emotional trauma resulting from the abuse to which she had been subjected.

The Tenth Circuit follows *Renville* but with a twist: it places the burden on the defendant to provide evidence that the child-declarant did not understand she was being treated by doctors and needed to be truthful. *United States v. Pacheco,* 154 F.3d 1236 (10th Cir. 1998).

Other courts admit statements of child-declarants without the *Renville* guarantee. These courts are more flexible and look to the circumstances to determine whether the child was seeking treatment or diagnosis. *See, e.g.,United States v. Kootswatewa*, 893 F.3d 1127 (9th Cir. 2018) (child's statements to a nurse practitioner regarding sexual abuse were admissible; an adequate foundation for the treatment motive was laid by a showing of the context in which the statement was made --- the statements were made in response to questions from a medical official in a medical facility); *Danaipour v. McLarey*, 386 F.3d 289, 296, n.1 (1st Cir. 2004) (rejecting as "unnecessary inflexible" the rule that statements by children are admissible only where the physician makes clear to the child that truthfully identifying the abuser is necessary to diagnosis

and treatment: "There are many ways in which a party wishing to enter into evidence a statement under Rule 803(4) can demonstrate that the statement was made for the purpose of diagnosis and treatment.").

So there is a dispute in the courts about the treatment of child-victim statements of sexual abuse under Rule 803(4). But an amendment may not be an ideal solution. The cases seem inherently fact-based. And more importantly, amending Rule 803(4) to cover a specific kind of case like a prosecution for child sexual abuse would go to a level of detail that conflicts with the general approach of the Federal Rules of Evidence. The Committee passed on a proposal to adopt a rule regulating forensic evidence on the ground that it was specifically directed to one type of evidence --- thus *too* specific. An amendment to cover child sexual abuse cases is even more refined --- it applies to one type of case. Of course it is true that Rules 412-415 are tied to specific cases. But Rule 412 is well-steeped in the policy of protecting victims of sexual assault. An amendment to Rule 803(4) would be much narrower, as it would cover the treatment of one type of statement in one type of factual situation. And as to Rules 413-415, they were directly enacted by Congress --- over the objection of the Advisory Committee, which argued that the rules were contrary to the generalized approach of the Federal Rules of Evidence.

As discussed above, there may come a time when it makes sense to have a whole new article of the Federal Rules of Evidence to deal with specific kinds of cases or specific kinds of evidence. That time may be now. If so, the treatment of statements made to doctors by child-victims may be a good candidate for an amendment, given the conflict in the case law. But it does not appear to fit in Rule 803(4).

## XIII. Rule 804(b)(1) Predecessor-in-Interest Requirement in Civil Cases

Rule 804(b)(1) provides that prior testimony is admissible if it is "offered against a party who had --- or, in a civil case, whose predecessor in interest had --- an opportunity and similar motive to develop it by direct, cross-, or redirect examination." There is a conflict in the case law about the meaning of the term "predecessor in interest" when prior testimony is offered in a civil case against a litigant who was not a party in the prior proceeding.[47] Most courts have held that a prior cross-examination can bind a new party if the prior cross-examiner had a similar motive and opportunity to cross-examine the declarant as the new party would have if the declarant were available. The basic question for these courts is whether the prior cross-examiner did as good a job

[47] The possibility of using prior testimony against a party that did not actually cross-examine the declarant previously is limited to civil cases; extending admissibility to a criminal case would violate a defendant's right to confrontation, especially after *Crawford v. Washington,* 541 U.S. 36 (2004) (finding that testimonial hearsay cannot be admitted against a defendant unless the *defendant* is provided the opportunity to cross-examine the declarant).

as the new party could have expected to do if the witness were available. The leading case is *Lloyd v. American Export Lines, Inc*., 580 F.2d 1179 (3d Cir. 1978), in which the Third Circuit construed the predecessor-in-interest language as mandating only a "sufficient community of interest" between the prior litigant and the party against whom the hearsay is offered. The justification for this position is that if the prior development was as effective and thorough as the subsequent party could expect to have done, it is not unfair to admit the testimony against that later party. At the very least, the opponent should have to present a credible argument that it would develop the testimony differently, and more effectively, if the declarant were available to testify in the present proceeding.[48]

There are a few opinions of district courts that interpret "predecessor-in-interest" to mean something closer to the common law concept of privity.[49] Finally, there is one opinion in which the court favored a strict construction of the "predecessor-in-interest" requirement of Rule 804(b)(1), but nonetheless admitted prior testimony under the residual exception as a "near miss"—so long as the party's development of the testimony was effective enough to bind the party against whom the testimony is now offered.[50]

If the Committee decides that it wants to address the "predecessor in interest" language of Rule 804(b)(1), it should definitely do so in accord with the vast majority of cases that have taken a flexible approach. There is no good reason to exclude testimony if the prior party was in the same situation regarding the witness as the new one is, and the new party can point to nothing that it

[48] *See, e.g., Horne v. Owens-Corning Fiberglas Corp*., 4 F.3d 276, 283 (4th Cir. 1993) (in a product liability case resulting from asbestos exposure, the court held that a deposition from another asbestos case was properly admitted against the plaintiff as prior testimony, even though she had no relationship to the plaintiff in that prior litigation; the party against whom the deposition is offered "must point up distinctions in her case not evident in the earlier litigation that would preclude similar motives of witness examination"; the plaintiff in this case was in the same situation with respect to asbestos exposure as the plaintiff in the case in which the deposition was taken); Clay v. Johns-Manville Sales Corp., 722 F.2d 1289 (6th Cir. 1983) (deposition from a prior litigation is admissible against a nonparty to that litigation, where the party who cross-examined the deponent had the same goal in cross-examination as the party against whom the deposition is now offered); *Volland-Golden v. City of Chi.,* 89 F. Supp. 3d 983, 987–88 (N.D. Ill. 2015) ("every federal Court of Appeals to address the issue head-on has determined that the term "predecessor in interest" does not invoke the common law concept of privity but rather sets out a more forgiving standard") .

[49] *See In re Screws Antitrust Litig*., 526 F. Supp. 1316, 1318–19 (D. Mass. 1981); *Lightsey v. John Crane, Inc.,* 2005 U.S. Dist. LEXIS 51646, at *8–9 (N.D. Ga. Sep. 2, 2005) ("Further, in the absence of a definitive ruling from the Eleventh Circuit, this Court is inclined to give the term "precedessor in interest" [sic] its common definition.").

[50] *Dartez v. Fibreboard Corp*., 765 F.2d 456 (5th Cir. 1985) (a deposition was offered against a defendant who was not a party to the litigation in which the deposition was taken; the party who cross-examined the deponent was probably not a predecessor in interest because there was no legal relationship between them; however, because the defendant could have added nothing to the cross-examination that did take place, the deposition was admissible against the defendant under the residual exception, as a "near miss" of the prior testimony exception).

could have pursued that was not pursued. It must be remembered that the alternative to admitting the prior testimony *is no evidence at all*, because the declarant is by definition unavailable.

An amendment to accord with the majority rule might look like this:

**(1) *Former Testimony*.** Testimony that:

**(A)** was given as a witness at a trial, hearing, or lawful deposition, whether given during the current proceeding or a different one; and

**(B)** is now offered against a party who had — or~~,~~ in a civil case~~, whose predecessor in interest~~ another party had — an opportunity and similar motive to develop it by direct, cross-, or redirect examination.

Maybe there needs to be something added to assure that the development of the testimony by the different party was adequate (or, as effective as the new party's development would be if it had the chance). Putting this qualifier in the rule presents a drafting challenge. But it can be argued that the qualifier is necessary. It is one thing if the party itself blew the cross-examination the first time around. It's another thing to say that the new party is bound by a terrible cross-examination that was made by a different party, albeit one with a similar motive and opportunity.

If some qualifier such as "the prior party's development was as effective as the party could have done" then it might be better drafting to separate civil and criminal cases. The point being that adding an "equal effectiveness" qualifier is a challenge. And given the fact that there is really not much conflict in the results in the cases, there is some doubt on whether the challenge of an amendment is worth the reward.

## XIV. Rule 804(b)(1) – Grand Jury Testimony Offered by the Defendant Against the Government

Another circuit split has developed in the application of Rule 804(b)(1) — the hearsay exception for prior testimony — in a relatively narrow fact situation: the prosecutor calls a witness before the grand jury, and the witness gives testimony favorable to the defendant; at trial, the witness is unavailable (usually because he declares the Fifth Amendment privilege and the government refuses to immunize him) and the defendant offers the grand jury testimony under Rule 804(b)(1).

The 2nd and 1st Circuits have held that exculpatory grand jury testimony is usually inadmissible under Rule 804(b)(1). The D.C. and the 6th and 9th Circuits have held that such testimony is admissible.

The leading Second Circuit case is *United States v. DiNapoli*, 8 F.3d 909 (2d Cir. 1993), in which two witnesses gave grand jury testimony that favored the defendant, then each declared their privilege and refused to testify at trial. The question for the court was whether the prosecutor had a motive to attack the witness at the grand jury that was similar to the motive she would have at trial. The *DiNapoli* court held that generally the prosecutor's motives would be dissimilar. It explained as follows:

> The proper approach … in assessing similarity of motive under Rule 804(b)(1) must consider whether the party resisting the offered testimony at a pending proceeding has at a prior proceeding an interest of *substantially similar intensity* to prove (or disprove) the same side of a substantially similar issue. The nature of the two proceedings — both what is at stake and the applicable burden of proof * * * will be relevant though not conclusive on the ultimate issue of similarity of motive. (Emphasis added).

The *DiNapoli* court held that because the standard of proof at the grand jury is so much lower than that at trial, the level of intensity to attack a witness favorable to the defendant is usually not similar to the level of intensity that would apply at a trial. On the facts of the case, when the witnesses gave exculpatory testimony at the grand jury, there was no doubt about probable cause as to any of the defendants in the case, because they had already been indicted, and the grand jury was simply investigating whether other targets should be indicted. As the court put it, "the grand jury had already been persuaded, at least by the low standard of probable cause, to believe that the [conspiracy] existed and that the defendants had participated in it to commit crimes." In contrast, at trial, where the government had the burden to prove the defendants guilty beyond a reasonable doubt, the prosecutor would have had a substantial incentive to attack the testimony of any exculpatory witness.

While the *DiNapoli* Court did not establish a bright-line rule, it is clear that, under the Court's decision, exculpatory grand jury testimony will only rarely be admissible against the government under Rule 804(b)(1). A similarity of motive is likely to be found only where the indictment is in doubt because the case as to probable cause is close — in that rare situation, the intensity of interest in attacking an exculpatory witness could be similar to what it would be at a trial.[51]

[51] *See also United States v. Peterson*, 100 F.3d 7 (2d Cir. 1996) (exculpatory grand jury testimony was not admissible as prior testimony where the evidence before the state grand jury "provided ample probable cause to indict Peterson" and therefore the government's incentive to attack testimony favorable to Peterson was not similar to the incentive it would have at trial).

The First Circuit is in accord with the Second Circuit's view that the government's motive to develop testimony at the grand jury is usually not similar to the motive to develop testimony at trial. See *United States v. Omar*, 104 F.3d 519, 522-24 (1st Cir.1997)

In contrast, the D.C. and 6th and 9th Circuits have a bright-line rule that exculpatory grand jury testimony is *always* admissible against the government at trial — i.e., that there is always a similar motive to attack the exculpatory testimony at these two proceedings. *See, e.g., United States v. Miller*, 904 F.2d 65 (D.C. Cir. 1990); *United States v. Foster*, 128 F.3d 949, 957 (6th Cir.1997). This view is explained by the 9th Circuit, which adopted the D.C. Circuit view, in *United States v. McFall,* 558 F.3d 951 (9th Cir. 2009). The *McFall* court analyzed the "similar motive" question in the following passage:

> The question is whether the government's motive in examining Sawyer [the exculpatory witness] before the grand jury was sufficiently similar to what its motive would be in challenging his testimony at McFall's trial. Prosecutors need not have pursued every opportunity to question Sawyer before the grand jury; the exception requires only that they possessed the motive to do so.
>
> * * *
>
> As a threshold matter, we must determine at what level of generality the government's respective motives should be compared, an issue that has divided the circuits. . . . In *United States v. Miller,* 904 F.2d 65, 68 (D.C.Cir.1990), the D.C. Circuit compared the government's respective motives at a high level of generality. The *Miller* Court concluded that "[b]efore the grand jury and at trial" the testimony of an unavailable co-conspirator "was to be directed to the same issue — the guilt or innocence" of the defendants — and thus, the government's motives were sufficiently similar. Id.; accord *United States v. Foster*, 128 F.3d 949, 957 (6th Cir.1997) (citing *Miller* with approval). McFall's trial counsel made a similar argument before the district court, contending that the government's primary goal in questioning Sawyer before the grand jury was to incriminate McFall. At trial, the government's motivation would, of course, have been the same.
>
> In *United States v. DiNapoli*, 8 F.3d 909 (2d Cir.1993) (en banc), in contrast, the Second Circuit required comparison of motives at a fine-grained level of particularity. See id. at 912 ("[W]e do not accept the proposition ... that the test of similar motive is simply whether at the two proceedings the questioner takes the same side of the same issue."); see id. (stating that the proper test for similarity of motive is whether the questioner had "a substantially similar degree of interest in prevailing" on the related issues at both proceedings) (emphasis added); accord *United States v. Omar,* 104 F.3d 519, 522-24 (1st

Cir.1997) (concluding that the government will rarely have a similar motive in questioning a witness before a grand jury as it would have at trial).

* * *

The government's motivation in questioning Sawyer before the grand jury was likely not as intense as it would have been at trial, both because it had already indicted McFall, and because the standard of proof for obtaining a conviction is much higher than the standard for securing an indictment. We cannot agree, however, with the Second Circuit's gloss on Rule 804(b)(1). As one of the dissenters in *DiNapoli* (an en banc decision) noted, the requirement of similar "intensity" of motivation conflicts with the rule's plain language, which requires "similar" but not identical motivation. Id. at 916 (Pratt, J., dissenting) * * * .

On balance, we agree with the D.C. Circuit's elaboration of the "similar motive" test and conclude that the government's fundamental objective in questioning Sawyer before the grand jury was to draw out testimony that would support its theory that McFall conspired with Sawyer to commit extortion — the same motive it possessed at trial. That motive may not have been as intense before the grand jury, but Rule 804(b)(1) does not require an identical quantum of motivation.

In sum, the dispute in the courts is over how to interpret the standard of "similar motive" with respect to exculpatory grand jury testimony. The Second Circuit view is that "motive" includes a requirement of similar "intensity" of interest in developing the testimony at the grand jury, while the Ninth Circuit rejects that position.

But would an amendment be a useful way to address the circuit conflict? In 2010, the Committee considered whether to propose an amendment to solve this problem, and decided against it. The Committee concluded that an amendment would be dealing with a very narrow fact situation — exculpatory grand jury testimony.[52] Moreover, the only amendment that could be cleanly written is one that would automatically admit exculpatory grand jury testimony against the government. The contrary view — that of the Second Circuit — is not an automatic rule excluding such testimony. Rather it is a case by case approach. So it would be more difficult to codify the Second Circuit view. One possible iteration is: "but grand jury testimony is admissible under this exception if at the time of the testimony the obtaining of the indictment is in doubt." Query whether that will be helpful. Another possible iteration is "but grand jury testimony is admissible under

[52] Exculpatory grand jury testimony is a relative rarity because the government does not have an obligation to present exculpatory evidence to the grand jury. *United States v. Williams,* 504 U.S. 36 (1992).

this exception only if the prosecutor has an interest in developing the grand jury testimony that is of similar intensity as the interest in developing it at trial." Again, query if that is sufficient to capture all the possible permutations.[53]

An automatic rule of admissibility could be written more cleanly. For example, something like the following sentence could be added to the end of the rule :

> "Testimony of a witness at a grand jury is admissible against the government under this exception."

But it is likely that a rule amendment *mandating* admissibility of exculpatory grand jury testimony would be strenuously opposed by the DOJ. And on the merits, that amendment could result in a change in grand jury practice in a number of circuits that would require some serious consideration (and perhaps empirical research). Certainly it could be predicted that a rule change from a case by case approach to automatic admissibility would require prosecutors in districts subject to the change to treat every instance of exculpatory grand jury testimony as a trial-like event. A mandated change in practice before a grand jury should not be done lightly by way of an evidence rule.

The other alternative would be to try to add something about "intensity" of motive to the Rule — that is, a general amendment as opposed to one dealing only with exculpatory grand jury testimony. An amendment incorporating the Second Circuit approach might look like this:

> **(B)** is now offered against a party who had — or, in a civil case, whose predecessor in interest had — an opportunity and similar motive and intensity of interest to develop it by direct, cross-, or redirect examination.

An amendment incorporating the Ninth Circuit approach might look like this:

> **(B)** is now offered against a party who had — or, in a civil case, whose predecessor in interest had — an opportunity and similar ~~motive~~ objective to develop it by direct, cross-, or redirect examination.

The word "objective" seems less likely to be read as having an intensity factor. The option of "motive, but not including intensity of interest" is another possibility, though it seems balky.

But to apply new language outside the grand jury context may create unintended consequences in a wide variety of cases and situations, including depositions and preliminary

[53] Moreover, if the correct concept is "intensity" then that concept should be applied to all prior testimony, not just exculpatory grand jury testimony. That broader question may or may not be something the Committee might want to explore. See the text infra.

hearings. And yet to limit the reference to "intensity" to grand jury testimony would get very down into the weeds, for a relatively small return.

One difference between 2010 and now is that the Committee was influenced not to act in part because *McFall* was a recent case, and there was some hope that the Supreme Court might rectify the conflict. Ten years later, this has not happened, and so there is at least an argument that if there needs to be a solution, it is rulemaking that will have to do it.

## XV. Rule 804(b)(3) --- The Meaning of the Corroborating Circumstances Requirement

Rule 804(b)(3) is the hearsay exception for declarations against interest. It provides that in a criminal case a declaration against penal interest is not admissible unless the proponent establishes that it is "supported by corroborating circumstances that clearly indicate its trustworthiness." The Rule was amended in 2010 to clarify that in a criminal case both the government and the defendant must provide corroborating circumstances --- the rule had previously provided that it was only the defendant that had the obligation.

When that amendment was being prepared, the Committee also considered whether the rule should be amended to rectify a conflict in the courts about the meaning of "corroborating circumstances." A question that divided the courts was whether in determining corroborating circumstances, the court could or must consider the existence of *corroborating evidence*. For example, assume that a defendant is charged with murdering Joe. The declarant says "I killed Joe, the defendant wasn't even there." That statement is not admissible on the defendant's behalf without corroborating circumstances. Now assume that the defendant can show that the declarant's fingerprints are on the murder weapon, or that a witness saw the declarant in the vicinity of the murder just before it occurred. These facts corroborate the declarant's account, and help to establish that the declarant is telling the truth. However, they are not circumstantial guarantees of trustworthiness in the making of the statement. Examples of circumstantial guarantees of trustworthiness include: 1) the declarant made the statement spontaneously, 2) to a person he trusted, 3) not long after the murder.

In defining "corroborating circumstances," most courts consider whether independent evidence supports or contradicts the declarant's statement. *See, e.g., United States v. Desena,* 260 F.3d 150 (2d Cir. 2001) (declarant identified himself and the defendant as perpetrators of an arson; the corroborating circumstances requirement was met in part by the testimony of an eyewitness whose description of the scene of the arson the day of the crime matched the declarant's description of the defendant's actions)*; United State v. Mines,* 894 F.2d 403 (4th Cir. 1990) (corroborating circumstances requirement not met because other evidence contradicts the declarant's account); *United States v. Butler,* 71 F.3d 243, 253 (7th Cir. 1995) (concluding that the declarant's comments

exculpating the defendant were not admissible in part because there was no direct evidence to corroborate them); *United States v. Hamilton,* 19 F.3d 350, 357 (7th Cir. 1994) (finding corroborating circumstances largely because the declarant's account was corroborated by other witnesses); *United States v. Paguio,* 114 F.3d 928 (9th Cir. 1997) (finding corroborating circumstances almost solely by the fact that documents in the transaction supported the declarant's account); *United States v. Westry,* 524 F.3d 1198 (11th Cir. 2008) (corroborating circumstances requirement met by testimony of other witnesses supporting the declarant's account, i.e., by corroborating evidence) ; *United States v. Kelley,* 2007 U.S. Dist. Lexis 14854 (S.D. Tex.) (statement by defendant's brother claiming ownership of guns and drugs was admissible as an exculpatory declaration against interest; corroborating circumstances found in part by the fact that the declarant actually had drugs on his person when arrested, and he correctly described where drugs and guns could be found); *United States v. Honken*, 378 F.Supp.2d 928 (D. Iowa 2004) (corroborating circumstances found in part because the declarant's statement was supported by independent evidence).

A minority of courts hold that independent evidence (or the lack of it) must be treated as irrelevant to the requirement of corroborating circumstances, and that the court must focus only on the circumstances under which the statement was made. *See, e.g., United States v. Barone,* 114 F.3d 1284, 1300 (1st Cir. 1997) ("The corroboration that is required by Rule 804(b)(3) is not independent evidence supporting the truth of the matters asserted by the hearsay statements, but evidence that clearly indicates that the statements are worthy of belief, based upon the circumstances in which the statements were made."). *See also United States v. Bobo,* 994 F.2d 524, 528 (8th Cir. 1993) (noting that the Eighth Circuit refers to five factors which aid in determining the trustworthiness of a hearsay statement that is against the penal interests of the declarant — none of which concern corroborating evidence: "1) whether there is any apparent motive for the out-of-court declarant to misrepresent the matter, 2) the general character of the speaker, 3) whether other people heard the out-of-court statement[54], 4) whether the statement was made spontaneously, and 5) the timing of the declaration and the relationship between the speaker and the witness."); *United States v. Franklin,* 415 F.3d 537, 547 (6th Cir. 2005) ("[t]o determine whether a statement is sufficiently trustworthy for admission under Rule 804(b)(3), the court is not to focus on whether other evidence in the case corroborates what the statement asserts, but rather on whether there are corroborating circumstances which clearly indicate the trustworthiness of the statement itself."). [55]

[54] This factor is misguided. It assures that the statement was actually made, but that is not a hearsay problem. That is a problem of a witness lying in court about whether the statement was made.

[55] There is conflicting authority in the Sixth Circuit. See *United States v. Price,* 134 F.3d 340 (6th Cir. 1998): In an appeal from narcotics convictions, the court held it error to exclude post-custodial statements from a person involved in the drug transaction, which indicated that the money for the drugs belonged only to the declarant, and that the defendant was not a substantial participant in the transaction. The court found corroborating circumstances because: the declarant and the defendant did not have a close relationship; the statement was made after the

The holdings that reject the use of corroborative evidence are curiously based on a theory of the right to confrontation that is long-abandoned. At one time, the Confrontation Clause protection was grounded in a requirement of "particularized guarantees of trustworthiness" --- and the Court in *Idaho v. Wright,* 497 U.S. 805 (1990), held that the standard of particularized guarantees of trustworthiness required the court to look only at circumstantial guarantees of reliability --- corroboration was irrelevant. But there is no reason to import the *Wright* analysis into the different, rule-based standard of "corroborating circumstances" in Rule 804(b)(3).

One could argue, at the time of some of these decisions, that *Wright,* though not on point for the hearsay exception, could be used as persuasive authority on the meaning of trustworthiness. But that time has long past. The *Wright* analysis on trustworthiness has been completely displaced by the focus on testimoniality in *Crawford v. Washington.* Yet the courts rejecting the use of corroborative evidence under Rule 804(b)(3) *still* rely on *Wright*. *See, e.g., United States v. Lubell,* 301 F.Supp.2d 88, 91 (D.Mass. 2007) ("In this context, corroboration does not refer to * * * whether the witness' testimony conforms with other evidence in the case. Rather, corroborating circumstances refers to 'only those that surround the making of the statement and that render the declarant particularly worthy of belief.' *Idaho v. Wright*, 497 U.S. 805, 819 (1990)"); *United States v. Johnson,* 2007 U.S. Dist. Lexis 62035 (E.D. Mich.) (relying on the overruled Supreme Court case of *Ohio v. Roberts* to conclude that corroborating evidence is irrelevant to corroborating circumstances under Rule 804(b)(3)).

In 2010 the Committee considered proposing an amendment that would require a court applying the Rule 804(b)(3) corroborating circumstances requirement to consider the presence or absence of corroborating evidence. (This would have been an add-on to the amendment that extended the requirement to the government in criminal cases). The Committee decided not to address the conflict in the courts on the corroboration question, even though it was proposing an amendment to the rule on other grounds. Here is the account of the Committee's decision from the 2009 minutes:

> Members noted that the disagreement in the courts about the meaning of "corroborating circumstances" did not run very deep, and that the few courts that are relying on outmoded constitutional law are likely to change their approach when the irrelevance of the abrogated Confrontation cases is directly addressed by those courts. The vast majority of courts consider corroborating evidence as relevant to the corroborating circumstances inquiry. Eight members of the Committee voted not to include any definition of corroborating circumstances in the text or Committee Note to the proposed amendment. One member dissented.

declarant was advised of his *Miranda* rights; there was no evidence that the declarant made the statement in an effort to curry favor with the authorities; and *independent evidence was consistent with the declarant's assertion*.

The Committee was essentially predicting that the courts on the wrong side of the issue would see the error of their ways. But that has not really been the case. The circuits rejecting corroborating evidence are the First, Sixth and Eighth. The First Circuit has held fast to its position. See *United States v. Taylor*, 848 F.3d 476 (1st Cir. 2017) (rejecting the argument that independent evidence can be used in support of a finding of corroborating circumstances). The Eighth Circuit has a case in the intervening years that seems to work at cross-purposes. In *United States v. Henley*, 766 F.3d 893 (8th Cir. 2014), the court held that a confession made by another was admissible as a declaration against penal interest. But the court found it was properly excluded. It stated that even if it were against penal interest, it was "still inadmissible if it lacked indicia of trustworthiness." That sounds like a reference to circumstantial guarantees. But in finding the statement lacking, the court noted that there were many witnesses who disputed the declarant's account. That is a reference to corroborating evidence. There is nothing explicit in the Sixth Circuit to indicate that it has altered its view.

Moreover, the Committee's assessment that the conflict "did not run very deep" is subject to question. There is case law in three circuits that rejects corroborating evidence in the corroborating circumstances inquiry. Three circuits can be thought to be a pretty deep conflict.

Finally, there is now an additional reason to require the courts to consider corroborating evidence in the corroborating circumstances inquiry--- that same requirement has been added to Rule 807 (the residual exception) in the 2019 amendment to that Rule. That rule now provides that the court must find that "the statement is supported by sufficient guarantees of trustworthiness --- after considering the totality of circumstances under which it was made *and evidence, if any, corroborating the statement.*" The Committee Note to the amendment explains as follows:

> The amendment specifically requires the court to consider corroborating evidence in the trustworthiness enquiry. Most courts have required the consideration of corroborating evidence, though some courts have disagreed. The rule now provides for a uniform approach, and recognizes that the existence or absence of corroboration is relevant to, but not dispositive of, whether a statement should be admissible under this exception. Of course, the court must consider not only the existence of corroborating evidence but also the strength and quality of that evidence.

In specifically adding the consideration of corroborating evidence as part of the trustworthiness requirement, the Committee was reacting to case law in the Eighth Circuit holding that corroboration was irrelevant under Rule 807, *and relying on Idaho v. Wright for that proposition. See United States v. Stoney End of Horn,* 829 F.3d 681 (8th Cir. 2016) (holding that corroboration has no place in the Rule 807 trustworthiness enquiry). So the Committee was correcting what it saw as an error in rejecting corroborating evidence as part of the trustworthiness

enquiry. Why would it not employ the same fix for the same error in what is essentially the same question --- the search for guarantees of trustworthiness?[56]

After the amendment to Rule 807, there is a good argument that there is an inconsistency between Rule 804(b)(3) and 807 --- at least in those courts that reject the relevance of corroborating evidence in assessing "corroborating circumstances" under Rule 804(b)(3). The bottom line is there was probably a pretty good reason in 2010 for addressing the corroboration requirement in the text of Rule 804(b)(3). And there is a better reason now.[57]

If the Committee wishes to proceed with an amendment to Rule 804(b)(3) to require consideration of the presence or absence of corroboration, the change might look like this:

A statement that:

(A) [is disserving]; and

**(B)** if offered in a criminal case as one that tends to expose the declarant to criminal liability, the court finds ~~is~~ supported by corroborating circumstances that clearly indicating trustworthiness --- after considering the totality of circumstances under which it was made and evidence, if any corroborating the statement. ~~if offered in a criminal case as one that tends to expose the declarant to criminal liability~~

The draft language borrows from the language of the 2019 amendment to Rule 807.

[56] When the Committee was working on Rule 807, I digested all of the case law, and found that courts had recognized that the Rule 804(b)(3) corroborating circumstances requirement was essentially equivalent to the trustworthiness requirement of Rule 807. If you met one, you met the other. And if you failed one, you failed the other. *See, e.g., United States v. Benko,* 2013 WL 2467675 (D.Va.): The defendant argued that a declarant's statement was admissible as a declaration against penal interest, and alternatively as residual hearsay. The court found that Rule 804(b)(3) was inapplicable, because of lack of corroborating circumstances indicating trustworthiness, noting that the statement was "fatally uncorroborated." Turning to the residual exception, the court held that the statement failed to meet the trustworthiness requirement for the same reasons it failed to meet the Rule 804(b)(3) corroborating circumstances requirement.

[57] It can be pointed out that the case law rejecting corroboration under Rule 804(b)(3) is not only inconsistent with Rule 807 as amended ---it is also inconsistent with the co-conspirator exception, see *Bourjaily v. United States,* 483 U.S. 171 (1987) (considering corroborating evidence on the question of whether the declarant is a coconspirator).

## XVI. The Applicability of the Corroborating Circumstances Requirement to Civil Cases

As seen above, the corroborating circumstances requirement applies to admission of a declaration against penal interest "if it is offered in a criminal case." But in *American Automotive Accessories, Inc. v. Fishman,* 175 F.3d 534 (7th Cir. 1999), the court held that the corroborating circumstances requirement applied to declarations against penal interest offered in *civil cases*. Favia, an employee of American, was discovered by the company to have written checks to fictional accounts. When confronted, he admitted that he cashed the checks for his own benefit, receiving payment for the checks from Fishman, who took a fee for the service. American sued Fishman to recover the funds, arguing that Fishman was in on the fraud. Favia's statements to his employer were offered as declarations against Favia's penal interest. The lower court found that American had not met its burden of showing that the statements were supported by corroborating circumstances clearly indicating their trustworthiness; summary judgment was granted for Fishman.

The Seventh Circuit read the corroborating circumstances requirement into civil cases. It basically concluded that it was important to have a "unitary standard" for declarations against penal interest, no matter in what case and no matter by whom they are offered. And the court reasoned that if there are sufficient doubts concerning the reliability of statements that tend to subject the declarant to criminal liability --- doubts that need to be shored up by the extra requirement of corroborating circumstances --- those doubts are equally applicable when the statement is offered in a civil case.

There are a few district court decisions that are consistent with *Fishman* in that they either hold or assume that the corroborating circumstances requirement applies in civil cases. *See SEC v. 800America.com,* 2006 U.S. Dist. LEXIS (S.D.N.Y.) (SEC enforcement proceeding; statement exculpating the defendant is not admissible as a declaration against penal interest because the defendant did not provide corroborating circumstances indicating that the statement was reliable); *Farr Man Coffee v. Chester,* 1993 U.S. Dist. LEXIS 8992 (S.D.N.Y.); (corroborating circumstances required, and found, in a civil case); *JVC Am., Inc. v. Guardsmark, LLC*, 2007 U.S. Dist. LEXIS 71529 (N.D. Ga.) (stating in dictum that corroborating circumstances are required for declarations against penal interest offered in civil cases).

But other cases disagree with *Fishman,* taking the straightforward position that the corroborating circumstances requirement, by its terms, applies only in criminal cases --- and courts don't have authority to read a requirement into an evidence rule that plainly is not there. For example, in *United States v. Riley*, 920 F.3d 200 (4th Cir. 2019), the court affirmed revocation of supervised release based on a convicted drug offender's admission of methamphetamine use and distribution to his probation officer. Even without a showing of corroborating circumstances, the

statement was found properly admitted as a declaration of the offender's penal interest, because the corroborating circumstances requirement applies only in criminal proceedings, which supervised release revocation proceedings are not. And in *Linde v. Arab Bank,* 97 F.Supp.3d 287 (E.D.N.Y. 2015), the court held that statements by Hamas taking responsibility for terrorist bombings were admissible in a civil case against a bank, alleging that the bank funded Hamas. The court stated as follows:

> It bears mentioning that this is not a criminal case. Thus, Rule 804(b)(3)(B)'s requirement that a statement against interest be supported by corroborating circumstances does not apply, because the statement is not "offered in a criminal case."

The Committee considered extending the corroborating circumstances requirement to civil cases in the work that led up to the 2010 amendment. That work actually started in 2001, with a proposed amendment that was issued for public comment in 2003. That proposed amendment made the corroborating circumstances requirement applicable in all cases (as said previously, the original rule did not apply to government-offered statements in criminal cases, and the major point of the proposed amendment was to require the government to prove corroborating circumstances, just like the defendant had always been required to do). The extension to civil cases was based on *Fishman,* which was the only circuit court case on point at the time. The Committee Note to the proposal provided as follows:

> The corroborating circumstances requirement has also been applied to declarations against penal interest offered in a civil case. *See, e.g., American Automotive Accessories, Inc. v. Fishman,* 175 F.3d 534, 541 (7th Cir. 1999) (noting the advantage of a "unitary standard" for admissibility of declarations against penal interest). This unitary approach to declarations against penal interest assures all litigants that only reliable hearsay statements will be admitted under the exception.

When the 2003 proposal was sent out for public comment, the extension of the corroborating circumstances requirement to civil cases was opposed by the American College of Trial Lawyers. The College argued that it would "move a difficult aspect of the criminal procedural law into the civil procedural law, without any compelling reason to do so." The College thought that any change to civil cases should at least await more case law on the subject. It was especially concerned that the change would create proof problems for plaintiffs in antitrust cases, and saw no justification for imposing an extra evidentiary requirement in such cases. Other public comments were favorable, however, arguing the benefit of having a unitary standard for admissibility of declarations against penal interest in all cases.

The 2003 proposed amendment came to an end when, after being approved by the Standing Committee and the Judicial Conference, it was sent back by the Supreme Court. By that time, *Crawford v. Washington* was on the docket, and the Court was concerned that applying the

"corroborating circumstances" requirement to government-proffered hearsay in criminal cases might not mesh with whatever new test for the Confrontation Clause might be developed.

When it was eventually concluded that *Crawford* posed no bar to a corroborating circumstances requirement (because that would have nothing to do with whether the hearsay statement was testimonial), the Committee started its process anew --- and the amendment to Rule 804(b)(3) finally became effective in 2010. During this second process, the Committee revisited the question of the applicability of the corroborating circumstances requirement to civil cases. The Committee noted the dearth of case law in the intervening years, and took to heart the concerns previously expressed by the American College of Trial Lawyers. The idea of a "unitary standard" was downplayed because the standard *would* be unitary in criminal cases, and the use of declarations against penal interest in civil cases is quite infrequent. The Committee unanimously decided not to address the applicability of the corroborating circumstances requirement to civil cases. A short statement was added to the 2010 Committee Note indicating that the Committee was taking no position on the applicability of the corroborating circumstances requirement in civil cases.

The difference between then and now is that now there is conflicting law between two circuits on the subject, as shown above. But there are still only two circuit court cases. It is clearly a question that does not often arise. So the case for an amendment to clarify the applicability of the corroborating circumstances requirement to civil cases is not especially strong.

On the merits of extending the requirement to civil cases, there are arguments on both sides. The College has a point: that it might not be a great idea to criminalize civil practice, and the corroborating circumstances requirement might impose a real impediment on civil plaintiffs (especially because the declarant by definition cannot be produced to testify). The other side of the argument is that expressed above: if the basis of the corroborating circumstances requirement is that the against-penal-interest requirement is too flimsy to support reliability on its own, then that concern applies to all cases, not just criminal cases.

If the Committee wishes to extend the corroborating circumstances requirement to civil cases, it need only delete the language "offered in a criminal case" from Rule 804(b)(3)(B). If the Committee is of the view that the requirement should not extend to civil cases, then there is nothing to do. That is what the rule already says, and the fact that the Seventh Circuit has misread it does not mean it has to be amended again to say "when we say a criminal case, we mean a criminal case."

## XVII. Rule 806 --- Impeaching Hearsay Declarants With Bad Acts

Rule 806 provides that when hearsay is admitted, "the declarant's credibility may be attacked . . . by any evidence that would be admissible for the purposes if the declarant had testified as a witness." The rule recognizes that when hearsay is admitted, it is the declarant who is effectively testifying at trial --- so for impeachment purposes, the declarant should be treated the same as a trial witness. Any other rule might allow a party to avoid impeachment of a witness by trying to admit the witness's hearsay statement in lieu of the witness's testimony.

There is a conflict in the courts about the viability of one form of impeachment under Rule 806: impeachment of the witness's character for truthfulness by evidence of prior bad acts. Rule 608(b), as applied at trial, limits the examiner to the witness's answers; it precludes extrinsic evidence of bad acts offered to impeach the witness's character for truthfulness. It can therefore be argued that bad act impeachment of a hearsay declarant who is not present to testify is impermissible, because it would require admission of extrinsic evidence of the bad act when the witness is not at trial to be asked about it and deny it. But the counter-argument is that the need to determine the credibility of a hearsay declarant is the same as with respect to an in-court witness, and so bad act evidence cannot be barred if it is the only way to raise the bad act. Rule 806 is clear in its intent that the adverse party is to have at least the same impeachment weapons as she would have if the witness were to testify.

In some courts, bad act impeachment is a permissible means of impeaching a hearsay declarant, if the witness who relates the hearsay has no knowledge of the bad act.[58] (Extrinsic evidence would not be required if the witness knows about the bad act and so can be asked about it.) The reasoning is that resort to extrinsic proof is the only meaningful way, in the absence of the declarant or any knowledge of the part of the witness, to disclose the bad act to the jury.[59]

In other courts, extrinsic evidence is never admissible to prove a bad act offered to impeach the hearsay declarant's character for truthfulness. For example, the court in *United States v. Saada,* 212 F.3d 210, 222 (3d Cir. 2000), relied on the "plain language" of Rule 806, which it read as creating exactly the same impeachment rules for in-court witnesses and hearsay declarants, with one exception—impeachment with inconsistent statements (where provision is made for admissibility even if the declarant never had an opportunity to explain or deny the statement). Because extrinsic evidence could not be used if the witness were to testify at trial, the court

[58] *See, e.g., United States v. Burton, 937* F.2d 324 (7th Cir. 1991) (error to preclude cross-examination of an FBI agent regarding the criminal record of a non-testifying government informant whose voice was heard in several tape-recorded conversations).

[59] *See, e.g., United States v. Friedman*, 854 F.2d 535 (2d Cir. 1988) (the court observed that when an unavailable declarant cannot be cross-examined, resort to extrinsic evidence may be the only means of presenting such evidence to the jury; in this case, however, the declarant's videotaped admission that he had lied on a single occasion was properly excluded under Rule 403).

reasoned that it cannot be used if the statement is introduced as hearsay. The court found that the rule's express exception for different treatment of inconsistent statements cut against any judicially-created differential treatment for bad-acts impeachment; that is, if Congress had wanted to create differential treatment for bad acts, it knew how to do so because it had done so for prior inconsistent statements. The court recognized that the ban on extrinsic proof, as applied to impeachment of hearsay declarants, "prevents using evidence of prior misconduct as a form of impeachment, unless the witness testifying to the hearsay has knowledge of the declarant's misconduct." Nevertheless, this drawback "may not override the language of Rules 806 and 608(b)." This means that the witness at trial who relates the hearsay could be asked about the hearsay declarant's bad act --- but only if that witness happens to know the hearsay declarant and has knowledge of the bad act. That will be a random event.[60]

The problem with the reasoning in *Saada* is that it is inconsistent with the intent of Rule 806, which is to give the opponent of the hearsay the same leeway for impeachment as it would have if the declarant testified at trial. Under *Saada*, the opponent of the hearsay is put in a worse position with respect to bad acts of the hearsay declarant. At trial, the bad acts could at least be referred to on cross-examination if the declarant were to testify, whereas if the statement is introduced as hearsay it is only randomly possible that the jury will hear about the declarant's bad acts, i.e., only if the witness relating the hearsay happens to know about the bad act.[61]

Assuming, though, that the *Saada* result is wrong on the merits, it is surely right about its construction of the existing Rule 806. The rule specifically provides an adjustment for impeaching hearsay declarants with prior inconsistent statements --- the Rule 613(b) requirement of providing

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[60] *See United States v. White,* 116 F.3d 903 (D.C. Cir. 1997) (per curiam): The court affirmed convictions for a drug trafficking conspiracy, holding there was no abuse of discretion in precluding cross-examination of an undercover officer as to whether a deceased declarant whose hearsay statements he had testified to had ever made false statements on an employment application or had ever violated any court orders. The court noted Rule 608(b)'s bar on extrinsic evidence of misconduct to impeach; "[a]ccordingly, [defendant]'s counsel could have asked [the officer] only if [the declarant] had ever lied on an employment form or violated any court orders, and could not have made reference to any extrinsic proof of those acts." Because the officer had known the declarant for only two months, the court found no abuse of discretion in the conclusion "that the questions were of little utility."

[61] For commentary in support of allowing extrinsic evidence of bad act impeachment under Rule 806, see Cordray, *Evidence Rule 806 and the Problem of the Nontestifying Declarant,* 56 Ohio St.L.J. 495, 526 (1995):

> If the attacking party cannot impeach the declarant with specific instances of conduct, she is clearly worse off than she would have been if her opponent had called the declarant to testify. … In addition, if Rule 806 is applied to enforce the prohibition on extrinsic evidence, parties might be encouraged to offer hearsay evidence rather than live testimony. For example, if a party felt that a witness was vulnerable to attack under Rule 608(b), that party might attempt to insulate the witness from this form of impeachment by offering his out-of-court statements, rather than calling him to testify. If, however, the attacking party were allowed to impeach a non-testifying declarant with extrinsic evidence of untruthful conduct, the incentive to use hearsay evidence would be removed. … These considerations militate strongly in favor of modifying Rule 608(b)'s ban on extrinsic evidence when the attacking party seeks to impeach a non-testifying declarant with specific instances of conduct showing untruthfulness.

an opportunity to explain or deny the statement is specifically made inapplicable to impeachment of hearsay declarants. (And for good reason, because they are not in court to explain or deny). But a similar adjustment was not made to impeachment with bad acts. There is nothing in the legislative history that I could find to explain why the Advisory Committee applied a carve-out to prior inconsistent statements but not to bad acts. But that is what happened.

If the Committee wishes to rectify the conflict in the cases – or if the Committee simply believes that there is a hole in Rule 806 that needs to be fixed, then an amendment might look like this:

**Rule 806. Attacking and Supporting the Declarant's Credibility**

**(a) General Rule.** When a hearsay statement — or a statement described in Rule 801(d)(2)(C), (D), or (E) — has been admitted in evidence, the declarant's credibility may be attacked, and then supported, by any evidence that would be admissible for those purposes if the declarant had testified as a witness.

**(b) Inconsistent Statement or Conduct.** The court may admit evidence of the declarant's inconsistent statement or conduct, regardless of when it occurred or whether the declarant had an opportunity to explain or deny it.

**(c) Specific Instances of Conduct.** The court may admit extrinsic evidence to prove specific instances of the declarant's conduct in order to attack or support the declarant's character for truthfulness, if the witness relating the declarant's statement at trial has no knowledge of the conduct.

**(d) Declarant Called as a Witness.** If the party against whom the statement was admitted calls the declarant as a witness, the party may examine the declarant on the statement as if on cross-examination.

# TAB 7

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Memorandum To: Advisory Committee on Evidence Rules
From: Daniel Capra, Reporter
Re: Federal Case Law Development After *Crawford v. Washington*
Date: October 1, 2020

The Committee has directed the Reporter to keep it apprised of case law developments after *Crawford v. Washington*. This memo is intended to fulfill that function. The memo describes the Supreme Court and federal circuit case law that discusses the impact of *Crawford* on the Federal Rules of Evidence. The outline begins with a short discussion of the Court's two latest cases on confrontation, *Ohio v. Clark* and *Williams v. Illinois,* and then summarizes all the post-*Crawford* cases by subject matter heading.

## I. Supreme Court Confrontation Cases

### *A. Ohio v. Clark*

The Court's most recent opinion on the Confrontation Clause and hearsay, *Ohio v. Clark,* 576 U.S. 237 (2015), shed light on how to determine whether hearsay is or is not "testimonial." As shown in the outline below, the Court has found a statement to be testimonial when the "primary motivation" for making the statement is to have it used in a criminal prosecution. *Clark* raised three questions about the application of the primary motivation test:

1. Can a statement be primarily motivated for use in a prosecution when it is not made with the involvement of law enforcement? (Or put the other way, is law enforcement involvement a prerequisite for a finding of testimoniality?).

2. If a person is required to report information to law enforcement, does that requirement render them law enforcement personnel for the purpose of the primary motivation test?

3. How does the primary motivation test apply to statements made by children, who are too young to know about use of statements for law enforcement purposes?

In *Clark*, teachers at a preschool saw indications that a 3 year-old boy had been abused, and asked the boy about it. The boy implicated the defendant. The boy's statement was admitted at trial under the Ohio version of the residual exception. The boy was not called to testify --- nor could he have been, because under Ohio law, a child of his age is incompetent to testify at trial. The defendant argued that the boy's statement was testimonial, relying in part on the fact that under Ohio law, teachers are required to report evidence of child abuse to law enforcement. The defendant argued that the reporting requirement rendered the teachers agents of law enforcement.

The Supreme Court in C*lark*, in an opinion by Justice Alito for six members of the Court, found that the boy's hearsay statement was not testimonial.[1] It made no categorical rulings as to the issues presented, but did make the following points about the primary motive test of testimoniality:

> 1. Statements of young children are *extremely unlikely* to be testimonial because a young child is not cognizant of the criminal justice system, and so will not be making a statement with the primary motive that it be used in a criminal prosecution.
>
> 2. A statement made without law enforcement involvement is *extremely unlikely* to be found testimonial because if law enforcement is not involved, there is probably some other motive for making the statement other than use in a criminal prosecution. Moreover, the formality of a statement is a critical component in determining primary motive, and if the statement is not made with law enforcement involved, it is much less likely to be formal in nature.
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> 3. The fact that the teachers were subject to a reporting requirement was essentially irrelevant, because the teachers would have sought information from the child whether or not there was a reporting requirement --- their primary motivation was to protect the child, and the reporting requirement did nothing to change that motivation. (So there may be room left for a finding of testimoniality if the government sets up mandatory reporting in a situation in which the individual would not otherwise think of, or be interested in, obtaining information).

[1]All nine Justices found that the boy's statement was not testimonial. Justices Scalia and Ginsburg concurred in the judgment, but challenged some of the language in the majority opinion on the ground that it appeared to be backsliding from the *Crawford* decision. Justice Thomas concurred in the judgment, finding that the statement was not testimonial because it lacked the solemnity required to meet his definition of testimoniality.

### *B. Williams v. Illinois*

In *Williams v. Illinois*, 567 U.S. 50 (2012), the Court brought substantial uncertainty to how courts are supposed to regulate hearsay offered against an accused under the Confrontation Clause. The case involved an expert who used testimonial hearsay as part of the basis for her opinion. The expert relied in part on a Cellmark DNA report to conclude that the DNA found at the crime scene belonged to Williams. The splintered opinions in *Williams* create confusion not only for how and whether experts may use testimonial hearsay, but more broadly about how some of the hearsay exceptions square with the Confrontation Clause bar on testimonial hearsay.

The question in *Williams* was whether an expert's testimony violates the Confrontation Clause when the expert relies on hearsay. A plurality of four Justices, in an opinion written by Justice Alito, found no confrontation violation for two independent reasons:

> 1) First, the hearsay (the report of a DNA analyst) was never admitted for its truth, but was only used as a basis of the expert's own conclusion that Williams's DNA was found at the crime scene. Justice Alito emphasized that the expert witness conducted her own analysis of the data and did not simply parrot the conclusions of the out-of-court analyst.
>
> 2) Second, the DNA test results were not testimonial in any event, because at the time the test was conducted the suspect was at large, and so the DNA was not prepared with the intent that it be used against a *targeted individual.*

Justice Kagan, in a dissenting opinion for four Justices, rejected both of the grounds on which Justice Alito relied to affirm Williams's conviction. She stated that it was a "subterfuge" to say that it was only the expert's opinion (and not the underlying report) that was admitted against Williams. She reasoned that where the expert relies on a report, the expert's opinion is useful only if the report itself is true. Therefore, according to Justice Kagan, the argument that the Cellmark report was not admitted for its truth rests on an artificial distinction that cannot satisfy the right to confrontation. As to Justice Alito's "targeting the individual" test of testimoniality, Justice Kagan declared that it was not supported by the Court's prior cases defining testimoniality in terms of primary motive. Her test of "primary motive" is whether the statement was prepared primarily for the purpose of *any* criminal prosecution, which the Cellmark report clearly was.[2]

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[2] Justice Breyer wrote a concurring opinion. He argued that rejecting the premise that an expert can rely on testimonial hearsay --- as permitted by Fed.R.Evid. 703 --- would end up requiring the government to call every person who had anything to do with a forensic test. That was a result he found untenable. He also set forth several possible approaches to permitting/limiting experts' reliance on lab reports, some of which he found "more compatible with *Crawford* than others" and some of which "seem more easily considered by a rules

Justice Thomas was the tiebreaker. He essentially agreed completely with Justice Kagan's critique of Justice Alito's two grounds for affirming the conviction. But Justice Thomas concurred in the judgment nonetheless, because he had his own reason for affirming the conviction. In his view, the use of the Cellmark report for its truth did not offend the Confrontation Clause because that report was not sufficiently "formalized." He declared that the Cellmark report

> lacks the solemnity of an affidavit of deposition, for it is neither a sworn nor a certified declaration of fact. Nowhere does the report attest that its statements accurately reflect the DNA testing processes used or the results obtained. . . . And, although the report was introduced at the request of law enforcement, it was not the product of any sort of formalized dialogue resembling custodial interrogation.

***Fallout from Williams:***

The irony of *Williams* is that *eight* members of the Court rejected Justice Thomas's view that testimoniality is defined by whether a statement is sufficiently formal as to constitute an affidavit or certification. Yet if a court is counting Justices, it appears that it might be necessary for the government to comply with the rather amorphous standards for "informality" established by Justice Thomas. Thus, if the government offers hearsay that would be testimonial under the Kagan view of "primary motive" but not under the Alito view, then the government may have to satisfy the Thomas requirement that the hearsay is not tantamount to a formal affidavit. Similarly, if the government proffers an expert who relies on testimonial hearsay, but the declarant does not testify, then it can be argued that the government must establish that the hearsay is not tantamount to a formal affidavit --- because five members of the Court rejected the argument that the Confrontation Clause is satisfied so long as the testimonial hearsay is used only as the basis of the expert's opinion.

There is a strong argument, though, that counting Justices after *Williams* is a fool's errand for now --- because of the death of Justices Scalia and Ginsburg and the retirement of Justice Kennedy, and the uncertainty over the views of the new Justices. (Though, in a dissent from denial of certiorari, Justice Gorsuch appeared to side with Justice Kagan's views in *Williams*).

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committee" than the Court.

The problem of course with consideration of these alternatives by a rules committee is that if the Confrontation Clause bars these approaches, the rules committee is just wasting its time. And given the uncertainty of *Williams*, it is fair to state that none of the approaches listed by Justice Breyer are clearly constitutional.

It should be noted that much of the post-*Crawford* landscape is unaltered by *Williams*. For example, take a case in which a victim has just been shot. He makes a statement to a neighbor "I've just been shot by Bill. Call an ambulance." Surely admission of that statement --- admissible against the accused as an excited utterance --- satisfies the Confrontation Clause on the same grounds after *Williams* as it did before. Such a statement is not testimonial because even under the Kagan view, it was not made with the primary motive that it would be used in a criminal prosecution. And *a fortiori* it satisfies the less restrictive Alito view. And Justice Thomas's "formality" test is not controlling, but even if it were, such a statement is not tantamount to an affidavit and so Justice Thomas would find no constitutional problem with its admission. See *Michigan v. Bryant,* 562 U.S. 344 (2011) (Thomas, J., concurring) (excited utterance of shooting victim "bears little if any resemblance to the historical practices that the Confrontation Clause aimed to eliminate.").

Similarly, there is extensive case law both before and after *Williams* allowing admission of testimonial statements on the ground that they are not offered for their truth. For example, if a statement is legitimately offered to show the background of a police investigation, or offered to show that the statement is in fact false, then it is not hearsay and it also does not violate the right to confrontation. This is because if the statement is not offered for its truth, there is no reason to cross-examine the declarant, and cross-examination is the procedure right that the Confrontation Clause guarantees. As will be discussed further below, while both Justice Thomas and Justice Kagan in *Williams* reject the not-for-truth analysis in the context of expert reliance on hearsay, they both distinguish that use from admitting a statement for a *legitimate* not-for-truth purpose. Moreover, both approve of the language in *Crawford* that the Confrontation Clause "does not bar the use of testimonial statements offered for purposes other than establishing the truth of the matter asserted." And they both approve of the result in *Tennessee v. Street,* 471 U.S. 409 (1985), in which the Court held that the Confrontation Clause was not violated when an accomplice confession was admitted only to show that it was different from the defendant's own confession. For the Kagan-Thomas camp, the question will be whether the testimonial statement is offered for a purpose as to which its probative value is not dependent on the statement being true --- and that is the test that is essentially applied by the lower courts in determining whether statements ostensibly offered for a not-for-truth purpose are consistent with the Confrontation Clause.

## II. Post-*Crawford* Cases Discussing the Relationship Between the Confrontation Clause and the Hearsay Rule and its Exceptions, Arranged By Subject Matter

### "Admissions" --- Hearsay Statements by the Defendant

**Defendant's own hearsay statement was not testimonial: *United States v. Lopez,* 380 F.3d 538 (1st Cir. 2004):** The defendant blurted out an incriminating statement to police officers after they found drugs in his residence. The court held that this statement was not testimonial under *Crawford.* The court declared that "for reasons similar to our conclusion that appellant's statements were not the product of custodial interrogation, the statements were also not testimonial." That is, the statement was spontaneous and not in response to police interrogation.

> **Note: The *Lopez* court had an easier way to dispose of the case. Both before and after *Crawford*, an accused has no right to confront *himself*. If the solution to confrontation is cross-examination, as the Court in *Crawford* states, then it is silly to argue that a defendant has the right to have his own statements excluded because he had no opportunity to cross-examine himself. *See United States v. Orm Hieng,* 679 F.3d 1131 (9th Cir. 2012): "The Sixth Amendment simply has no application [to the defendant's own hearsay statements] because a defendant cannot complain that he was denied the opportunity to confront himself."**

**Defendant's own statements, reporting statements of another defendant, are not testimonial under the circumstances: *United States v. Gibson,*** 409 F.3d 325 (6th Cir. 2005): In a case involving fraud and false statements arising from a mining operation, the trial court admitted testimony from a witness that Gibson told him that another defendant was planning on doing something that would violate regulations applicable to mining. The court recognized that the testimony encompassed double hearsay, but held that each level of hearsay was admissible as a statement by a party-opponent. Gibson also argued that the testimony violated *Crawford.* But the court held that Gibson's statement and the underlying statement of the other defendant were both casual remarks made to an acquaintance, and therefore were not testimonial.

**Text messages were properly admitted as coming from the defendant: *United States v. Brinson,*** 772 F.3d 1314 (10th Cir. 2014). In a prosecution for sex trafficking, text messages sent to a prostitute were admitted against the defendant. The defendant argued that admitting the texts violated his right to confrontation, but the court disagreed. The court stated that the texts were properly admitted as statements of a party-opponent, because the government had established by a preponderance of the evidence that the texts were sent by the defendant. They were therefore "not hearsay" under Rule 801(d)(2)(A), and "[b]ecause the messages did not constitute hearsay their introduction did not violate the Confrontation Clause."

**Note: The court in *Brinson* was right but for the wrong reasons. It is true that if a statement is "not hearsay" its admission does not violate the Confrontation Clause. (See the many cases collected under the "not hearsay" headnote, infra). But party-opponent statements are only technically "not hearsay." They are in fact hearsay because they are offered for their truth --- they are hearsay subject to an exemption. The Evidence Rules' technical categorization in Rule 801(d)(2) cannot determine the scope of the Confrontation Clause. If that were so, then coconspirator statements would automatically satisfy the Confrontation Clause because they, too, are classified as "not hearsay" under the Federal Rules. That would have made the Supreme Court's decision in *Bourjaily v. United States* unnecessary; and the Court in *Crawford* would not have had to discuss the fact that coconspirator statements are ordinarily not testimonial. The real reason that party-opponent statements are not hearsay is that when the defendant makes a hearsay statement, he has no right to confront himself.**

## *Bruton* --- Statements of Co-Defendants

***Bruton* line of cases not applicable unless accomplice's hearsay statement is testimonial:** ***United States v. Figueroa-Cartagena,*** 612 F.3d 69 (1st Cir. 2010): The defendant's codefendant had made hearsay statements in a private conversation that was taped by the government. The statements directly implicated both the codefendant and the defendant. At trial the codefendant's statements were admitted against him, and the defendant argued that the *Bruton* line of cases required severance. But the court found no *Bruton* error, because the hearsay statements were not testimonial in the first place. The statements were from a private conversation so the speaker was not primarily motivated to have the statements used in a criminal prosecution. The court stated that the "*Bruton/Richardson* framework presupposes that the aggrieved co-defendant has a Sixth Amendment right to confront the declarant in the first place."

***Bruton* does not apply unless the testimonial hearsay directly implicates the nonconfessing codefendant:** ***United States v. Lung Fong Chen***, 393 F.3d 139, 150 (2d Cir. 2004)**:** The court held that a confession of a co-defendant, when offered only against the co-defendant, is regulated by *Bruton,* not *Crawford*: so that the question of a Confrontation violation is dependent on whether the confession is powerfully incriminating against the non-confessing defendant. If the confession does not directly implicate the defendant, then there will be no violation if the judge gives an effective limiting instruction to the jury. *Crawford* does not apply because if the instruction is effective, the co-defendant is not a witness "against" the defendant within the meaning of the Confrontation Clause. ***See also Chrysler v. Guiney,*** 806 F.3d 104 (2nd Cir. 2015) (noting that if an accomplice confession is properly redacted to satisfy *Bruton,* then *Crawford* is not violated because the accomplice is not a witness "against" the defendant within the meaning of the Confrontation Clause).

***Bruton* protection limited to testimonial statements:** ***United States v. Berrios,*** 676 F.3d 118 (3rd Cir. 2012): "[B]ecause *Bruton* is no more than a byproduct of the Confrontation Clause, the Court's holdings in *Davis* and *Crawford* likewise limit *Bruton* to testimonial statements. Any protection provided by *Bruton* is therefore only afforded to the same extent as the Confrontation Clause, which requires that the challenged statement qualify as testimonial. To the extent we have held otherwise, we no longer follow those holdings." ***See also United States v. Shavers,*** 693 F.3d 363 (3rd Cir. 2012) (admission of non-testifying co-defendant's inculpatory statement did not violate *Bruton* because it was made casually to an acquaintance and so was non-testimonial; the statement bore "no resemblance to the abusive governmental investigation tactics that the Sixth Amendment seeks to prevent").

***Bruton* protection does not apply unless the codefendant's statements are testimonial: *United States v. Dargan,*** 738 F.3d 643 (4th Cir. 2013): The court held that a statement made to a cellmate in an informal setting was not testimonial --- therefore admitting the statement against the nonconfessing codefendant did not violate *Bruton,* because the premise of *Bruton* is that the nonconfessing defendant's confrontation rights are violated when the confessing defendant's statement is admitted at trial. But after *Crawford* there can be no confrontation violation unless the hearsay statement is testimonial.

***Bruton* does not apply unless the testimonial hearsay clearly and directly implicates the non-confessing co-defendant: *United States v. Benson,*** 957 F.3d 218 (4th Cir. 2020). In a case involving a robbery and murder, one of the joined defendants made a confession to a police officer. This statement was clearly testimonial, but the court found no *Bruton* violation because the confession was "not facially incriminating" at to the non-confessing codefendant. The statement was that the confessing defendant took the non-confessing defendant's truck to the robbery. "Left unsaid was whether Brown was physically present in the truck or at the house, or that Brown approved or even knew of Wallace's use of his truck." The court also rejected a *Bruton* claim as to confessions made by one defendant to a friend, because that statement was not testimonial.

**Limiting instruction satisfies *Bruton* as to testimonial hearsay, because it was not a direct accusation against the defendant: *United States v. Ramos-Cardenas,*** 524 F.3d 600 (5th Cir. 2008): In a multiple-defendant case, the trial court admitted a post-arrest statement by one of the defendants, which indirectly implicated the others. The court found that the confession could not be admitted against the other defendants, because the confession was testimonial under *Crawford.* But the court found that *Crawford* did not change the analysis with respect to the admissibility of a confession against the confessing defendant (because he has no right to confront himself); nor did it displace the case law under *Bruton* allowing limiting instructions to protect the non-confessing defendants under certain circumstances. The court found that the reference to the other defendants in the confession was vague, and therefore a limiting instruction was sufficient to assure that the confession would not be used against them. Thus, the *Bruton* problem was resolved by a limiting instruction.

**Codefendant's testimonial statements were not admitted "against" the defendant in light of limiting instruction: *United States v. Harper,*** 527 F.3d 396 (5th Cir. 2008): Harper's co-defendant made a confession, but it did not directly implicate Harper. At trial the confession was admitted against the co-defendant and the jury was instructed not to use it against Harper. The court recognized that the confession was testimonial, but held that it did not violate Harper's right to confrontation because the co-defendant was not a witness "against" him. The court relied on the post-*Bruton* case of *Richardson v. Marsh,* and held that the limiting instruction was sufficient to protect Harper's right to confrontation because the co-defendant's confession did not directly implicate Harper and so was not as "powerfully incriminating" as the confession in *Bruton.* The

court concluded that because "the Supreme Court has so far taken a pragmatic approach to resolving whether jury instructions preclude a Sixth Amendment violation in various categories of cases, and because *Richardson* has not been expressly overruled, we will apply *Richardson* and its pragmatic approach, as well as the teachings in *Bruton.*"

***Bruton* inapplicable to statement made by co-defendant to another prisoner, because that statement was not testimonial: *United States v. Vasquez,*** 766 F.3d 373 (5th Cir. 2014): The defendant's co-defendant made a statement to a jailhouse snitch that implicated the defendant in the crime. The defendant argued that admitting the codefendant's statement at his trial violated *Bruton*, but the court disagreed. It stated that *Bruton "*is no longer applicable to a non-testimonial prison yard conversation because *Bruton* is no more than a by-product of the Confrontation Clause." The court further stated that "statements from one prisoner to another are clearly non-testimonial."

***Bruton* protection does not apply unless codefendant's statements are testimonial: *United States v. Johnson,*** 581 F.3d 320 (6th Cir. 2009): The court held that after *Crawford, Bruton* is applicable only when the codefendant's statement is testimonial.

***Bruton* protection does not apply unless codefendant's statements are testimonial: *United States v. Dale,*** 614 F.3d 942 (8th Cir. 2010): The court held that after *Crawford, Bruton* is applicable only when the codefendant's statement is testimonial.

***Bruton* protection does not apply unless codefendant's statements are testimonial: *Lucero v. Holland,*** 902 F.3d 979 (9th Cir. 2018): The defendant was charged with others for attempting to murder a fellow prisoner. At trial, the government offered a handwritten gang memo that was found on another defendant the day after the murder attempt. It detailed the assault on the victim and identified the perpetrators. The memo was admitted only against the defendant who wrote it, as a party-opponent statement. The defendant argued that admission of the memo was a violation of *Bruton.* But the court found that the memo among gang members was clearly not testimonial, as it was not prepared with the primary motive of use in a criminal prosecution. (Far from it.). The court found that "the specialized rules of *Bruton* fit comfortably within the *Crawford* umbrella" --- meaning that *Bruton* is premised on a violation of the non-confessing defendant's right to confrontation and, after *Crawford,* the right to confrontation applies only to the admission of testimonial hearsay. The court concluded that "only testimonial codefendant statements are subject to the federal Confrontation Clause limits established in *Bruton."*

**Statement admitted against co-defendant only does not implicate *Crawford: Mason v. Yarborough,*** 447 F.3d 693 (9th Cir. 2006): A non-testifying codefendant confessed during police interrogation. At the trial of both defendants, the government introduced only the fact that the codefendant confessed, not the content of the statement. The court first found that there was no *Bruton* violation, because the defendant's name was never mentioned --- *Bruton* does not prohibit the admission of hearsay statements of a non-testifying codefendant if the statements implicate the

defendant only by inference and the jury is instructed that the evidence is not admissible against the defendant. For similar reasons, the court found no *Crawford* violation, because the codefendant was not a "witness against" the defendant. "Because Fenton's words were never admitted into evidence, he could not 'bear testimony' against Mason."

**Statement that is non-testimonial cannot raise a *Bruton* problem: *United States v. Patterson,*** 713 F.3d 1237 (10th Cir. 2013): The defendant challenged a statement by a non-testifying codefendant on *Bruton* grounds. The court found no error, because the statement was made in furtherance of the conspiracy. Accordingly, it was non-testimonial. That meant there was no *Bruton* problem because *Bruton* does not apply to non-testimonial hearsay. *Bruton* is a confrontation case and the Supreme Court has held that the Confrontation Clause extends only to testimonial hearsay. ***See also United States v. Clark,*** 717 F.3d 790 (10th Cir. 2013) (No *Bruton* violation because the codefendant hearsay was a coconspirator statement made in furtherance of the conspiracy and so was not testimonial); ***United States v. Morgan***, 748 F.3d 1024 (10th Cir. 2014) (statement admissible as a coconspirator statement cannot violate *Bruton* because "*Bruton* applies only to testimonial statements" and the statements were made between coconspirators dividing up the proceeds of the crime and so "were not made to be used for investigation or prosecution of crime.").

**Admission of codefendant's incriminating statement, made in an informal conversation with a friend, did not violate *Bruton*: *United States v. Hano,*** 922 F.3d 1272 (11th Cir. 1999): The court stated that "the same principles that govern whether the admission of testimony violated the Confrontation Clause control whether the admission of the statements of a nontestifying codefendant against a defendant at a joint trial violate *Bruton."* In this case there was no *Bruton* violation because the codefendant's incriminating statement was made as part of a "friendly and informal" exchange with a friend.

## Child-Declarants

**Statements of young children are extremely unlikely to be testimonial: *Ohio v. Clark,*** 576 U.S. 237 (2015): This case is fully discussed in Part I. The case involved a statement from a three-year-old boy to his teachers. It accused the defendant of injuring him. The Court held that a statement from a young child is extremely unlikely to be testimonial because the child is not aware of the possibility of use of statements in criminal prosecutions, and so cannot be speaking with the primary motive that the statement will be so used. The Court refused to adopt a bright-line rule, but it is hard to think of a case in which the statement of a young child will be found testimonial under the primary motivation test.

**Following *Clark,* the court finds that a report of sex abuse to a nurse by a 4 ½ year old child is not testimonial: *United States v. Barker,*** 820 F.3d 167 (5th Cir. 2016): The court held that a statement by a 4 ½ year-old girl, accusing the defendant of sexual abuse, was not testimonial in light of *Ohio v. Clark.* The girl made the statement to a nurse who was registered by the state to take such statements. The court held that like in *Clark* the statement was not testimonial because: 1) it was made by a child too young to understand the criminal justice system; 2) it was not made to law enforcement; 3) the nurse's primary motive was to treat the child; and 4) the fact that the nurse was required to report the abuse to law enforcement did not change her motivation to treat the child.

# Coconspirator Statements

**Coconspirator statement not testimonial: *United States v. Felton,*** 417 F.3d 97 (1st Cir. 2005): The court held that a statement by the defendant's coconspirator, made during the course and in furtherance of the conspiracy, was not testimonial under *Crawford.* **Accord *United States v. Sanchez-Berrios,*** 424 F.3d 65 (1st Cir. 2005) (noting that *Crawford* "explicitly recognized that statements made in furtherance of a conspiracy by their nature are not testimonial."). ***See also United States v. Turner,*** 501 F.3d 59 (1st Cir. 2007) (conspirator's statement made during a private conversation were not testimonial); ***United States v. Ciresi*****,** 697 F.3d 19 (1st Cir. 2012) (statements admissible as coconspirator hearsay under Rule 801(d)(2)(E) are "by their nature" not testimonial because they are "made for a purpose other than use in a prosecution.") ***United States v. Mayfield****,* 909 F.3d 956 (8th Cir. 2018): Affirming convictions for conspiracy to distribute methamphetamine, the court found that the trial court did not err in admitting statements by one coconspirator about a completed act of distribution, and by another who informed the defendant what the police had found when he was arrested. The defendant argued that both sets of statements were testimonial, but the court found that statements made in furtherance of a conspiracy are not testimonial because, by definition, they are not made for the primary purpose of being used as evidence in a prosecution.

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**Statements made pursuant to a conspiracy to commit kidnapping are not testimonial: *United States v. Stimler,*** 864 F.3d 253 (3rd Cir. 2017): The defendants were prosecuted for conspiracy to kidnap and related crimes arising out of Orthodox Jewish divorce proceedings. Statements were made at a *beth din* which was convened when the alleged victim of one of the kidnappings had challenged the validity of the *get* he signed. The court found that those statements were made pursuant to the kidnapping conspiracy, and reasoned that "none of the individuals at the *beth din* --- all of whom were charged in the conspiracy --- would have reasonably believed that they were making statements for the purpose of assisting a criminal prosecution."

**Surreptitiously recorded statements of coconspirators are not testimonial: *United States v. Hendricks,*** 395 F.3d 173 (3rd Cir. 2005): The court found that surreptitiously recorded statements of an ongoing criminal conspiracy were not testimonial within the meaning of *Crawford* because they were informal statements among coconspirators. ***See also United States v. Bobb,*** 471 F.3d 491 (3rd Cir. 2006) (noting that the holding in *Hendricks* was not limited to cases in which the declarant was a confidential informant).

**Statement admissible as coconspirator hearsay is not testimonial: *United States v. Robinson***, 367 F.3d 278 (5th Cir. 2004): The court affirmed a drug trafficker's murder convictions and death sentence. It held that coconspirator statements are not testimonial under *Crawford* as they are made under informal circumstances and not for the purpose of creating evidence. ***Accord***

***United States v. Delgado,*** 401 F.3d 290 (5th Cir. 2005); ***United States v. Olguin,*** 643 F.3d 384 (5th Cir. 2011); ***United States v. Alaniz,*** 726 F.3d 586 (5th Cir. 2013); ***United States v. Ayelotan,*** 917 F.3d 394 (5th Cir. 2019). ***See also United States v. King,*** 541 F.3d 1143 (5th Cir. 2008) ("Because the statements at issue here were made by co-conspirators in the furtherance of a conspiracy, they do not fall within the ambit of *Crawford's* protection"). Note that the court in *King* rejected the defendant's argument that the co-conspirator statements were testimonial because they were "presented by the government for their testimonial value." Accepting that definition would mean that all hearsay is testimonial simply by being offered at trial. The court observed that *"Crawford's* emphasis clearly is on whether the statement was testimonial at the time it was made."

**Statement by an anonymous coconspirator is not testimonial: *United States v. Martinez,*** 430 F.3d 317 (6th Cir. 2005). The court held that a letter written by an anonymous coconspirator during the course and in furtherance of a conspiracy was not testimonial under *Crawford* because it was not written with the intent that it would be used in a criminal investigation or prosecution. ***See also United States v. Mooneyham,*** 473 F.3d 280 (6th Cir. 2007) (statements made by coconspirator in furtherance of the conspiracy are not testimonial because the one making them "has no awareness or expectation that his or her statements may later be used at a trial"; the fact that the statements were made to a law enforcement officer was irrelevant because the officer was undercover and the declarant did not know he was speaking to a police officer); ***United States v. Stover,*** 474 F.3d 904 (6th Cir. 2007) (holding that under *Crawford,* "co-conspirators' statements made in pendency and furtherance of a conspiracy are not testimonial" and therefore that the defendant's right to confrontation was not violated when a statement was properly admitted under Rule 801(d)(2)(E)); ***United States v. Damra,*** 621 F.3d 474 (6th Cir. 2010) (statements made by a coconspirator "by their nature are not testimonial") ***United States v. Tragas,*** 727 F.3d 610 (6th Cir. 2013) ("As coconspirator statements were made in furtherance of the conspiracy, they were categorically non-testimonial.").

**Coconspirator statements made to an undercover informant are not testimonial: *United States v. Hargrove,*** 508 F.3d 445 (7th Cir. 2007): The defendant, a police officer, was charged with taking part in a conspiracy to rob drug dealers. One of his coconspirators had a discussion with a potential member of the conspiracy (in fact an undercover informant) about future robberies. The defendant argued that the coconspirator's statements were testimonial, but the court disagreed. It held that *"Crawford* did not affect the admissibility of coconspirator statements." The court specifically rejected the defendant's argument that *Crawford* somehow undermined *Bourjaily*, noting that in *Crawford*, "the Supreme Court specifically cited *Bourjaily* --- which as here involved a coconspirator's statement made to a government informant --- to illustrate a category of nontestimonial statements that falls outside the requirements of the Confrontation Clause."

**Statements by a coconspirator during the course and in furtherance of the conspiracy are not testimonial:** ***United States v. Lee,*** 374 F.3d 637 (8th Cir. 2004): The court held that statements admissible under the coconspirator exemption from the hearsay rule are by definition not testimonial. As those statements to be admissible must be made during the course and in furtherance of the conspiracy, they cannot be the kind of formalized, litigation-oriented statements that the Court found testimonial in *Crawford.* The court reached the same result on co-conspirator hearsay in ***United States v. Reyes*****,** 362 F.3d 536 (8th Cir. 2004); ***United States v. Singh,*** 494 F.3d 653 (8th Cir. 2007); and ***United States v. Hyles,*** 521 F.3d 946 (8th Cir. 2008) (noting that the statements were not elicited in response to a government investigation and were casual remarks to co-conspirators); ***United States v. Furman,*** 867 F.3d 981 (8th Cir. 2017) (statements by a coconspirator over a prison telephone were not testimonial even though the declarant knew the statements were recorded by law enforcement: "[A]lthough Gerald was aware that law enforcement might listen to his telephone conversations and use them as evidence, the primary purpose of the calls was to further the drug conspiracy, not to create a record for a criminal prosecution.").

**Statements in furtherance of a conspiracy are not testimonial:** ***United States v. Allen,*** 425 F.3d 1231 (9th Cir. 2005): The court held that "co-conspirator statements are not testimonial and therefore beyond the compass of *Crawford's* holding." ***See also United States v. Larson,*** 460 F.3d 1200 (9th Cir. 2006) (statement from one conspirator to another identifying the defendants as the source of some drugs was made in furtherance of the conspiracy; conspiratorial statements were not testimonial as there was no expectation that the statements would later be used at trial); ***United States v. Grasso,*** 724 F.3d 1077 (9th Cir. 2013) ("co-conspirator statements in furtherance of a conspiracy are not testimonial"); ***United States v. Cazares,*** 788 F.3d 956 (9th Cir. 2015) ("a conversation between two gang members about the journey of their burned gun is not testimonial").

**Statements admissible under the co-conspirator exemption are not testimonial:** ***United States v. Townley,*** 472 F.3d 1267 (10th Cir. 2007): The court rejected the defendant's argument that hearsay is testimonial under *Crawford* whenever "confrontation would have been required at common law as it existed in 1791." It specifically noted that *Crawford* did not alter the rule from *Bourjaily* that a hearsay statement admitted under Federal Rule 801(d)(2)(E) does not violate the Confrontation Clause. ***Accord United States v. Ramirez,*** 479 F.3d 1229 (10th Cir. 2007) (statements admissible under Rule 801(d)(2)(E) are not testimonial under *Crawford*); ***United States v. Patterson,*** 713 F.3d 1237 (10th Cir. 2013) (same); ***United States v. Morgan***, 748 F.3d 1024 (10th Cir. 2014) (statements made between coconspirators dividing up the proceeds of the crime were not testimonial because they "were not made to be used for investigation or prosecution of crime."); ***United States v. Yurek*****,** 925 F.3d 423 (10th Cir. 2019) (coconspirator hearsay is not testimonial).

**Statements made during the course and in furtherance of the conspiracy are not testimonial: *United States v. Underwood,*** 446 F.3d 1340 (11th Cir. 2006): In a narcotics prosecution, the defendant argued that the admission of an intercepted conversation between his brother Darryl and an undercover informant violated *Crawford*. But the court found no error and affirmed. The court noted that the statements "clearly were not made under circumstances which would have led [Daryl] reasonably to believe that his statement would be available for use at a later trial. Had Darryl known that Hopps was a confidential informant, it is clear that he never would have spoken to her in the first place." The court concluded as follows:

> Although the foregoing discussion would probably support a holding that the evidence challenged here is not "testimonial," two additional aspects of the *Crawford* opinion seal our conclusion that Darryl's statements to the government informant were not "testimonial" evidence. First, the Court stated: "most of the hearsay exceptions covered statements that by their nature were not testimonial -- for example, business records or statements in furtherance of a conspiracy." Also, the Court cited *Bourjaily v. United States*, 483 U.S. 171 (1987) approvingly, indicating that it "hew[ed] closely to the traditional line" of cases that *Crawford* deemed to reflect the correct view of the Confrontation Clause. In approving *Bourjaily*, the *Crawford* opinion expressly noted that it involved statements unwittingly made to an FBI informant. * * * The co-conspirator statement in *Bourjaily* is indistinguishable from the challenged evidence in the instant case.

***See also United States v. Lopez,*** 649 F.3d 1222 (11th Cir. 2011): co-conspirator's statement, bragging that he and the defendant had drugs to sell after a robbery, was admissible under Rule 801(d)(2)(E) and was not testimonial, because it was merely "bragging to a friend" and not a formal statement intended for trial.

## Cross-Examination

**Cross-examination of a witness during prior testimony was adequate even though defense counsel was found ineffective on other grounds: *Rolan v. Coleman,*** 680 F.3d 311 (3rd Cir. 2012): The habeas petitioner argued that his right to confrontation was violated when he was retried and testimony from the original trial was admitted against him. The prior testimony was obviously testimonial under *Crawford.* The question was whether the witness --- who was unavailable for the second trial --- was adequately cross-examined at the first trial. The defendant argued that cross-examination could not have been adequate because the court had already found defense counsel to be constitutionally ineffective at that trial (by failing to investigate a self-defense theory and failing to call two witnesses). The court, however, found the cross-examination to be adequate. The court noted that the state court had found the cross-examination to be adequate --- that court found "baseless" the defendant's argument that counsel had failed to explore the witness's immunity agreement. Because the witness had made statements before that agreement was entered into that were consistent with his in-court testimony, counsel could reasonably conclude that exploring the immunity agreement would do more harm than good. The court of appeals concluded that "[t]here is no Supreme Court precedent to suggest that Goldstein's cross-examination was inadequate, and the record does not support such a conclusion. Consequently, the Superior Court's finding was not contrary to, or an unreasonable application of, *Crawford.*"

**Attorney's cross-examination at a prior trial was adequate and therefore admitting the testimony at a later trial did not violate the right to confrontation: *United States v. Richardson,*** 781 F. 3d 287 (5th Cir. 2015): The defendant was convicted on drug and gun charges, but the conviction was reversed on appeal. By the time of retrial on mostly the same charges, a prosecution witness had become unavailable, and the trial court admitted the transcript of the witness's testimony from the prior trial. The court found no violation of the right to confrontation. The court found that *Crawford* did not change the long-standing rule as to the opportunity that must be afforded for cross-examination to satisfy the Confrontation Clause. What is required is an "adequate opportunity to cross-examine" the witness: enough to provide the jury with "sufficient information to appraise the bias and the motives of the witness." The court noted that while the lawyer's cross-examination of the witness at the first trial could have been better, it was adequate, as the lawyer explored the witness's motive to cooperate, his arrests and convictions, his relationship with the defendant, and "the contours of his trial testimony."

**Cross-examination at a deposition was adequate to satisfy the right to confrontation: *United States v. Mallory,*** 902 F.3d. 584 (6th Cir. 2018): The defendant was charged with a scheme to pilfer money from an old person, by forging a will. One of his accomplices, with whom he had fallen out, testified against him at a deposition, and was unavailable to testify at trial, due to dementia. The trial court admitted the deposition transcript, and the defendant argued that this violated his right to confrontation. The court held that the defendant had a meaningful opportunity

to cross-examine the witness at the deposition. The defendant argued that he had insufficient time to prepare for the deposition given voluminous discovery; but the court found that the defendant had failed to specify what his counsel could have reviewed but did not, and concluded that "counsel's preparation, even if hurried, was not so rushed as to significantly limit his ability to cross-examine." The defendant next argued that he received discovery after the deposition, but the court found that none of this information was pertinent to cross-examining the witness. The defendant next argued that he did not know that the witness had been diagnosed with dementia at the time of the deposition, and would have liked to cross-examine the witness on that. But the court responded that the defendant had information that the witness was confused, and actually asked him if he had been diagnosed with Alzheimer's; and moreover, the defendant was allowed to impeach the deposition at trial with information about the witness's mental condition.

**State court was not unreasonable in finding that cross-examination by defense counsel at the preliminary hearing was sufficient to satisfy the defendant's right to confrontation: *Williams v. Bauman,*** 759 F.3d 630 (9th Cir. 2014): The defendant argued that his right to confrontation was violated when the transcript of the preliminary hearing testimony of an eyewitness was admitted against him at his state trial. The witness was unavailable for trial and the defense counsel cross-examined him at the preliminary hearing. The court found that the state court was not unreasonable in concluding that the cross-examination was adequate, thus satisfying the right to confrontation. The court noted that "there is some question whether a preliminary hearing necessarily offers an adequate opportunity to cross-examine for Confrontation Clause purposes" but concluded that there was "reasonable room for debate" on the question, and therefore the state court's decision to align itself on one side of the argument was beyond the federal court's power to remedy on habeas review.

## Declarations Against Penal Interest (Including Accomplice Statements to Law Enforcement)

**Accomplice's jailhouse statement was admissible as a declaration against interest and accordingly was not testimonial: *United States v. Pelletier,*** 666 F.3d 1 (1st Cir. 2011): The defendant's accomplice made hearsay statements to a jailhouse buddy, indicating among other things that he had smuggled marijuana for the defendant. The court found that the statements were properly admitted as declarations against interest. The court noted specifically that the fact that the accomplice made the statements "to fellow inmate Hafford, rather than in an attempt to curry favor with police, cuts in favor of admissibility." For similar reasons, the hearsay was not testimonial under *Crawford.* The court stated that the statements were made "not under formal circumstances, but rather to a fellow inmate with a shared history, under circumstances that did not portend their use at trial against Pelletier." ***See also United States v. Veloz,*** 948 F.3d 418 (1st Cir. 2020) (statement to a fellow inmate, admissible as a declaration against penal interest, was not testimonial).

**Statement admissible as a declaration against penal interest, after *Williamson*, is not testimonial: *United States v. Saget,*** 377 F.3d 223 (2nd Cir. 2004) (Sotomayor, J.): The defendant's accomplice spoke to an undercover officer, trying to enlist him in the defendant's criminal scheme. The accomplice's statements were admitted at trial as declarations against penal interest under Rule 804(b)(3), as they tended to implicate the accomplice in a conspiracy. After *Williamson v. United States,* hearsay statements made by an accomplice to a law enforcement officer while in custody are not admissible under Rule 804(b)(3) when they implicate the defendant, because the accomplice may be currying favor with law enforcement. But in the instant case, the accomplice's statement was not barred by *Williamson,* because it was made to an undercover officer---the accomplice didn't know he was talking to a law enforcement officer and therefore had no reason to curry favor by implicating the defendant. For similar reasons, the statement was not testimonial under *Crawford* --- it was not the kind of formalized statement to law enforcement, prepared for trial, such as a "witness" would provide. ***See also United States v. Williams***, 506 F.3d 151 (2d Cir. 2007): Statement of accomplice implicating himself and defendant in a murder was admissible under Rule 804(b)(3) where it was made to a friend in informal circumstances; for the same reason the statement was not testimonial. The defendant's argument about insufficient indicia of reliability was misplaced because the Confrontation Clause no longer imposes a reliability requirement. ***Accord United States v. Wexler,*** 522 F.3d 194 (2nd Cir. 2008) (inculpatory statement made to friends found admissible under Rule 804(b)(3) and not testimonial).

**Intercepted conversations were admissible as declarations against penal interest and were not testimonial: *United States v. Berrios,*** 676 F.3d 118 (3rd Cir. 2012): Authorities intercepted a conversation between two criminal associates in a prison yard. The court held that

the statements were non-testimonial, because neither of the declarants "held the objective of incriminating any of the defendants at trial when their prison yard conversation was recorded; there is no indication that they were aware of being overheard; and there is no indication that their conversation consisted of anything but casual remarks to an acquaintance." A defendant also lodged a hearsay objection, but the court found that the statements were admissible as declarations against interest. The declarants unequivocally incriminated themselves in acts of carjacking and murder, as well as shooting a security guard, and they mentioned the defendant "only to complain that he crashed the getaway car." ***See also Mitchell v. Superintendent,*** 902 F.3d 156 (3rd Cir. 2016) (jailhouse conversations among inmates, admissible as declarations against interest, were not testimonial).

**Accomplice's statement made to a friend, admitting complicity in a crime, was admissible as a declaration against interest and was not testimonial: *United States v. Jordan,*** 509 F.3d 191 (4th Cir. 2007): The defendant was convicted of murder while engaged in a drug-trafficking offense. He contended that the admission of a statement of an accomplice was error under the Confrontation Clause and the hearsay rule. The accomplice confessed her part in the crime in a statement to her roommate. The court found no error in the admission of the accomplice's statement. It was not testimonial because it was made to a friend, not to law enforcement. The court stated: "To our knowledge, no court has extended *Crawford* to statements made by a declarant to friends or associates." The court also found the accomplice's statement properly admitted as a declaration against interest. The court elaborated as follows:

> Here, although Brown's statements to Adams inculpated Jordan, they also subject *her* to criminal liability for a drug conspiracy and, by extension, for Tabon's murder. Brown made the statements to a friend in an effort to relieve herself of guilt, not to law enforcement in an effort to minimize culpability or criminal exposure.

**Accomplice's statements to the victim, in conversations taped by the victim, were not testimonial: *United States v. Udeozor,*** 515 F.3d 260 (4th Cir.2008): The defendant was convicted for conspiracy to hold another in involuntary servitude. The evidence showed that the defendant and her husband brought a teenager from Nigeria into the United States and forced her to work without compensation. The victim also testified at trial that the defendant's husband raped her on a number of occasions. On appeal the defendant argued that the trial court erroneously admitted two taped conversations between the victim and the defendant. The victim taped the conversations surreptitiously in order to refer them to law enforcement. The court found no error in admitting the tapes. The conversations were hearsay, but the husband's statements were admissible as declarations against penal interest, as they admitted wrongdoing and showed an attempt to evade prosecution. The defendant argued that even if admissible under Rule 804(b)(3), the conversations were testimonial under *Crawford*. She argued that a statement is testimonial if the *government's* primary motivation is to prepare the statement for use in a criminal prosecution --- and that in this case, the victim was essentially acting as a government agent in obtaining statements to be used for trial. But the court found that the conversation was not testimonial because the husband did not

know he was talking to anyone affiliated with law enforcement, and the *husband's* primary motivation was not to prepare a statement for any criminal trial. The court observed that the "intent of the police officers or investigators is relevant to the determination of whether a statement is testimonial only if it is first the case that a person in the position of the declarant reasonably would have expected that his statements would be used prosecutorially."

> **Note: This case was decided before *Michigan v. Bryant, infra,* but it consistent with the holding in *Bryant* that the primary motive test considers the motivation of all the parties to a communication --- and that all of them must be primarily motivated to have the statement used in a criminal prosecution for the statement to be testimonial.**

**Accomplice's confessions to law enforcement agents were testimonial: *United States v. Harper,*** 514 F.3d 456 (5th Cir. 2008): The court held that confessions made by the codefendant to law enforcement were testimonial, even though the codefendant did not mention the defendant as being involved in the crime. The statements were introduced to show that the codefendant owned some of the firearms and narcotics at issue in the case, and these facts implicated the defendant as well. The court did not consider whether the confessions were admissible under a hearsay exception --- but they would not have been admissible as a declaration against interest, because *Williamson* bars confessions of cohorts made to law enforcement.

**Accomplice's statements to a friend, implicating both the accomplice and the defendant in the crime, were not testimonial: *Ramirez v. Dretke,*** 398 F.3d 691 (5th Cir. 2005): The defendant was convicted of murder. Hearsay statements of his accomplice were admitted against him. The accomplice made statements both before and after the murder that directly implicated both himself and the defendant. These statements were made to the accomplice's roommate. The court found that these statements were not testimonial under *Crawford*: "There is nothing in *Crawford* to suggest that testimonial evidence includes spontaneous out-of-court statements made outside any arguably judicial or investigatorial context."

**Declaration against penal interest, made to a friend, is not testimonial: *United States v. Franklin,*** 415 F.3d 537 (6th Cir. 2005): The defendant was charged with bank robbery. One of the defendant's accomplices (Clarke), was speaking to a friend (Wright) sometime after the robbery. Wright told Clarke that he looked "stressed out." Clarke responded that he was indeed stressed out, because he and the defendant had robbed a bank and he thought the authorities were on their trail. The court found no error in admitting Clarke's hearsay statement against the defendant as a declaration against penal interest, as it disserved Clark's interest and was not made to law enforcement officers in any attempt to curry favor with the authorities. On the constitutional question, the court found that Clarke's statement was not testimonial under *Crawford:*

> Clarke made the statements to his friend by happenstance; Wright was not a police officer or a government informant seeking to elicit statements to further a prosecution against Clarke or Franklin. To the contrary, Wright was privy to Clarke's statements only as his friend and confidant.

The court distinguished other cases in which an informant's statement to police officers was found testimonial, on the ground that those other cases involved accomplice statements knowingly made to police officers, so that "the informant's statements were akin to statements elicited during police interrogation, i.e., the informant could reasonably anticipate that the statements would be used to prosecute the defendant."

***See also United States v. Gibson,*** 409 F.3d 325 (6th Cir. 2005) (describing statements as nontestimonial where "the statements were not made to the police or in the course of an official investigation, nor in an attempt to curry favor or shift the blame"); ***United States v. Johnson,*** 440 F.3d 832 (6th Cir. 2006) (statements by accomplice to an undercover informant he thought to be a cohort were properly admitted against the defendant; the statements were not testimonial because the declarant didn't know he was speaking to law enforcement, and so a person in his position "would not have anticipated that his statements would be used in a criminal investigation or prosecution of Johnson.").

**Statement admissible as a declaration against penal interest is not testimonial: *United States v. Johnson*,** 581 F.3d 320 (6th Cir. 2009): The court held that the tape-recorded confession of a coconspirator describing the details of an armed robbery, including his and the defendant's roles, was properly admitted as a declaration against penal interest. The court found that the statements tended to disserve the declarant's interest because "they admitted his participation in an unsolved murder and bank robbery." And the statements were trustworthy because they were made to a person the declarant thought to be his friend, at a time when the declarant did not know he was being recorded "and therefore could not have made his statement in order to obtain a benefit from law enforcement." Moreover, the hearsay was not testimonial, because the declarant did not know he was being recorded or that the statement would be used in a criminal proceeding against the defendant.

**Accomplice confession to law enforcement is testimonial, even if redacted: *United States v. Jones,*** 371 F.3d 363 (7th Cir. 2004): An accomplice's statement to law enforcement was offered against the defendant, though it was redacted to take out any direct reference to the defendant. The court found that even if the confession, as redacted, could be admissible as a declaration against interest (a question it did not decide), its admission would violate the Confrontation Clause after *Crawford*. The court noted that even though redacted, the confession was testimonial, as it was made during interrogation by law enforcement. And because the defendant never had a chance to cross-examine the accomplice, "under *Crawford*, no part of Rock's confession should have been allowed into evidence."

**Declaration against interest made to an accomplice who was secretly recording the conversation for law enforcement was not testimonial: *United States v. Watson,*** 525 F.3d 583 (7th Cir. 2008): After a bank robbery, one of the perpetrators was arrested and agreed to cooperate with the FBI. She surreptitiously recorded a conversation with Anthony, in which Anthony implicated himself and Watson in the robbery. The court found that Anthony's statement was against his own interest, and rejected Watson's contention that it was testimonial. The court noted that Anthony could not have anticipated that the statement would be used at a trial, because he did not know that the FBI was secretly recording the conversation. It concluded: "A statement unwittingly made to a confidential informant and recorded by the government is not testimonial for Confrontation Clause purposes." ***Accord United States v. Volpendesto*** *,* 746 F.3d 273 (7th Cir. 2014): Statements of an accomplice made to a confidential informant were properly admitted as declarations against interest and for the same reasons were not testimonial. The defendant argued that the court should reconsider its ruling in *Watson* because the Supreme Court, in *Michigan v. Bryant,* had in the interim stated that in determining primary motive, the court must look at the motivation of both the declarant and the other party to the conversation, and in this case as in *Watson* the other party was a confidential informant trying to obtain statements to use in a criminal prosecution. But the court noted that in *Bryant* the Court stated that the relevant inquiry "is not the subjective or actual purpose of the individuals involved in a particular encounter, but rather the purpose that reasonable participants would have had." Applying this objective approach, the court concluded that the conversation "looks like a casual, confidential discussion between co-conspirators."

**Statement admissible as a declaration against penal interest, after *Williamson*, is not testimonial: *United States v. Manfre,*** 368 F.3d 832 (8th Cir. 2004): An accomplice made a statement to his fiancee that he was going to burn down a nightclub for the defendant. The court held that this statement was properly admitted as a declaration against penal interest, as it was not a statement made to law enforcement to curry favor. Rather, it was a statement made informally to a trusted person. For the same reason, the statement was not testimonial under *Crawford*; it was a statement made to a loved one and was "not the kind of memorialized, judicial-process-created evidence of which *Crawford* speaks."

**Accomplice statements to cellmate were not testimonial: *United States v. Johnson,*** 495 F.3d 951 (8th Cir. 2007): The defendant's accomplice made statements to a cellmate, implicating himself and the defendant in a number of murders. The court found that these hearsay statements were not testimonial, as they were made under informal circumstances and there was no involvement with law enforcement.

**Accomplice's confession to law enforcement was testimonial, even if redacted: *United States v. Shaw,*** 758 F.3d 1187 (10th Cir. 2014): At the defendant's trial, the court permitted a police officer to testify about a confession made by the defendant's alleged accomplice. The accomplice was not a co-defendant, but the court, relying on the *Bruton* line of cases, ruled that

the confession could be admitted so long as all references to the defendant were replaced with a neutral pronoun. The court of appeals found that this was error, because the confession to law enforcement was, under *Crawford,* clearly testimonial. It stated that "[r]edaction does not override the Confrontation Clause. It is just a tool to remove, in appropriate cases, the prejudice to the defendant from allowing the jury to hear evidence admissible against the codefendant but not admissible against the defendant." The trial court's reliance on the *Bruton* cases was flawed because in those cases the accomplice is joined as a codefendant and the confession is admissible against the accomplice. In this case, where the defendant was tried alone and the confession was offered against him only, it was inadmissible for any purpose, whether or not redacted.

**Jailhouse confession implicating defendant was admissible as a declaration against penal interest and was not testimonial: *United States v. Smalls,*** 605 F.3d 765 (10th Cir. 2010): The court found no error in admitting a jailhouse confession that implicated a defendant in the murder of a government informant. The fact that the statements were made in a conversation with a government informant did not make them testimonial because the declarant did not know he was being interrogated, and the statement was not made under the formalities required for a statement to be testimonial. And the statements were properly admitted under Rule 804(b)(3), because they implicated the declarant in a serious crime committed with another person, there was no attempt to shift blame to the defendant, and the declarant did not know he was talking to a government informant and therefore was not currying favor with law enforcement.

**Declaration against interest is not testimonial: *United States v. U.S. Infrastructure, Inc.,*** 576 F.3d 1195 (11th Cir. 2009): The declarant, McNair, made a hearsay statement that he was accepting bribes from one of the defendants. The statement was made in private to a friend. The court found that the statement was properly admitted as a declaration against McNair's penal interest, as it showed that he accepted bribes from an identified person. The court also held that the hearsay was not testimonial, because it was "part of a private conversation" and no law enforcement personnel were involved. ***See also, United States v. Hano,*** 922 F.3d 1272 (11th Cir. 2019) (Incriminating statement was made as part of a "friendly and informal" exchange with a friend; the statement was nontestimonial, and was properly admitted as a declaration against interest).

## Dying Declarations

**Testimonial dying declarations do not clearly offend the Confrontation Clause: *Woods v. Cook,*** 960 F.3d 295 (6th Cir. 2020): Reviewing a denial of a habeas petition, the court found that the state court had not acted unreasonably in determining that the admission of a testimonial dying declaration did not violate the petitioner's right to confrontation. The court stated that under *Crawford,* "the state may admit an unconfronted out-of-court statement if it fits a historically recognized common law exception." It noted, however, that the *Crawford* Court refused to decide whether the Sixth Amendment incorporates the dying declaration exception, and so the exception is in "High Court limbo." Nonetheless, the fact that the *Crawford* Court found it unnecessary to decide the issue meant that the state court by definition had not unreasonably applied clearly established Supreme Court precedent in determining that the dying declarations exception was consistent with the Sixth Amendment. The court explained as follows:

> Since *Crawford*, the U.S. Supreme Court has acknowledged the potential permissibility of this common law exception to the Confrontation Clause. See *Giles*, 554 U.S. at 358, 128 S.Ct. 2678. Under these circumstances, we cannot fault state courts for continuing to do what the U.S. Supreme Court has acknowledged they may be able to do after *Crawford* and what the Court itself did before *Crawford*. *See, e.g., Mattox v. United States,* 156 U.S. 237, 243–44, 15 S.Ct. 337, 39 L.Ed. 409 (1895) (noting that courts have treated dying declarations as "competent testimony" since "time immemorial"). * * * Our sister circuits have taken a similar view in unpublished opinions. See, e.g., *Martin v. Fanies,* 365 F. App'x 736, 738–39 (8th Cir. 2010); *Brown v. Att'y Gen. of Cal.,* 650 F. App'x 434, 436 (9th Cir. 2016). We are not aware of a contrary decision, and Woods has not identified one.

## Excited Utterances, 911 Calls, Etc.

**911 calls and statements to responding officers may be testimonial, but only if the primary purpose is to establish or prove past events in a criminal prosecution: *Davis v. Washington* and *Hammon v. Indiana,*** 547 U.S. 813 (2006): In companion cases, the Court decided whether reports of crime by victims of domestic abuse were testimonial under *Crawford*. In *Davis,* the victim's statements were made to a 911 operator while and shortly after the victim was being assaulted by the defendant. In *Hammon,* the statements were made to police, who were conducting an interview of the victim after being called to the scene. The Court held that the statements in *Davis* were not testimonial, but came to the opposite result with respect to one of the statements in *Hammon*. The Court set the dividing line for such statements as follows:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

The Court defined testimoniality by whether the *primary motivation* in making the statements was for use in a criminal prosecution.

**Pragmatic application of the emergency and primary purpose standards: *Michigan v. Bryant,*** 562 U.S. 344 (2011): The Court held that the statement of a shooting victim to police, identifying the defendant as the shooter --- and admitted as an excited utterance under a state rule of evidence --- was not testimonial under *Davis* and *Crawford.* The Court applied the test for testimoniality established by *Davis* --- whether the primary motive for making the statement was to have it used in a criminal prosecution --- and found that in this case such primary motive did not exist. The Court noted that *Davis* focused on whether statements were made to respond to an emergency, as distinct from an investigation into past events. But it stated that the lower court had construed that distinction too narrowly to bar, as testimonial, essentially all statements of past events. The Court made the following observations about how to determine testimoniality when statements are made to responding police officers:

> 1. The primary purpose inquiry is objective. The relevant inquiry into the parties' statements and actions is not the subjective or actual purpose of the particular parties, but the purpose that reasonable participants would have had, as ascertained from the parties' statements and actions and the circumstances in which the encounter occurred.
>
> 2. As *Davis* notes, the existence of an "ongoing emergency" at the time of the encounter is among the most important circumstances informing the interrogation's

primary purpose. An emergency focuses the participants not on proving past events potentially relevant to later criminal prosecution, but on ending a threatening situation. But there is no categorical distinction between present and past fact. Rather, the question of whether an emergency exists and is ongoing is a highly context-dependent inquiry. An assessment of whether an emergency threatening the police and public is ongoing cannot narrowly focus on whether the threat to the first victim has been neutralized, because the threat to the first responders and public may continue.

3. An emergency's duration and scope may depend in part on the type of weapon involved; in *Davis* and *Hammon* the assailants used their fists, which limited the scope of the emergency --- unlike in this case where the perpetrator used a gun, and so questioning could permissibly be broader.

4. A victim's medical condition is important to the primary purpose inquiry to the extent that it sheds light on the victim's ability to have any purpose at all in responding to police questions and on the likelihood that any such purpose would be a testimonial one. It also provides important context for first responders to judge the existence and magnitude of a continuing threat to the victim, themselves, and the public.

5. Whether an ongoing emergency exists is simply one factor informing the ultimate inquiry regarding an interrogation's "primary purpose." Another is the encounter's informality. Formality suggests the absence of an emergency, but informality does not necessarily indicate the presence of an emergency or the lack of testimonial intent.

6. The statements and actions of *both* the declarant and interrogators provide objective evidence of the interrogation's primary purpose. Looking to the contents of both the questions and the answers ameliorates problems that could arise from looking solely to one participant, because both interrogators and declarants may have mixed motives.

Applying all these considerations to the facts, the Court found that the circumstances of the encounter as well as the statements and actions of the shooting victim and the police objectively indicated that the interrogation's "primary purpose" was "to enable police assistance to meet an ongoing emergency." The circumstances of the interrogation involved an armed shooter, whose motive for and location after the shooting were unknown and who had mortally wounded the victim within a few blocks and a few minutes of the location where the police found him. Unlike the emergencies in *Davis* and *Hammon*, the circumstances presented in *Bryant* indicated a potential threat to the police and the *public*, even if not the victim. And because this case involved a gun, the physical separation that was sufficient to end the emergency in *Hammon* was not necessarily sufficient to end the threat.

The Court concluded that the statements and actions of the police and victim objectively indicated that the primary purpose of their discussion was not to generate statements for trial. When the victim responded to police questions about the crime, he was lying in a gas station parking lot bleeding from a mortal gunshot wound, and his answers were punctuated with

questions about when emergency medical services would arrive. Thus, the Court could not say that a person in his situation would have had a primary purpose "to establish or prove past events potentially relevant to later criminal prosecution." For their part, the police responded to a call that a man had been shot. They did not know why, where, or when the shooting had occurred; the shooter's location; or anything else about the crime. They asked exactly the type of questions necessary to enable them "to meet an ongoing emergency" --- essentially, who shot the victim and where did the act occur. Nothing in the victim's responses indicated to the police that there was no emergency or that the emergency had ended. The informality suggested that their primary purpose was to address what they considered to be an ongoing emergency --- apprehending a suspect with a gun --- and the circumstances lacked the formality that would have alerted the victim to or focused him on the possible future prosecutorial use of his statements.

Justice Sotomayor wrote the majority opinion for five Justices. Justice Thomas concurred in the judgment, adhering to his longstanding view that testimoniality is determined by whether the statement is the kind of formalized accusation that was objectionable under common law --- he found no such formalization in this case. Justices Scalia and Ginsburg wrote dissenting opinions. Justice Kagan did not participate.

**911 call reporting drunk person with an unloaded gun was not testimonial: *United States v. Cadieux,*** 500 F.3d 37 (1st Cir. 2007): In a felon-firearm prosecution, the trial court admitted a tape of a 911 call, made by the daughter of the defendant's girlfriend, reporting that the defendant was drunk and walking around with an unloaded shotgun. The court held that the 911 call was not testimonial. It relied on the following factors: 1) the daughter spoke about events "in real time, as she witnessed them transpire"; 2) she specifically requested police assistance; 3) the dispatcher's questions were tailored to identify "the location of the emergency, its nature, and the perpetrator"; and 4) the daughter was "hysterical as she speaks to the dispatcher, in an environment that is neither tranquil nor, as far as the dispatcher could reasonably tell, safe." The defendant argued that the call was testimonial because the daughter was aware that her statements to the police could be used in a prosecution. But the court found that after *Davis*, awareness of possible use in a prosecution is not enough for a statement to be testimonial. A statement is testimonial only if the "primary motivation" for making it is for use in a criminal prosecution.

**911 call was not testimonial under the circumstances: *United States v. Brito,*** 427 F.3d 53 (1st Cir. 2005): The court affirmed a conviction of illegal firearm possession. It held that statements made in a 911 call, indicating that the defendant was carrying and had fired a gun, were properly admitted as excited utterances, and that the admission of the 911 statements did not violate the defendant's right to confrontation. The court declared that the relevant question is whether the statement was made with an eye toward "legal ramifications." The court noted that under this test, statements to police made while the declarant or others are still in personal danger are ordinarily not testimonial, because the declarant in these circumstances "usually speaks out of urgency and a

desire to obtain a prompt response." In this case the 911 call was properly admitted because the caller stated that she had "just" heard gunshots and seen a man with a gun, that the man had pointed the gun at her, and that the man was still in her line of sight. Thus the declarant was in "imminent personal peril" when the call was made and therefore her report was not testimonial. The court also found that the 911 operator's questioning of the caller did not make the answers testimonial, because "it would blink reality to place under the rubric of interrogation the single off-handed question asked by the dispatcher --- a question that only momentarily interrupted an otherwise continuous stream of consciousness."

**911 call --- including statements about the defendant's felony status --- was not testimonial: *United States v. Proctor,*** 505 F.3d 366 (5th Cir. 2007): In a firearms prosecution, the court admitted a 911 call from the defendant's brother (Yogi), in which the brother stated that the defendant had stolen a gun and shot it into the ground twice. Included in the call were statements about the defendant's felony status and that he was probably on cocaine. The court held that the entire call was nontestimonial. It applied the "primary purpose" test and evaluated the call in the following passage:

> Yogi's call to 911 was made immediately after Proctor grabbed the gun and fired it twice. During the course of the call, he recounts what just happened, gives a description of his brother, indicates his brother's previous criminal history, and the fact that his brother may be under the influence of drugs. All of these statements enabled the police to deal appropriately with the situation that was unfolding. The statements about Proctor's possession of a gun indicated Yogi's understanding that Proctor was armed and possibly dangerous. The information about Proctor's criminal history and possible drug use necessary for the police to respond appropriately to the emergency, as it allowed the police to determine whether they would be encountering a violent felon. Proctor argues that the emergency had already passed, because he had run away with the weapon at the time of the 911 call and, therefore, the 911 conversation was testimonial. It is hard to reconcile this argument with the facts. During the 911 call, Yogi reported that he witnessed his brother, a felon possibly high on cocaine, run off with a loaded weapon into a nightclub. This was an ongoing emergency --- not one that had passed. Proctor's retreat into the nightclub provided no assurances that he would not momentarily return to confront Yogi * * *. Further, Yogi could have reasonably feared that the people inside the nightclub were in danger. Overall, a reasonable viewing of the 911 call is that Yogi and the 911 operator were dealing with an ongoing emergency involving a dangerous felon, and that the 911 operator's questions were related to the resolution of that emergency.

***See also United States v. Mouzone,*** 687 F.3d 207 (5th Cir. 2012) (911 calls found non-testimonial as "each caller simply reported his observation of events as they unfolded"; the 911 operators were not attempting to "establish or prove past events"; and "the transcripts simply reflect an effort to meet the needs of the ongoing emergency").

**911 call, and statements made by the victim after police arrived, are excited utterances and not testimonial:** ***United States v. Arnold,*** 486 F.3d 177 (6th Cir. 2007) (en banc): In a felon-firearm prosecution, the court admitted three sets of hearsay statements made by the daughter of the defendant's girlfriend, after an argument between the daughter (Tamica) and the defendant. The first set were statements made in a 911 call, in which Tamica stated that Arnold pulled a pistol on her and is "fixing to shoot me." The call was made after Tamica got in her car and went around the corner from her house. The second set of statements occurred when the police arrived within minutes; Tamica was hysterical, and without prompting said that Arnold had pulled a gun and was trying to kill her. The police asked what the gun looked like and she said "a black handgun." At the time of this second set of statements, Arnold had left the scene. The third set of statements was made when Arnold returned to the scene in a car a few minutes later. Tamica identified Arnold by name and stated "that's the guy that pulled the gun on me." A search of the vehicle turned up a black handgun underneath Arnold's seat.

The court first found that all three sets of statements were properly admitted as excited utterances. For each set of statements, Tamica was clearly upset, she was concerned about her safety, and the statements were made shortly after or right at the time of the two startling events (the gun threat for the first two sets of statements and Arnold's return for the third set of statements).

The court then concluded that none of Tamica's statements fell within the definition of "testimonial" as developed by the Court in *Davis*. Essentially the court found that the statements were not testimonial for the very reason that they were excited utterances --- Tamica was upset, she was responding to an emergency and concerned about her safety, and her statements were largely spontaneous and not the product of an extensive interrogation.

**911 call is not testimonial:** ***United States v. Thomas,*** 453 F.3d 838 (7th Cir. 2006): The court held that statements made in a 911 call were non-testimonial under the analysis provided by the Supreme Court in *Davis/Hammon*. The anonymous caller reported a shooting, and the perpetrator was still at large. The court analyzed the statements as follows:

> [T]he caller here described an emergency as it happened. First, she directed the operator's attention to Brown's condition, stating "[t]here's a dude that just got shot . . .", and ". . . the guy who shot him is still out there." Later in the call, she reiterated her concern that ". . . [t]here is somebody shot outside, somebody needs to be sent over here, and there's somebody runnin' around with a gun, somewhere." Any reasonable listener would know from this exchange that the operator and caller were dealing with an ongoing emergency, the resolution of which was paramount in the operator's interrogation. This fact is evidenced by the operator's repeatedly questioning the caller to determine who had the gun and where Brown lay injured. Further, the caller ended the conversation immediately upon the arrival of the police, indicating a level of interrogation that was significantly less formal than the testimonial statement in *Crawford*. Because the tape-recording of the call is nontestimonial, it does not implicate Thomas's right to confrontation.

***See also United States v. Dodds,*** 569 F.3d 336 (7th Cir. 2009) (unidentified person's identification of a person with a gun was not testimonial: "In this case, the police were responding to a 911 call reporting shots fired and had an urgent need to identify the person with the gun and to stop the shooting. The witness's description of the man with a gun was given in that context, and we believe it falls within the scope of *Davis*.").

**Statement made by a child immediately after an assault on his mother was admissible as excited utterance and was not testimonial: *United States v. Clifford,*** 791 F.3d 884 (8th Cir. 2015): In an assault trial, the court admitted a hearsay statement from the victim's three-year-old son, made to a trusted adult, that the defendant "hurt mama." The statement was made immediately after the event and the child was shaking and crying; the statement was in response to the adult asking "what happened?" The court of appeals held that the statement was admissible as an excited utterance and was not testimonial. There was no law enforcement involvement and the court noted that the defendant "identifies no case in which questions from a private individual acting without any direction from state officials were determined to be equivalent to police interrogation." The court also noted that the interchange between the child and the adult was informal, and was in response to an emergency. Finally, the court relied on the Supreme Court's most recent decision in *Ohio v. Clark:*

> As in *Clark,* the record here shows an informal, spontaneous conversation between a very young child and a private individual to determine how the victim had just been injured. [The child's] age is significant since "statements by very young children will rarely, if ever, implicate the Confrontation Clause."

**911 call was not testimonial even though the caller referenced a prior crime: *United States v. Robertson,*** 948 F.3d 912 (8th Cir. 2020): In a prosecution for a gun-related assault, the court admitted a 911 call after a shooting, identifying Robertson as the shooter and "the same one that shot his gun over here last month." The court found that the 911 call was not testimonial. The declarant was clearly under the influence of the shooting that prompted the call; the statement about the prior shooting was not intended for trial but rather to "help police identify and apprehend an armed, threatening individual."

**911 calls and statements made to officers responding to the calls were not testimonial: *United States v. Brun,*** 416 F.3d 703 (8th Cir. 2005): The defendant was charged with assault with a deadly weapon. The police received two 911 calls from the defendant's home. One was from the defendant's 12-year-old nephew, indicating that the defendant and his girlfriend were arguing, and requesting assistance. The other call came 20 minutes later, from the defendant's girlfriend, indicating that the defendant was drunk and had a rifle, which he had fired in the house and then left. When officers responded to the calls, they found the girlfriend in the kitchen crying; she told the responding officers that the defendant had been drunk, and shot his rifle in the bathroom while she was in it. The court had little problem in finding that all three statements were properly admitted as excited utterances, and addressed whether the admission of the statements violated the

defendant's right to confrontation after *Crawford.* The court first found that the nephew's 911 call was not testimonial because it was not the kind of statement that was equivalent to courtroom testimony. The court had "no doubt that the statements of an adolescent boy who has called 911 while witnessing an argument between his aunt and her partner escalate to an assault would be emotional and spontaneous rather than deliberate and calculated." The court used similar reasoning to find that the girlfriend's 911 call was not testimonial. The court also found that the girlfriend's statement to the police was not testimonial. It reasoned that the girlfriend's conversation with the officers "was unstructured, and not the product of police interrogation."

**Statements made by mother to police, after her son was taken hostage, were not testimonial: *United States v. Lira-Morales,*** 759 F.3d 1105 (9th Cir. 2014): The defendant was charged with hostage-taking and related crimes. At trial, the court admitted statements from the hostage's mother, describing a telephone call with her son's captors. The call was arranged as part of a sting operation to rescue the son. The court found that the mother's statements to the officers about what the captors had said were not testimonial, because the primary motive for making the call --- and thus the report about it to the police officers --- was to rescue the son. The court noted that throughout the event the mother was "very nervous, shaking, and crying in response to continuous ransom demands and threats to her son's life." Thus the agents faced an "emergency situation" and "the primary purpose of the telephone call was to respond to these threats and to ensure [the son's] safety." The defendant argued that the statements were testimonial because an agent attempted, unsuccessfully, to record the call that they had set up. But the court rejected this argument, noting that the agent "primarily sought to record the call to obtain information about Aguilar's location and to facilitate the plan to rescue Aguilar. Far from an attempt to build a case for prosecution, Agent Goyco's actions were good police work directed at resolving a life-threatening hostage situation. * * * That Agent Goyco may have also recorded the call in part to build a criminal case does not alter our conclusion that the *primary* purpose of the call was to diffuse the emergency hostage situation."

**Excited utterance not testimonial under the circumstances, even though made to law enforcement: *Leavitt v. Arave*,** 371 F.3d 663 (9th Cir. 2004): In a murder case, the government introduced the fact that the victim had called the police the night before her murder and stated that she had seen a prowler who she thought was the defendant. The court found that the victim's statement was admissible as an excited utterance, as the victim was clearly upset and made the statement just after an attempted break-in. The court held that the statement was not testimonial under *Crawford*. The court explained as follows:

> Although the question is close, we do not believe that Elg's statements are of the kind with which *Crawford* was concerned, namely, testimonial statements. * * * Elg, not the police, initiated their interaction. She was in no way being interrogated by them but instead sought their help in ending a frightening intrusion into her home. Thus, we do not believe that the admission of her hearsay statements against Leavitt implicate the principal evil at which

the Confrontation Clause was directed: the civil-law mode of criminal procedure, and particularly its use of ex parte examinations as evidence against the accused.

**Note: The court's decision in *Leavitt* preceded the Supreme Court's treatment of 911 calls and statements to responding officers in *Davis/Hammon*, but the analysis appears consistent with that of the Supreme Court. The Court in *Davis/Hammon* acknowledged that statements to responding officers are non-testimonial if they are directed toward dealing with an emergency rather than prosecuting a crime. It is especially consistent with the pragmatic approach to applying the primary motive test established in *Michigan v. Bryant.***

**911 call that a man had put a gun to another person's head was not testimonial: *United States v. Hughes,*** 840 F.3d 1368 (11th Cir. 2016): In a felon-firearm prosecution, the trial court admitted a 911 call in which a bystander reported that the defendant had cocked a gun and put it to the head of a couple of people. The defendant argued that the 911 call was testimonial, but the court of appeals found no error. It concluded that "Hughes fails to distinguish the 911 caller's statements from those in *Davis* in any way whatsoever."

## Expert Witnesses and Other Witnesses Relying on Testimonial Hearsay for Their Conclusion

**Confusion over expert witnesses testifying on the basis of testimonial hearsay: *Williams v. Illinois,*** 567 U.S. 50 (2012): This case is fully set forth in Part One. To summarize, the confusion is over whether an expert can, consistently with the Confrontation Clause, rely on testimonial hearsay so long as the hearsay is not explicitly introduced for its truth and the expert makes an independent judgment, i.e., is not just a conduit for the hearsay. That practice is permitted by Rule 703. Five members of the Court rejected the use of testimonial hearsay in this way, on the ground that it was based on an artificial distinction. But the plurality decision by Justice Alito embraces this Rule 703 analysis. As seen elsewhere in this outline, some courts have found *Williams* to have no precedential effect other than over cases that present the same facts as *Williams.* And many courts have held that the use of testimonial hearsay by an expert is permitted without regard to its formality, so long as the expert makes an independent conclusion and the hearsay itself is not admitted into evidence.

**Expert's reliance on testimonial hearsay does not violate the Confrontation Clause: *United States v. Law,*** 528 F.3d 888 (D.C. Cir. 2008)**:** The court found that an expert's testimony about the typical practices of narcotics dealers did not violate *Crawford*. While the testimony was based on interviews with informants, "Thomas testified based on his experience as a narcotics investigator; he did not relate statements by out-of-court declarants to the jury."

> **Note: This opinion precedes *Williams* and is questionable if you count the votes in *Williams.* But the case is quite consistent with the Alito opinion in *Williams* and many lower court cases after *Williams* --- allowing the expert to use testimonial hearsay as long as the hearsay is not introduced at trial and the expert is not simply parroting the hearsay. Lower federal courts are in substance treating the Alito opinion as controlling on an expert's reliance on testimonial hearsay.**

**Confrontation Clause violated where expert does no more that restate the results of a testimonial lab report: *United States v. Ramos-Gonzalez,*** 664 F.3d 1 (1st Cir. 2011): In a drug case, a lab report indicated that substances found in the defendant's vehicle tested positive for cocaine. The lab report was testimonial under *Melendez-Diaz*, and the person who conducted the test was not produced for trial. The government sought to avoid the *Melendez-Diaz* problem by calling an expert to testify to the results, but the court found that the defendant's right to confrontation was nonetheless violated, because the expert did not make an independent assessment, but rather simply restated the report. The court explained as follows:

> Where an expert witness employs her training and experience to forge an independent conclusion, albeit on the basis of inadmissible evidence, the likelihood of a Sixth

Amendment infraction is minimal. Where an expert acts merely as a well-credentialed conduit for testimonial hearsay, however, the cases hold that her testimony violates a criminal defendant's right to confrontation. See, e.g., *United States v. Ayala*, 601 F.3d 256, 275 (4th Cir.2010) ( "[Where] the expert is, in essence, ... merely acting as a transmitter for testimonial hearsay," there is likely a *Crawford* violation); *United States v. Johnson*, 587 F.3d 625, 635 (4th Cir.2009) (same); *United States v. Lombardozzi*, 491 F.3d 61, 72 (2d Cir.2007) (" [T]he admission of [the expert's] testimony was error ... if he communicated out-of-court testimonial statements ... directly to the jury in the guise of an expert opinion."). In this case, we need not wade too deeply into the thicket, because the testimony at issue here does not reside in the middle ground.

The government is hard-pressed to paint Morales's testimony as anything other than a recitation of Borrero's report. On direct examination, the prosecutor asked Morales to "say what are the results of the test," and he did exactly that, responding "[b]oth bricks were positive for cocaine." This colloquy leaves little room for interpretation. Morales was never asked, and consequently he did not provide, his independent expert opinion as to the nature of the substance in question. Instead, he simply parroted the conclusion of Borrero's report. Morales's testimony amounted to no more than the prohibited transmission of testimonial hearsay. While the interplay between the use of expert testimony and the Confrontation Clause will undoubtedly require further explication, the government cannot meet its Sixth Amendment obligations by relying on Rule 703 in the manner that it was employed here.

**Note: Whatever *Williams* may mean, the court's analysis in *Ramos-Gonzalez* surely remains valid. Even Justice Alito cautions that an expert may not testify if he does nothing more than parrot the testimonial hearsay.**

**Confrontation Clause not violated where testifying expert conducts his own testing that confirms the results of a testimonial report: *United States v. Soto,*** 720 F.3d 51 (1st Cir. 2013): In a prosecution for identity theft and related offenses, a technician did a review of the defendant's laptop and came to conclusions that inculpated the defendant. At trial, a different expert testified that he did the same test and it came out exactly the same as the test done by the absent technician. The defendant argued that this was surrogate testimony that violated *Bullcoming v. New Mexico,* in which the Court held that production of a surrogate who simply reported testimonial hearsay did not satisfy the Confrontation Clause. But the court disagreed:

Agent Pickett did not testify as a surrogate witness for Agent Murphy. * * * Unlike in *Bullcoming*, Agent Murphy's forensic report was not introduced into evidence through Agent Pickett. Agent Pickett testified about a conclusion he drew from his own independent examination of the hard drive. The government did not need to get Agent Murphy's report into evidence through Agent Pickett. We do not interpret *Bullcoming* to

> mean that the agent who testifies against the defendant cannot know about another agent's prior examination or that agent's results when he conducts his examination. The government may ask an agent to replicate a forensic examination if the agent who did the initial examination is unable to testify at trial, so long as the agent who testifies conducts an independent examination and testifies to his own results.

The *Soto* court did express concern, however, that the testifying expert did more than simply replicate the results of the prior test: he also testified that the tests came to identical results:

> Soto's argument that Agent Murphy's report bolstered Agent Pickett's testimony hits closer to the mark. At trial, Agent Pickett testified that the incriminating documents in Exhibit 20 were found on a laptop that was seized from Soto's car. Although Agent Pickett had independent knowledge of that fact, he testified that "everything that was in John Murphy's report was exactly the way he said it was," and that Exhibit 20 "was contained in the same folder that John Murphy had said that he had found it in." * * * These two out-of-court statements attributed to Agent Murphy were arguably testimonial and offered for their truth. Agent Pickett testified about the substance of Agent Murphy's report which Agent Murphy prepared for use in Soto's trial. * * * Agent Pickett's testimony about Agent Murphy's prior examination of the hard drive bolstered Agent Pickett's independent conclusion that the Exhibit 20 documents were found on Soto's hard drive.

But the court found no plain error, in large part because the bolstering was cumulative.

***See also Barbosa v. Mitchell,*** 812 F.3d 62 (1st Cir. 2016): On habeas review, the court found it not clearly established that expert reliance on a testimonial lab report violates the Confrontation Clause. The defendant was convicted in the time between *Melendez-Diaz* and *Williams.* The Court held that, "[t]o the contrary, four Justices [in *Williams*] later read *Melendez-Diaz* as not establishing at all, much less beyond doubt" the principle that such testimony violates the Confrontation Clause.

**Testimony by *lay* witnesses that they had seen lab reports does not violate the Confrontation Clause: *United States v. Ocean,*** 904 F.3d 25 (1st Cir. 2018): In a drug prosecution, police officers testifying as lay witnesses identified the substance found on the defendant as drugs. The government did not introduce lab reports and the witnesses did not refer to them on direct examination. On cross, the officers testified that they had seen lab reports. The court found no confrontation violation because the government never sought to offer the reports into evidence and the witnesses did not rely on the reports.

**Expert reliance on a manufacturing label to conclude on point of origin did not violate the Confrontation Clause, because the label was not testimonial: *United States v. Torres-Colon,*** 790 F.3d 26 (1st Cir. 2015): In a trial on a charge of unlawful possession of a firearm, the government's expert testified that the firearm was made in Austria. He relied on a manufacturing inscription on the firearm that stated "made in Austria." The court found no confrontation violation in the expert's testimony. The statement on the firearm was clearly not made by the manufacturer with the primary purpose of use in a criminal prosecution. The Confrontation Clause does not regulate expert testimony unless the expert is relying on *testimonial* hearsay.

**No relief under AEDPA where expert relied on informal notations regarding testing of buccal swab: *Washington v. Griffin,*** 876 F.3d 395 (2nd Cir. 2017) (Livingston, J.): In this habeas petition, the constitutional challenge in state court presented facts close to those of *Williams:* a buccal swab of the defendant was subjected to DNA testing, and an expert relied on notations by lab personnel indicating the process of extraction, amplification, and chain of custody. The expert who testified was not involved in conducting or supervising that process, but the expert did conduct her own review and made an independent conclusion that the DNA from the buccal swab matched the DNA from the crime scene. The court held that the petitioner had not established a clear violation of the Confrontation Clause --- as required under AEDPA --- when the state court allowed the expert to testify and did not require production of the lab analysts. The court found that *Melendez-Diaz* and *Bullcoming* were distinguishable because "Washington does not rely on a lab analyst's affidavit, as in *Melendez-Diaz*, or on the formal certificate of an analyst attesting to his results, as in *Bullcoming,* to make out his constitutional claim. He instead points to a medley of unsworn, uncertified notations by often unspecified lab personnel * * * . Such notations, standing alone, are potentially as suggestive of a purpose to record tasks, in order to accomplish the lab's work, as of any purpose to make an out-of-court statement for admission at trial." The court also noted that the lab reports on the buccal swab were never entered into evidence. The court found that the disarray in *Williams* only highlighted the fact that the state court had not violated clearly established law in allowing the expert to testify and not requiring the lab analysts to do so.

Judge Katzmann, concurring, suggested that the prosecution could avoid any litigation risk by simply having an expert supervise a new test when the case is going to trial. He noted, and the court agreed, that the supervising analyst "need not conduct every step of the process herself. Instead, by supervising the process, she could personally attest to the extraction and correct labeling of the sample, that a proper chain of custody was maintained, and that the DNA profile match was in fact a comparison of the defendant's DNA to that of the DNA found on the crime scene evidence."

**Expert's reliance on out-of-court accusations does not violate *Crawford*, unless the accusations are directly presented to the jury*: United States v. Lombardozzi,*** 491 F.3d 61 (2nd Cir. 2007): The court stated that *Crawford* is inapplicable if testimonial statements are not used for their truth, and that "it is permissible for an expert witness to form an opinion by applying her expertise because, in that limited instance, the evidence is not being presented for the truth of the

matter asserted." The court concluded that the expert's testimony would violate the Confrontation Clause "only if he communicated out-of-court testimonial statements . . . directly to the jury in the guise of an expert opinion." ***See also United States v. Mejia,*** 545 F.3d 179 (2nd Cir. 2008) (violation of Confrontation Clause where expert directly relates statements made by drug dealers during an interrogation).

**Statements made to psychiatric expert were testimonial and were used by the jury for their truth at trial: *Lambert v. Warden,*** 861 F.3d 459 (3rd Cir. 2017): Tillman shot two people and Lambert drove him to and from the crime. Tillman's mental capacity was in dispute and the government called a psychiatric expert to whom Tillman made statements. Tillman did not testify at trial. The court found that the jury may have used these statements, related inferentially in the expert's testimony, against Lambert for their truth --- in which case there would have been a confrontation violation. The government argued that the statements were not offered to prove anything, only for judging the expert's opinion, but the court found that in the context of the case this was not a "legitimate" not for truth purpose --- the prosecutor raised the statements as inferential proof of Lambert's involvement and the trial court gave no limiting instruction. The court remanded for an assessment of whether the defense counsel's failure to object constituted ineffective assistance of counsel.

**Expert reliance on printout from machine does not violate *Crawford*: *United States v. Summers,*** 666 F.3d 192 (4th Cir. 2011): The defendant objected to the admission of DNA testing performed on a jacket that linked him to drug trafficking. The court first considered whether the Confrontation Clause was violated by the government's failure to call the FBI lab employees who signed the internal log documenting custody of the jacket. The court found no error in admitting the log, because chain-of-custody evidence had been introduced by the defense and therefore the defendant had opened the door to rebuttal. The court next considered whether the Confrontation Clause was violated by testimony of an expert who relied on DNA testing results by lab analysts who were not produced at trial. The court again found no error. It emphasized that the expert did his own testing, and his reliance on the report was limited to a "pure instrument read-out." The court stated that "[t]he numerical identifiers of the DNA allele here, insofar as they are nothing more than raw data produced by a machine" should be treated the same as gas chromatograph data, which the courts have held to be non-testimonial. ***See also United States v. Shanton,*** 2013 WL 781939 (4th Cir.) (Unpublished) (finding that the result concerning the admissibility of the expert testimony in *Summers* was unaffected by *Williams*).

**Expert reliance on confidential informants in interpreting coded conversation does not violate *Crawford: United States v. Johnson*,** 587 F.3d 625 (4th Cir. 2009): The court found no error in admitting expert testimony that decoded terms used by the defendants and coconspirators during recorded telephone conversations. The defendant argued that the experts relied on hearsay statements by cooperators to help them reach a conclusion about the meaning of particular conversations. The defendant asserted that the experts were therefore relying on testimonial hearsay. The court recognized that it is "appropriate to recognize the risk that a particular expert might become nothing more than a transmitter of testimonial hearsay." But in this case, the experts never made reference to their interviews, and the jury heard no testimonial hearsay. "Instead, each expert presented his independent judgment and specialized understanding to the jury." Because the experts "did not become mere conduits" for the testimonial hearsay, their consideration of that hearsay "poses no *Crawford* problem." ***Accord United States v. Ayala,*** 601 F.3d 256 (4th Cir. 2010) (no violation of the Confrontation Clause where the experts "did not act as mere transmitters and in fact did not repeat statements of particular declarants to the jury."). ***Accord United States v Palacios*,** 677 F.3d 234 (4th Cir. 2012): Expert testimony on operation of a criminal enterprise, based in part on interviews with members, did not violate the Confrontation Clause because the expert "did not specifically reference" any of the testimonial interviews during his testimony, and simply relied on them as well as other information to give his own opinion.

> **Note: These cases are in doubt if you count the votes in *Williams,* but most courts have come to the same result after *Williams:* Finding no confrontation problem where an expert relies on testimonial hearsay, so long as the hearsay is not admitted into evidence and the expert draws his own conclusion from the data (rather than just parroting it).**

**Expert testimony translating coded conversations violated the right to confrontation where the government failed to make a sufficient showing that the expert was relying on her own evaluations rather than those of informants: *United States v. Garcia,*** 752 F.3d 382 (4th Cir. 2014): The court reversed drug convictions in part because the law enforcement expert who translated purportedly coded conversations had relied, in coming to her conclusion, on input from coconspirators whom she had debriefed. The court distinguished *Johnson, supra*, on the ground that in this case the government had not done enough to show that the expert had conducted her own independent analysis in reaching her conclusions as to the meaning of certain conversations. The court noted that "the question is whether the expert is, in essence, giving an independent judgment or merely acting as a transmitter for testimonial hearsay." In this case, "we cannot say that Agent Dayton was giving such independent judgments. While it is true she never made direct reference to the content of her interviews, this could just has well have been the result of the Government's failure to elicit a proper foundation for Agent Dayton's interpretations." The government argued that the information from the coconspirators only served to confirm the Agent's interpretations after the fact, but the court concluded that "[t]he record is devoid of evidence that this was, in fact, the sequence of Dayton's analysis, to Garcia's prejudice." ***Compare United States v. Smith,*** 919 F.3d 825 (4th Cir. 2019) (expert translating coded conversation was

not acting as a conduit; he was "not simply replaying the conspirators' interpretations" but rather relying on his own expertise, and "exercised his judgment independent of any later debriefings").

**Officer testifying as a lay witness as to drug activity, in part based on statements from arrestees, did not violate the Confrontation Clause: *United States v. Smith,*** 962 F.3d 755 (4th Cir. 2020): In a drug trial, a law enforcement officer was allowed to testify as a lay witness on drug practices like the use of baggies, on the basis of his extensive experience. (For the record, it was probably expert testimony, but the court disagreed). The defendant argued that the officer's conclusions were based in part on statements he heard during police investigations --- which were testimonial hearsay. But the court found no confrontation violation in the testimony, because none of the testimonial hearsay was disclosed at trial, and the officer "was not merely 'parroting' outside statements or repeating what he had overheard in come interrogation room, as opposed to offering insight gleaned from decades of police work."

**Expert testimony on gangs, based in part on testimonial hearsay, did not violate the Confrontation Clause when the hearsay was not transmitted to the jury: *United States v. Rios,*** 830 F.3d 403 (5th Cir. 2016): In a prosecution of Latin Kings gang members for racketeering and drug offenses, the court found it was not error to allow a law enforcement officer to testify as an expert about the organization of the gang. The testimony was based in large part on listening to jail conversations and interviewing former members. The court found no violation of the Confrontation Clause to the extent the underlying statements were not transmitted to the jury. The one instance in which a statement was related to the jury was found to be harmless error.

**Expert opinion based in part on information learned during custodial interrogation did not violate *Crawford* where expert was more than a conduit: *United States v. Lockhart,*** 844 F.3d 501 (5th Cir. 2016): In a sex trafficking prosecution, an officer testified as an expert that the defendants were gang members. The defendant argued that the testimony violated his right to confrontation because the officer, in reaching his conclusion, relied on statements made during custodial interrogations, as well as statements of other officers describing their experiences during interrogations. But the court found no error. The court explained that *Crawford* "in no way prevents expert witnesses from offering their independent judgments merely because those judgments were in some part informed by their exposure to otherwise inadmissible evidence." It further stated that "when the expert witness has consulted numerous sources, and uses that information, together with his own professional knowledge and experience, to arrive at his opinion, that opinion is regarded as evidence in its own right and not as hearsay in disguise." The court concluded that in this case the expert "did not serve as a conduit for inadmissible testimonial hearsay."

**Law enforcement expert's testimony about a motorcycle group, based in part on statements from members in interviews, did not violate the Confrontation Clause: *United States v. Portillo,*** 969 F.3d 144 (5th Cir. 2020): In a prosecution of members of a motorcycle gang, a law enforcement agent testified as an expert about the organization and activity of the gang, based on his extensive investigation as well as on interviews with gang members. The court found that the expert's reliance on testimonial hearsay did not violate the defendants' right to confrontation, because the expert "used his expertise to synthesize various source materials rather than simply regurgitating information he learned from those sources." The court concluded that "[a]s long as an expert forms his opinion by *amalgamating* potential testimonial statements, his testimony does not violate the Confrontation Clause." (emphasis in original).

**Expert testimony by technical reviewer, rather than the case analyst, does not clearly violate the Confrontation Clause: *Jenkins v. Hall,*** 910 F.3d 828 (5th Cir. 2018): In a drug prosecution, the case analyst weighed the drug and the supervisor testified to the weight on the basis of reviewing the case analyst's technical data. The court found no confrontation violation under the AEDPA standard of review. The court found *Bullcoming* to be distinguishable because in that case the supervisor who testified did not review the technical data and come to his own conclusion. **Accord *Grim v. Fisher,*** 816 F.3d 296 (5th Cir. 2016) (no clear confrontation violation where the supervisor "examined the analyst's report and all of the data, including everything the analyst did to the item of evidence; ensured that the analyst did the proper tests and that the analyst's interpretation of the test results was correct; agreed . . . with the examinations and results of the report; and signed the report.")

**Police officer's reliance on statements from people he had arrested for drug crimes did not violate *Crawford: United States v. Collins,*** 799 F.3d 554 (6th Cir. 2015): In a trial involving manufacture of methamphetamine, a law enforcement officer testified as an expert on the conversion ratio between pseudoephedrine and methamphetamine. He relied in part on statements from people he had interviewed after he had arrested them for manufacturing methamphetamine. The court found no plain error because there was "no evidence that the suspected methamphetamine manufacturers Agent O'Neil questioned throughout his career 'intended to bear testimony' against Collins or his co-defendants." Thus the expert was not relying on testimonial hearsay.

> **Note: The court appears to be applying --- maybe without realizing it --- Justice Alito's definition of testimoniality in *Williams.* The court is saying that the arrestees did not *target* their testimony toward the defendant. But under the view of five Justices in *Williams,* the statements of the arrestees would probably be testimonial, as they were under arrest --- just like Mrs. Crawford --- and the statements could be thought to be motivated toward *some* criminal prosecution.**

**Expert reliance on printout from machine and another expert's lab notes does not violate *Crawford*: *United States v. Moon,*** 512 F.3d 359 (7th Cir. 2008): The court held that an expert's testimony about readings taken from an infrared spectrometer and a gas chromatograph (which determined that the substance taken from the defendant was narcotics) did not violate *Crawford* because "data is not 'statements' in any useful sense. Nor is a machine a 'witness against' anyone." Moreover, the expert's reliance on another expert's lab notes did not violate *Crawford* because the court concluded that an expert is permitted to rely on hearsay (including testimonial hearsay) in reaching his conclusion. The court noted that the defendant could "insist that the data underlying an expert's testimony be admitted, see Fed.R.Evid. 705, but by offering the evidence themselves defendants would waive any objection under the Confrontation Clause." The court observed that the notes of the chemist, evaluating the data from the machine, were testimonial and should not have been independently admitted, but it found no plain error in the admission of these notes.

**Expert reliance on drug test conducted by another does not violate the Confrontation Clause --- though on remand from *Williams* the court states that part of the expert's testimony might have violated the Confrontation Clause, but finds harmless error*: United States v. Turner,*** 591 F.3d 928 (7th Cir. 2010), on remand from Supreme Court, 709 F.3d 1187 (7th Cir. 2013) : At the defendant's drug trial, the government called a chemist to testify about the tests conducted on the substance seized from the defendant --- the tests indicating that it was cocaine. The defendant objected that the witness did not conduct the tests and was relying on testimonial statements from other chemists, in violation of *Crawford.* The court found no error, emphasizing that no statements of the official who actually tested the substance were admitted at trial, and that the witness unequivocally established that his opinions about the test reports were his own.

**Note: The Supreme Court vacated the decision in *Turner* and remanded for reconsideration in light of *Williams.* On remand, the court declared that while a rule from *Williams* was difficult to divine, it at a minimum "casts doubt on using expert testimony in place of testimony from an analyst who actually examined and tested evidence bearing on a defendant's guilt, insofar as the expert is asked about matters which lie solely within the testing analyst's knowledge." But the court noted that even after *Williams*, much of what the expert testified to was permissible because it was based on personal knowledge:**

> We note that the bulk of Block's testimony was permissible. Block testified as both a fact and an expert witness. In his capacity as a supervisor at the state crime laboratory, he described the procedures and safeguards that employees of the laboratory observe in handling substances submitted for analysis. He also noted that he reviewed Hanson's work in this case pursuant to the laboratory's standard peer review procedure. As an expert forensic chemist, he went on to explain for the jury how suspect substances are tested using gas chromatography, mass spectrometry, and infrared spectroscopy to yield data from which the nature of the substance may be determined. He then opined, based on his experience and expertise, that the data Hanson had produced in testing the substances that Turner distributed to the

> undercover officer-introduced at trial as Government Exhibits 1, 2, and 3-indicated that the substances contained cocaine base. * * *
>
> As we explained in our prior decision, an expert who gives testimony about the nature of a suspected controlled substance may rely on information gathered and produced by an analyst who does not himself testify. Pursuant to Federal Rule of Evidence 703, the information on which the expert bases his opinion need not itself be admissible into evidence in order for the expert to testify. Thus, the government could establish through Block's expert testimony what the data produced by Hanson's testing revealed concerning the nature of the substances that Turner distributed, without having to introduce either Hanson's documentation of her analysis or testimony from Hanson herself. And because the government did not introduce Hanson's report, notes, or test results into evidence, Turner was not deprived of his rights under the Sixth Amendment's Confrontation Clause simply because Block relied on the data contained in those documents in forming his opinion. Nothing in the Supreme Court's *Williams* decision undermines this aspect of our decision. On the contrary, Justice Alito's plurality opinion in *Williams* expressly endorses the notion that an appropriately credentialed individual may give expert testimony as to the significance of data produced by another analyst. Nothing in either Justice Thomas's concurrence or in Justice Kagan's dissent takes issue with this aspect of the plurality's reasoning. Moreover, as we have indicated, Block in part testified in his capacity as Hanson's supervisor, describing both the procedures and safeguards that employees of the state laboratory are expected to follow and the steps that he took to peer review Hanson's work in this case. Block's testimony on these points, which were within his personal knowledge, posed no Confrontation Clause problem.

**The *Turner* court on remand saw two Confrontation problems in the expert's testimony: 1) his statement that Hanson followed standard procedures in testing the substances that Turner distributed to the undercover officer, and 2) his testimony that he reached the same conclusion about the nature of the substances that the analyst did. The court held that on those two points, "Block necessarily was relying on out-of-court statements contained in Hanson's notes and report. These portions of Block's testimony strengthened the government's case; and, conversely, their exclusion would have diminished the quantity and quality of evidence showing that the substances Turner distributed comprised cocaine base in the form of crack cocaine." And while the case was much like *Williams,* the court found two distinguishing factors: 1) it was tried to a jury, thus raising a question of whether Justice Alito's not-for-truth analysis was fully applicable; and 2) the test was conducted with a suspect in mind, as Turner had been arrested with the substances to be tested in his possession. The defendant also argued that the report was "certified" and so was formal under the Thomas view. But the court noted that the analysts did not formally certify the results --- the certification was made by the Attorney General to the effect that the report was a correct copy of the *report.* Yet the court implied that it was sufficiently formal in any case, because it was "both official and signed, it constituted a formal record of the result of**

**the laboratory tests that Hanson had performed, and it was clearly designed to memorialize that result for purposes of the pending legal proceeding against Turner, who was named in the report."**

**Ultimately the court found it unnecessary to decide whether the defendant's Confrontation rights were violated because the error, if any, in the use of the analyst's report was harmless.**

**No confrontation violation where expert did not testify that he relied on a testimonial report: *United States v. Maxwell,*** 724 F.3d 724 (7th Cir. 2013): In a narcotics prosecution, the analyst from the Wisconsin State Crime Laboratory who originally tested the substance seized from Maxwell retired before trial, so the government offered the testimony of his co-worker instead. The coworker did not personally analyze the substance herself, but concluded that it contained crack cocaine after reviewing the data generated by the original analyst. The court found no plain error in permitting this testimony, explaining that there could be no Confrontation problem, even after *Bullcoming* and *Williams*, where there is no testimony that the expert relied on the report:

> What makes this case different (and relatively more straightforward) from those we have dealt with in the past is that Gee did not read from Nied's report while testifying * * * , she did not vouch for whether Nied followed standard testing procedures or state that she reached the same conclusion as Nied about the nature of the substance (as in *Turner*), and the government did not introduce Nied's report itself or any readings taken from the instruments he used (as in *Moon*). Maxwell argues that Nied's forensic analysis is testimonial, but Gee never said she relied on Nied's report or his interpretation of the data in reaching her own conclusion. Instead, Gee simply testified (1) about how evidence in the crime lab is typically tested when determining whether it contains a controlled substance, (2) that she had reviewed the data generated for the material in this case, and (3) that she reached an independent conclusion that the substance contained cocaine base after reviewing that data.

The court concluded that concluded that "Maxwell was not deprived of his Sixth Amendment right simply by virtue of the fact that Gee relied on Nied's data in reaching her own conclusions, especially since she never mentioned what conclusions Nied reached about the substance."

**Expert's reliance on report of another law enforcement agency did not violate the right to confrontation: *United States v. Huether,*** 673 F.3d 789 (8th Cir. 2012): In a trial on charges of sexual exploitation of minors, an expert testified in part on the basis of a report by the National Center for Missing and Exploited Children. The court found no confrontation violation

because the NCMEC report was not introduced into evidence and the expert drew his own conclusion and was not a conduit for the hearsay.

**No confrontation violation where expert who testified did so on the basis of his own retesting: *United States v. Ortega,*** 750 F.3d 1020 (8th Cir. 2014): In a drug conspiracy prosecution, the defendant argued that his right to confrontation was violated because the expert who testified at trial that the substances seized from a coconspirator's car were narcotics had tested composite samples that another chemist had produced from the substances found in the car. But the court found no error, because the testifying expert had personally conducted his own test of the composite substances, and the original report of the other chemist who prepared the composite (and who concluded the substances were narcotics) was not offered by the government; nor was the testifying expert asked about the original test. The court noted that any objection about the composite really went to the chain of custody --- whether the composite tested by the expert witness was in fact derived from what was found in the car --- and the court observed that "it is up to the prosecution to decide what steps are so crucial as to require evidence." The defendant made no showing of bad faith or evidence tampering, and so any question about the chain of custody was one of weight and not admissibility. Moreover, the government's introduction of the original chemist's statement about creating the composite sample did not violate the Confrontation Clause because "chain of custody alone does not implicated the Confrontation Clause" as it is "not a testimonial statement offered to prove the truth of the matter asserted."

**No Confrontation Clause violation where expert's opinion was based on his own assessment and not on the testimonial hearsay: *United States v. Vera,*** 770 F.3d 1232 (9th Cir. 2014): Appealing from convictions for drug offenses, the defendants argued that the testimony of a prosecution expert on gangs violated the Confrontation Clause because it was nothing but a conduit for testimonial hearsay from former gang members. The court agreed with the premise that expert testimony violates the Confrontation Clause when the expert "is used as little more than a conduit or transmitter for testimonial hearsay, rather than as a true expert whose considered opinion sheds light on some specialized factual situation." But the court disagreed that the expert operated as a conduit in this case. The court found that the witness relied on his extensive experience with gangs and that his opinion "was not merely repackaged testimonial hearsay but was an original product that could have been tested through cross-examination."

**Expert's reliance on notes prepared by lab technicians did not violate the Confrontation Clause: *United States v. Pablo*,** 625 F.3d 1285 (10th Cir. 2010), ***on remand for reconsideration under Williams,* 696 F.3d 1280 (10th Cir. 2012)**: The defendant was tried for rape and other charges. Two lab analysts conducted tests on the rape kit and concluded that the DNA found at the scene matched the defendant. The defendant complained that the lab results were introduced through the testimony of a forensic expert and the lab analysts were not produced for cross-examination. In the original appeal the court found no plain error, reasoning that the notes of the lab analysts were not admitted into evidence and were never offered for their truth. To the

extent they were discussed before the jury, it was only to describe the basis of the expert's opinion --- which the court found to be permissible under Rule 703. The court observed that "[t]he extent to which an expert witness may disclose to a jury otherwise inadmissible testimonial hearsay without implicating a defendant's confrontation rights * * * is a matter of degree." According to the court, if an expert "simply parrots another individual's testimonial hearsay, rather than conveying her own independent judgment that only incidentally discloses testimonial hearsay to assist the jury in evaluating her opinion, then the expert is, in effect, disclosing the testimonial hearsay for its substantive truth and she becomes little more than a backdoor conduit for otherwise inadmissible testimonial hearsay." In this case the court, applying the plain error standard, found insufficient indication that the expert had operated solely as a conduit for testimonial hearsay.

***Pablo* was vacated for reconsideration in light of *Williams*. On remand, the court once again affirmed the conviction.** The court stated that "we need not decide the precise mandates and limits of *Williams,* to the extent they exist." The court noted that five members of the *Williams* Court "might find" that the expert's reliance on the lab test in this case was for its truth. But "we cannot say the district court plainly erred in admitting Ms. Snider's testimony, as it is not plain that a majority of the Supreme Court would have found reversible error with the challenged admission."

The *Pablo* court on remand concluded that "the manner in which, and degree to which, an expert may merely rely upon, and reference during her in-court expert testimony, the out-of-court testimonial conclusions in a lab report made by another person not called as a witness is a nuanced legal issue without clearly established bright line parameters, particularly in light of the discordant 4-1-4 divide of opinions in *Williams*."

**Expert's testimony on gang structure and practice did not violate the Confrontation Clause even though it was based in part on testimonial hearsay, where expert applied his own expertise. *United States v. Kamahele,*** 748 F.3d 984 (10th Cir. 2014): Appealing from convictions for gang-related activity, the defendants argued that a government expert's testimony about the structure and operation of the gang violated the Confrontation Clause because it was based in part on interviews with cooperating witnesses and other gang members. The court found no error and affirmed, concluding that the admission of expert testimony violates the Confrontation Clause "only when the expert is simply parroting a testimonial fact." The court noted that in this case the expert "applied his expertise, formed by years of experience and multiple sources, to provide an independently formed opinion." Therefore, no testimonial hearsay was offered for its truth against the defendant. ***Compare United States v. Garcia,*** 793 F.3d 1194 (10th Cir. 2015) (gang-expert's testimony violated the Confrontation Clause, where he parroted statements from former gang members that were testimonial hearsay: "The government cannot plausibly argue that Webb applied his expertise to this statement. It involves no interpretation of gang culture or iconography, no calibrated judgment based on years of experience and the synthesis of multiple sources of information. He simply relayed what DV gang members told him. Admission of the testimony violated the Confrontation Clause.").

# Forfeiture

**Constitutional standard for forfeiture --- like Rule 804(b)(6) --- requires a showing that the defendant acted wrongfully with the intent to keep the witness from testifying: *Giles v. California,*** 554 U.S. 353 (2008): The Court held that a defendant does not forfeit his constitutional right to confront testimonial hearsay unless the government shows that the defendant engaged in wrongdoing *designed to keep the witness from testifying at trial.* Giles was charged with the murder of his former girlfriend. A short time before the murder, Giles had assaulted the victim, and she made statements to the police implicating Giles in that assault. The victim's hearsay statements were admitted against the defendant on the ground that he had forfeited his right to invoke the Confrontation Clause, because he murdered the victim. The government made no showing that Giles murdered the victim with the intent to keep her from testifying. The Court found an intent-to-procure requirement in the common law, and therefore, under the historical analysis mandated by *Crawford*, there is necessarily an intent-to-procure requirement for forfeiture of confrontation rights. Also, at one point in the opinion, the Court in dictum stated that "statements to friends and neighbors about abuse and intimidation, and statements to physicians in the course of receiving treatment," are not testimonial --- presumably because the primary motivation for making such statements is for something other than use at trial.

**Murder of witness by co-conspirators as a sanction to protect the conspiracy against testimony constitutes forfeiture of both hearsay and Confrontation Clause objections: *United States v. Martinez,*** 476 F.3d 961 (D.C. Cir. 2007): Affirming drug and conspiracy convictions, the court found no error in the admission of hearsay statements made to the DEA by an informant involved with the defendant's drug conspiracy. The trial court found by a preponderance of the evidence that the informant was murdered by members of the defendant's conspiracy, in part to procure his unavailability as a witness. The court of appeals affirmed this finding --- rejecting the defendant's argument that forfeiture could not be found because his co-conspirators would have murdered the informant anyway, due to his role in the loss of a drug shipment. The court stated that it is "surely reasonable to conclude that anyone who murders an informant does so intending *both* to exact revenge *and* to prevent the informant from disclosing further information and testifying." It concluded that the defendant's argument would have the "perverse consequence" of allowing criminals to avoid forfeiture if they could articulate more than one bad motivation for disposing of a witness. Finally, the court held that forfeiture under Rule 804(b)(6) by definition constituted forfeiture of the Confrontation Clause objection. It stated that *Crawford* and *Davis* "foreclose" the possibility that the admission of evidence under Rule 804(b)(6) could nonetheless violate the Confrontation Clause.

**Fleeing prosecution constitutes forfeiture: *United States v. Ponzo,*** 853 F.3d 558 (1st Cir. 2017): At the defendant's racketeering trial the government offered prior testimony of a witness from the trial of the defendant's coconspirators. The defendant was not tried with his coconspirators because he had fled prosecution. By the time he was caught and tried, the witness had died. The defendant argued that admitting the dead witness's testimony at his trial violated his right to confrontation, but the court found that the defendant had forfeited that right by absenting himself from the prior trial. It reasoned as follows: "Had Ponzo been at the 1988 trial, he could have cross-examined Hildonen. But like a defendant who obtains a witness's absence by killing him, by fleeing and remaining on the lam for years, Ponzo effectively schemed to silence Hildonen's testimony against him. And Hildonen's subsequent unavailability signifies the success of that scheming. So Ponzo forfeited his confrontation rights. To hold otherwise would allow Ponzo to profit from his own wrong and would undermine the integrity of the criminal-trial system --- which we cannot allow."

**Forfeiture through veiled threats and prior history of violence: *United States v. Pratt,*** 915 F.3d 266 (4th Cir. 2019): Appealing convictions for sex trafficking and child pornography, the defendant argued that it was error to admit a hearsay statement made by one of the trafficking victims to a police officer. The court found no error in the trial court's determination that the defendant had forfeited his hearsay objection and also his right to confrontation. The defendant called the victim three times while he was in jail --- in violation of the magistrate judge's order not to contact her. The court noted that "[a]s an ineffective ruse, Pratt would pretend to be talking to someone other than" the victim; in each of the calls he urged her to deny any knowledge, and his instructions sounded like "veiled threats." This was particularly so "against the backdrop of several women at trial who detailed how Pratt would beat prostitutes --- including [the declarant] --- whom he considered disobedient." The court concluded that these threats, in the context of a history of violence toward the victim, caused the victim not to testify. It recognized that the victim might have had another motivation for refusing to testify: her feelings for the defendant, whom she considered to be her boyfriend. But the court noted that "those feelings were tied up in the same abusive relationship."

**Fact that defendant had multiple reasons for killing a witness does not preclude a finding of forfeiture: *United States v. Jackson,*** 706 F.3d 262 (4th Cir. 2013): The defendant argued that the constitutional right to confrontation can be forfeited only when a defendant was motivated *exclusively* by a desire to silence a witness. (In this case the defendant argued that while he murdered a witness to silence him, he had additional reasons, including preventing the witness from harming the defendant's drug operation and as retaliation for robbing one of the defendant's friends.) The court rejected the argument, finding nothing in *Giles* to support it. To the contrary, the Court in *Giles* reasoned that the common law forfeiture rule was designed to prevent the defendant from profiting from his own wrong. Moreover, under a multiple-motive exception to forfeiture, defendants might be tempted to murder witnesses and then cook up another motive for the murder after the fact.

**Forfeiture can be found on the basis of *Pinkerton* liability: *United States v. Dinkins,*** 691 F.3d 358 (4th Cir. 2012): The court found that the defendant had forfeited his right of confrontation when a witness was killed by a coconspirator as an act to further the conspiracy by silencing the witness. The court concluded that in light of *Pinkerton* liability, "the Constitution does not guarantee an accused person against the legitimate consequence of his own wrongful acts." ***Compare United States v. Brown,*** 2020 WL 5088074 (7th Cir. Aug. 28, 2020) (questioning whether forfeiture can be found under *Pinkerton* under the Constitution, because the constitutional doctrine of forfeiture is based on common law, and *Pinkerton* liability did not exist under common law; but finding it unnecessary to decide the question because any error in admitting the hearsay testimony was harmless).

**Retaliatory murder of witnesses who testified against the accused in a prior case is not a forfeiture in the trial for murdering the witnesses: *United States v. Henderson,*** 626 F.3d 626 (6th Cir. 2010): The defendant was convicted of bank robbery after two people (including his accomplice) testified against him. Shortly after the defendant was released from prison, the two witnesses were found murdered. At the trial for killing the two witnesses, the government offered statements made by the victims to police officers during the investigation of the bank robbery. These statements concerned their cooperation and threats made by the defendant. The trial judge admitted the statements after finding by a preponderance of the evidence that the defendant killed the witnesses. That decision, grounded in forfeiture, was made before *Giles* was decided. On appeal, the court found error under *Giles* because "Bass and Washington could not have been killed, in 1996 and 1998, respectively, to prevent them from testifying against [the defendant] in the bank robbery prosecution in 1981." Thus there was no showing of intent to keep the witnesses from testifying, as *Giles* requires for a finding of forfeiture. The court found the errors to be harmless.

**Forfeiture of confrontation rights, like forfeiture under Federal Rule 804(b)(6), is found upon a showing by a preponderance of the evidence: *United States v. Johnson*,** 767 F.3d 815 (9th Cir. 2014): The court affirmed convictions for murder and armed robbery. At trial hearsay testimony of an unavailable witness was admitted against the defendant, after the government made a showing that the defendant had threatened the witness; the trial court found that the defendant had forfeited his right under both the hearsay rule and the Confrontation Clause to object to the hearsay. The court found no error. It held that a forfeiture of the right to object under the hearsay rule and under the Confrontation Clause is governed by the same standard: the government must establish by a preponderance of the evidence that the defendant acted wrongfully to cause the unavailability of a government witness, with the intent that the witness would not testify at trial. The defendant argued that the Constitution requires a showing of clear and convincing evidence before forfeiture of a right to confrontation can be found. But the court disagreed. It noted that a clear and convincing evidence standard had been applied by some lower courts when the Confrontation Clause regulated the admission of unreliable hearsay. But now, after *Crawford v. Washington*, the Confrontation Clause does not bar unreliable hearsay from

being admitted; rather it regulates testimonial hearsay. The court stated that after *Crawford,* "the forfeiture exception is consistent with the Confrontation Clause, not because it is a means for determining whether hearsay is reliable, but because it is an equitable doctrine designed to prevent defendants from profiting from their own wrongdoing." The court also noted that the Supreme Court's post-*Crawford* decisions of Davis v. Washington and Giles v. California "strongly suggest, if not squarely hold, that the preponderance standard applies." On the facts, the court concluded that "the evidence tended to show that Johnson alone had the means, motive, and opportunity to threaten [the witness], and did not show anyone else did. This was sufficient to satisfy the preponderance standard."

**Evaluating the kind of action the defendant must take to justify a finding of forfeiture: *Carlson v. Attorney General of California,*** 791 F.3d 1003 (9th Cir. 2015): Reviewing the denial of a habeas petition, the court found that statements of victims to police were testimonial, but that the state trial court was not unreasonable in finding that the petitioner had forfeited his right to confront the declarants. In a careful analysis of Supreme Court cases, the court provided "a standard for the kind of action a defendant must take" to be found to have forfeited the right to confrontation. The court concluded that

> [T]he forfeiture-by-wrongdoing doctrine applies where there has been affirmative action on the part of the defendant that produces the desired result, non-appearance by a prospective witness against him in a criminal case. Simple tolerance of, or failure to foil, a third party's previously unexpressed decision either to skip town himself rather than testifying or to prevent another witness from appearing [is] not a sufficient reason to foreclose a defendant's Sixth Amendment confrontation rights at trial.

On the merits --- and applying the standard of deference required by AEDPA, the court concluded that the trial court could reasonably have found, on the basis of circumstantial evidence, that the petitioner more likely than not was actively involved in procuring unavailability, with the intent to keep the witness from testifying.

> **Note: The court says that a defendant's mere "acquiescence" is not enough to justify forfeiture. That language might raise a doubt as to whether a forfeiture may be found by the defendant's mere membership in a conspiracy; courts have found such membership to be sufficient where disposing of a witness is within the course and furtherance of the underlying conspiracy. See, e.g., *United States v. Dinkins,* 691 F.3d 358 (4th Cir. 2012). The *Carlson* court, however, cited the conspiracy cases favorably, and noted that in such cases, the defendant *has* acted affirmatively and committed wrongdoing by joining a conspiracy in which a foreseeable result is killing witnesses.**
>
> **A different panel of the Ninth Circuit, in a case decided around the same time as *Carlson*, upheld a finding of forfeiture based on *Pinkerton* liability. *See United***

***States Cazares,* 788 F.3d 956 (9th Cir. 2015). *But see United States v. Brown,* 2020 WL 5088074 (7th Cir. Aug. 28, 2020) (questioning whether forfeiture can be found under *Pinkerton* under the Constitution, because the constitutional doctrine of forfeiture is based on common law, and *Pinkerton* liability did not exist under common law; but finding it unnecessary to decide the question because any error in admitting the hearsay testimony was harmless).**

**The *Carlson* court noted that the restyled Rule 804(b)(6) provides a helpful clarification of what the original rule meant by "acquiescence."**

## Grand Jury, Plea Allocutions, Etc.

**Grand jury testimony and plea allocution statement are both testimonial: *United States v. Bruno,*** 383 F.3d 65 (2nd Cir. 2004): The court held that a plea allocution statement of an accomplice was testimonial, even though it was redacted to take out any direct reference to the defendant. It noted that the Court in *Crawford* had taken exception to previous cases decided by the Circuit that had admitted such statements as sufficiently reliable under *Roberts*. Those prior cases have been overruled by *Crawford.* The court also noted that the admission of grand jury testimony was error as it was clearly testimonial after *Crawford*. **See *also United States v. Becker,*** 502 F.3d 122 (2nd Cir. 2007) (plea allocution is testimonial even though redacted to take out direct reference to the defendant: "any argument regarding the purposes for which the jury might or might not have actually considered the allocutions necessarily goes to whether such error was harmless, not whether it existed at all"); ***United States v. Snype,*** 441 F.3d 119 (2nd Cir. 2006) (plea allocution of the defendant's accomplice was testimonial even though all direct references to the defendant were redacted); ***United States v. Gotti,*** 459 F.3d 296 (2nd Cir. 2006) (redacted guilty pleas of accomplices, offered to show that a bookmaking business employed five or more people, were testimonial under *Crawford*); ***United States v. Al-Sadawi,*** 432 F.3d 419 (2nd Cir. 2005) (*Crawford* violation where the trial court admitted portions of a cohort's plea allocution against the defendant, even though the statement was redacted to take out any direct reference to the defendant).

**Defendant charged with aiding and abetting has confrontation rights violated by admission of primary wrongdoer's guilty plea: *United States v. Head,*** 707 F.3d 1026 (8th Cir. 2013): The defendant was charged with aiding and abetting a murder committed by her boyfriend in Indian country. The trial court admitted the boyfriend's guilty plea to prove the predicate offense. The court found that the guilty plea was testimonial and reversed the aiding and abetting conviction. The court relied on *Crawford's* statement that "prior testimony that the defendant was unable to cross-examine" is one of the "core class of 'testimonial' statements."

**Grand jury testimony is testimonial: *United States v. Wilmore,*** 381 F.3d 868 (9th Cir. 2004): The court held, unsurprisingly, that grand jury testimony is testimonial under *Crawford*. It could hardly have held otherwise, because even under the narrowest definition of "testimonial" (i.e., the specific types of hearsay mentioned by the *Crawford* Court) grand jury testimony is covered within the definition.

## Implied Testimonial Statements

**Testimony that a police officer's focus changed after hearing an out-of-court statement impliedly included accusatorial statements from an accomplice and so violated the defendant's right to confrontation:** ***United States v. Meises,*** 645 F.3d 5 (1st Cir. 2011): At trial an officer testified that his focus was placed on the defendant after an interview with a cooperating witness. The government did not explicitly introduce the statement of the cooperating witness. On appeal, the defendant argued that the jury could surmise that the officer's focus changed because of an out-of-court accusation of a declarant who was not produced at trial. The government argued that there was no confrontation violation because the testimony was all about the actions of the officer and no hearsay statement was admitted at trial. But the court agreed with the defendant and reversed the conviction. The court noted that it was irrelevant that the government did not introduce the actual statements, because such statements were effectively before the jury in the context of the trial. The court stated that "any other conclusion would permit the government to evade the limitations of the Sixth Amendment and the Rules of Evidence by weaving an unavailable declarant's statements into another witness's testimony by implication. The government cannot be permitted to circumvent the Confrontation Clause by introducing the same substantive testimony in a different form." ***Compare United States v. Occhiuto,*** 784 F.3d 862 (1st Cir. 2015)**:** In a narcotics prosecution, an officer testified that he arranged for a cooperating informant to buy drugs from the defendant; that he monitored the transactions; and that the drugs that were in evidence were the same ones that the defendant had sold to the informant. The defendant argued that the officer's conclusion about the drugs must have rested on assertions from the informant, and therefore his right to confrontation was violated. The defendant relied upon *Meises,* but the court distinguished that case, because here the officer's testimony was based on his own personal observations and did not necessarily rely on anything said by the informant. The fact that the officer's surveillance was not airtight did not raise a confrontation issue, rather it raised a question of weight as to the officer's conclusion.

**Testimonial statements to law enforcement were admitted by implication, in violation of the Confrontation Clause:** ***United States v. Kizzee,*** 877 F.3d 650 (5th Cir. 2017): The defendant was suspected of drug-dealing; an officer arrested Brown after leaving the defendant's house and Brown implicated the defendant. At trial, the officer was asked only whether he asked Brown about the defendant's drug activity. The officer responded that he asked but did not state Brown's answers. The officer was asked what he did after receiving Brown's answers and he responded that he got a warrant to search the defendant's house. The court found that the officer's testimony "introduced Brown's out-of-court testimonial statements by implication" and that an officer's testimony "that allows a fact-finder to infer the statements made to him --- even without revealing the content of those statements --- is hearsay." ***Accord United States v. Jones,*** 930 F.3d 366 ((5th Cir. 2019) ("Agent Clayborne testified that he *knew* that Jones had received a large amount of methamphetamine because of what the confidential informant told him he had heard from others. The jury was not required to make any logical inferences, clear or otherwise, to link the informant's

statement to Jones's guilt"; moreover, the informant's statement was not properly offered to explain the police investigation, because the statement exceeded that permissible purpose by specifically linking the defendant to the crime--- therefore the Agent's testimony rendered testimonial hearsay in violation of the Confrontation Clause.). ***Accord Atkins v. Hooper,*** 969 F.3d 200 (5th Cir. 2020) ("explain-the investigation exceptions to hearsay cannot displace the Confrontation Clause"; statement by a cohort specifically identifying the defendant was in effect offered for its truth).

***Compare United States v. Sosa,*** 897 F.3d 615 (5th Cir. 2018): Appealing a conviction for bringing methamphetamine into the United States, the defendant argued that his right to confrontation was violated when an officer was allowed to testify that an undercover agent told him that the defendant's mother was recruiting drug couriers. The court found no error because the statement was not offered for its truth. Rather it was offered to explain why the officer took investigative steps regarding the defendant's mother. The court stated that "there is not a hearsay or a confrontation problem when the evidence is not offered for the truth of the matter asserted." The court emphasized, citing *Kizzee,* that "courts must be vigilant in ensuring that these attempts to 'explain the officer's actions' with out-of-court statements do not allow the backdoor introduction of highly inculpatory statements that the jury may also consider for its truth." In this case, the court found no such danger, because the undercover officer's statement was probative in explaining the police investigation, and the prejudicial effect was not high because the statement only implicated the defendant's mother, who was an acknowledged participant in the drug activity.

**Statements to law enforcement were testimonial, and right to confrontation was violated even though the statements were not stated in detail at trial: *Ocampo v. Vail,*** 649 F.3d 1098 (9th Cir. 2011): In a murder case, an officer testified that on the basis of an interview with Vazquez, the police were able to rule out suspects other than the defendant. Vazquez was not produced for trial. The state court found no confrontation violation on the ground that the officer did not testify to the substance of anything Vazquez said. But the court found that the state court unreasonably applied *Crawford* and reversed the district court's denial of a grant of habeas corpus. The statements from Vazquez were obviously testimonial because they were made during an investigation of a murder. And the court held that the Confrontation Clause bars not only quotations from a declarant, but also any testimony at trial that conveys the substance of a declarant's testimonial hearsay statement. It reasoned as follows:

> Where the government officers have not only "produced" the evidence, but then condensed it into a conclusory affirmation for purposes of presentation to the jury, the difficulties of testing the veracity of the source of the evidence are not lessened but exacerbated. With the language actually used by the out-of-court witness obscured, any clues to its truthfulness provided by that language --- contradictions, hesitations, and other clues often used to test credibility --- are lost, and instead a veneer of objectivity conveyed.
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> * * *

> Whatever locution is used, out-of-court statements admitted at trial are "statements" for the purpose of the Confrontation Clause * * * if, fairly read, they convey to the jury the substance of an out-of-court, testimonial statement of a witness who does not testify.

***See also United States v. Brooks,*** 772 F.3d 1161 (9th Cir. 2014): An agent testified that he telephoned a postal supervisor and provided him a description of the suspect, and then later searched a particular parcel with a tracking number and mailing information he had been provided over the phone as identifying the package mailed by the suspect. The postal supervisor was not produced for trial. The government argued that the agent's testimony did not violate the Confrontation Clause because the postal supervisor's actual statements were never offered at trial. But the court declared that "out-of-court statements need not be repeated verbatim to trigger the protections of the Confrontation Clause." Fairly read, the agent's testimony revealed the substance of the postal supervisor's statements. And those statements were made with the motivation that they be used in a criminal prosecution. Therefore the agent's testimony violated the Confrontation Clause.

***Accord United States v. Benamor,*** 937 F.3d 1182 (9th Cir. 2019): In a felon-firearm prosecution, the trial judge declared that an officer's conversation with the defendant's landlord (in which the landlord said that the defendant had a shotgun in his car) could not be admitted because the landlord's accusations were testimonial. The government called the officer who was asked only whether the conversation "affected your decision to investigate" and "confirmed your decision to arrest" the defendant. The officer answered yes to both questions. The court of appeals held that this testimony violated the defendant's right to confrontation. It noted that in context, the answers "implied that the landlord confirmed that Defendant possessed the shotgun" and that the government "made that implication unmistakable during closing argument by again emphasizing the landlord's statement." The court stated that it would be an unreasonable application of *Crawford* "to allow police officers to testify to the substance of an unavailable witness's testimonial statements so long as they do so descriptively rather than verbatim or in detail." The court also noted that a brief description may actually be worse for the defendant than a verbatim description of the testimonial hearsay, quoting from prior cases: "With the language actually used by the out-of-court witness obscured, any clues to its truthfulness provided by that language --- contradictions, hesitations, and other clues often used to test credibility --- are lost, and instead, a veneer of objectivity conveyed."

## Informal Circumstances, Private Statements, No Law Enforcement Involvement, etc.

**Statement of young child to his teacher is not sufficiently formal to be testimonial: *Ohio v. Clark,*** 576 U.S. 237 (2015): This case is fully discussed in Part I. The case involved a statement from a three-year-old boy to his teachers. It accused the defendant of injuring him. The Court held that a statement is extremely unlikely to be found testimonial in the absence of some participation by or with law enforcement. The presence of law enforcement is what signifies that a statement is made formally with the motivation that it will be used in a criminal prosecution. The Court did not establish a bright-line rule, however, leaving at least the remote possibility that an accusation might be testimonial even if law enforcement had no role in the making of the statement.

**Private conversations and casual remarks are not testimonial: *United States v. Malpica-Garcia,*** 489 F.3d 393 (1st Cir. 2007): In a drug prosecution, the defendant argued that testimony of his former co-conspirators violated *Crawford* because some of their assertions were not based on personal knowledge but rather were implicitly derived from conversations with other people (e.g., that the defendant ran a protection racket). The court found that if the witnesses were in fact relying on accounts from others, those accounts were not testimonial. The court noted that the information was obtained from people "in the course of private conversations or in casual remarks that no one expected would be preserved or later used at trial." There was no indication that the statements were made "to police, in an investigative context, or in a courtroom setting."

**Threats to cooperating witness were not testimonial: *United States v. Kirk Tang Yuk,*** 855 F.3d 57 (2nd Cir. 2018): A cooperating witness testified that he felt intimidated by two inmates who were friends of the defendant. The defendant argued that the threats were testimonial, but the court held that the threats were obviously not intended to be used as part of an investigation or prosecution, and so were not testimonial.

**Informal letter found reliable under the residual exception is not testimonial: *United States v. Morgan,*** 385 F.3d 196 (2nd Cir. 2004): In a drug trial, a letter written by the co-defendant was admitted against the defendant. The letter was written to a boyfriend and implicated both the defendant and the co-defendant in a conspiracy to smuggle drugs. The court found that the letter was properly admitted under Rule 807, and that it was not testimonial under *Crawford.* The court noted the following circumstances indicating that the letter was not testimonial: 1) it was not written in a coercive atmosphere; 2) it was not addressed to law enforcement authorities; 3) it was written to an intimate acquaintance; 4) it was written in the privacy of the co-defendant's hotel room; 5) the co-defendant had no reason to expect that the letter would ever find its way into the hands of the police; and 6) it was not written to curry favor with the authorities or with anyone

else. These were the same factors that rendered the hearsay statement sufficiently reliable to qualify under Rule 807.

**Informal conversation between the defendant and an undercover informant was not testimonial*: United States v. Burden,*** 600 F.3d 204 (2nd Cir. 2010): Appealing RICO and drug convictions, the defendant argued that the trial court erred in admitting a recording of a drug transaction between the defendant and a cooperating witness. The defendant argued that the statements on the recording were testimonial, but the court disagreed and affirmed. The defendant's part of the conversation was not testimonial because he was not aware at the time that the statement was being recorded or would be potentially used at his trial. As to the informant, "anything he said was meant not as an accusation in its own right but as bait."

> **Note: Other courts, as seen in the "Not Hearsay" section below, have come to the same result as the Second Circuit in *Burden,* but using a different analysis: 1) admitting the defendant's statement does not violate the Confrontation Clause because it is his own statement and he doesn't have a right to confront himself; 2) the informant's statement, while testimonial, is not offered for its truth but only to put the defendant's statements in context --- therefore it does not violate the right to confrontation because it is not offered as an accusation.**

**Prison telephone calls between defendant and his associates were not testimonial: *United States v. Jones,*** 716 F.3d 851 (4th Cir. 2013): Appealing from convictions for marriage fraud, the defendant argued that the trial court erred in admitting telephone conversations between the defendant and his associates, who were incarcerated at the time. The calls were recorded by the prison. The court found no error in admitting the conversations because they were not testimonial. The calls involved discussions to cover up and lie about the crime, and they were casual, informal statements among criminal associates, so it was clear that they were not primarily motivated to be used in a criminal prosecution. The defendant argued that the conversations were testimonial because the parties knew they were being recorded. But the court noted that "a declarant's understanding that a statement could potentially serve as criminal evidence does not necessarily denote testimonial intent" and that "just because recorded statements are used at trial does not mean they were created for trial." The court also noted that a prison "has significant institutional reasons for recording phone calls outside or procuring forensic evidence --- i.e., policing its own facility by monitoring prisoners' contact with individuals outside the prison." ***See also United States v. Benson,*** 937 F.3d 218 (4th Cir. 2020) ("testimonial evidence does not include statements made to friends in an informal setting").

**Following *Clark,* the court finds that a report of sex abuse to a nurse by a 4 ½ year old child is not testimonial: *United States v. Barker,*** 820 F.3d 167 (5th Cir. 2016): The court held that a statement by a 4 ½ year-old girl, accusing the defendant of sexual abuse, was not testimonial in light of *Ohio v. Clark.* The girl made the statement to a nurse who was registered by the state to take such statements. The court held that like in *Clark* the statement was not testimonial because: 1) it was made by a child too young to understand the criminal justice system; 2) it was not made to law enforcement; 3) the nurse's primary motive was to treat the child; and 4) the fact that the nurse was required to report the abuse to law enforcement did not change her motivation to treat the child.

**Statements made to an undercover informant setting up a drug transaction are not testimonial: *Brown v. Epps,*** 686 F.3d 281 (5th Cir. 2012)**:** The court found no error in the state court's admission of an intercepted conversation between the defendant, an accomplice, and an undercover informant. The conversation was to set up a drug deal. The court held that statements "unknowingly made to an undercover officer, confidential informant, or cooperating witness are not testimonial in nature because the statements are not made under circumstances which would lead an objective witness to reasonably believe that the statements would be available for later use at trial." The court elaborated further:

> The conversations did not consist of solemn declarations made for the purpose of establishing some fact. Rather, the exchange was casual, often profane, and served the purpose of selling cocaine. Nor were the unidentified individuals' statements made under circumstances that would lead an objective witness reasonably to believe that they would be available for use at a later trial. To the contrary, the statements were furthering a criminal enterprise; a future trial was the last thing the declarants were anticipating. Moreover, they were unaware that their conversations were being preserved, so they could not have predicted that their statements might subsequently become available at trial. * * * No witness goes into court to proclaim that he will sell you crack cocaine in a Wal-Mart parking lot. An objective analysis would conclude that the primary purpose of the unidentified individuals' statements was to arrange the drug deal. Their purpose was not to create a record for trial and thus is not within the scope of the Confrontation Clause.

**Statements made by a victim to her friends and family are not testimonial: *Doan v. Carter,*** 548 F.3d 449 (6th Cir. 2008): The defendant challenged a conviction for murder of his girlfriend. The trial court admitted a number of statements from the victim concerning physical abuse that the defendant had perpetrated on her. The defendant argued that these statements were testimonial but the court disagreed. The defendant contended that a statement is nontestimonial only if it is in response to an emergency, but the court rejected the defendant's "narrow characterization of nontestimonial statements." The court relied on the statement in *Giles v. California* that "statements to friends and neighbors about abuse and intimidation * * * would be excluded, if at all, only by hearsay rules." ***See also United States v. Boyd,*** 640 F.3d 657 (6th Cir.

2011) (statements were non-testimonial because the declarant made them to a companion; stating broadly that "statements made to friends and acquaintances are non-testimonial").

**Suicide note implicating the declarant and defendant in a crime was testimonial under the circumstances:** ***Miller v. Stovall,*** 608 F.3d 913 (6th Cir. 2010): A former police officer involved in a murder wrote a suicide note to his parents, indicating he was going to kill himself so as not go to jail for the crime that he and the defendant committed. The note was admitted against the defendant. The court found that the note was testimonial and its admission against the defendant violated his right to confrontation, because the declarant could "reasonably anticipate" that the note would be passed on to law enforcement --- especially because the declarant was a former police officer.

> **Note: The court's "reasonable anticipation" test appears to be a broader definition of testimoniality than that applied by the Supreme Court in *Davis* and especially *Bryant.* The Court in *Davis* looked to the "primary motivation" of the speaker. In this case, the "primary motivation" of the declarant was probably to explain to his parents why he was going to kill himself, rather than to prepare a case against the defendant. So the case appears wrongly decided.**

**Informal statements made about planned criminal activity are not testimonial:** ***United States v. Klemis,*** 899 F.3d 436 (7th Cir. 2017): In a narcotics prosecution in which a user died, the court held that statements by the victim to a friend, that he had stolen from her in order to pay a drug debt to the defendant, were not testimonial. The court reasoned that the Supreme Court in *Ohio v. Clark* declared that a statement was very unlikely to be testimonial if it was made outside the law enforcement context. Here, spontaneous statements to a friend about attempts to borrow or steal from her to pay a drug debt, were not "efforts to create an out-of-court substitute for trial testimony."

**Statements made by an accomplice to a jailhouse informant are not testimonial:** ***United States v. Honken,*** 541 F.3d 1146 (8th Cir. 2008): When the defendant's murder prosecution was pending, the defendant's accomplice (Johnson) was persuaded by a fellow inmate (McNeese) that Johnson could escape responsibility for the crime by getting another inmate to falsely confess to the crime --- but that in order to make the false confession believable, Johnson would have to disclose where the bodies were buried. Johnson prepared maps and notes describing where the bodies were buried, and gave it to McNeese with the intent that it be delivered to the other inmate who would falsely confess. In fact this was all a ruse concocted by McNeese and the authorities to get Johnson to confess, in which event McNeese would get a benefit from the government. The notes and maps were admitted at the defendant's trial, over the defendant's objection that they were testimonial. The defendant argued that Johnson had been subjected to the equivalent of a

police interrogation. But the court held that the evidence was not testimonial, because Johnson didn't know that he was speaking to a government agent. It explained as follows:

> Johnson did not draw the maps with the expectation that they would be used against Honken at trial * * * . Further, the maps were not a "solemn declaration" or a "formal statement." Rather, Johnson was more likely making a casual remark to an acquaintance. We simply cannot conclude Johnson made a "testimonial" statement against Honken without the faintest notion that she was doing so.

***See also United States v. Spotted Elk,*** 548 F.3d 641 (8th Cir. 2008) (private conversation between inmates about a future course of action is not testimonial).

**Incriminatory statements made by an accomplice from a telephone in jail are not testimonial: *United States v. LeBeau,*** 867 F.3d 960 (8th Cir. 2017): The defendant's codefendant made coded calls while in jail to further drug activity. The defendant argued that these statements were testimonial because the codefendant was aware --- based on a message played at the beginning of the call --- that his call was being monitored by law enforcement. But the court rejected this argument, stating that even though the codefendant might have anticipated that his statements were used in a criminal prosecution, his primary motivation was not related to law enforcement: "the primary purpose of the calls was to further the drug conspiracy, not to create a record for a criminal prosecution." The fact that the codefendant spoke in code was strong evidence that his primary motivation was *not* to have his statement used in a criminal prosecution.

**Statement from one friend to another in private circumstances is not testimonial: *United States v. Wright,*** 536 F.3d 819 (8th Cir. 2008): The defendant was charged with shooting two people in the course of a drug deal. One victim died and one survived. The survivor testified at trial to a private conversation he had with the other victim, before the shootings occurred. The court held that the statements of the victim who died were not testimonial. The statements were made under informal circumstances to a friend. The court relied on the Supreme Court's statement in *Giles v. California* that "statements to friends and neighbors about abuse and intimidation, and statements to physicians in the course of receiving treatment," are not testimonial.

**Accusatory statements in a victim's diary are not testimonial: *Parle v. Runnels***, 387 F.3d 1030 (9th Cir. 2004): In a murder case, the government offered statements of the victim that she had entered in her diary. The statements recounted physical abuse that the victim received at the hand of the defendant. The court held that the victim's diary was not testimonial, as it was a private diary of daily events. There was no indication that it was prepared for use at a trial.

**Jailhouse conversations among coconspirators were not testimonial: *United States v. Alcorta,*** 853 F.3d 1123 (10th Cir. 2017): Affirming drug convictions, the court rejected the defendant's argument that admitting jailhouse conversations of his coconspirators violated his right to confrontation. The court stated that to be testimonial, the statements must be made "with the primary purpose of creating evidence for the prosecution." The court concluded that "[t]he statements here --- jailhouse conversations between criminal codefendants (none of whom were cooperating with the government) --- do not satisfy that definition because that was not their purpose; quite the opposite."

**Private conversation between mother and son is not testimonial: *United States v. Brown,*** 441 F.3d 1330 (11th Cir. 2006): In a murder prosecution, the court admitted testimony that the defendant's mother received a phone call, apparently from the defendant; the mother asked the caller whether he had killed the victim, and then the mother started crying. The mother's reaction was admitted at trial as an excited utterance. The court found no violation of *Crawford.* The court reasoned as follows:

> We need not divine any additional definition of "testimonial" evidence to conclude that the private conversation between mother and son, which occurred while Sadie Brown was sitting at her dining room table with only her family members present, was not testimonial. The phone conversation Davis overheard obviously was not made under examination, was not transcribed in a formal document, and was not made under circumstances leading an objective person to reasonably believe the statement would be available for use at a later trial. Thus, it is not testimonial and its admission is not barred by *Crawford*. (Citations omitted).

**Defendant's lawyer's informal texts with I.R.S. agent found not testimonial: *United States v. Wilson,*** 788 F.3d 1298 (11th Cir. 2015): The defendant was charged with converting checks that he knew to be issued as a result of fraudulently filed income tax returns. He claimed that he was a legitimate cashier and did not know that the checks were obtained by fraud. The trial court admitted texts sent by the defendant's lawyer to the I.R.S. The texts involved the return of certain records that the I.R.S. agent had allowed the defendant to take to copy; the texts contradicted the defendant's account at trial that he didn't know he had to return the boxes (in essence a showing of consciousness of guilt). The defendant argued that the lawyer's texts to the I.R.S. agent were testimonial, but the court disagreed: "Here, the attorney communicated through informal text messages to coordinate the delivery of the boxes. The cooperative and informal nature of those text messages was such that an objective witness would not reasonably expect the texts to be used prosecutorially." ***See also United States v. Mathis,*** 767 F.3d 1264 (11th Cir. 2014) (text messages between defendant and a minor concerning sex were informal, haphazard communications and therefore not made with the primary motive to be used in a criminal prosecution).

## Interpreters

**Interpreter is not a witness but merely a language conduit and so testimony recounting the interpreter's translation does not violate *Crawford*: *United States v. Orm Hieng,*** 679 F.3d 1131 (9th Cir. 2012): At the defendant's drug trial, an agent testified to inculpatory statements the defendant made through an interpreter. The interpreter was not called to testify, and the defendant argued that admitting the interpreter's statements about what the defendant said violated his right to confrontation. The court found that the interpreter had acted as a "mere language conduit" and so he was not a witness against the defendant within the meaning of the Confrontation Clause. The court noted that in determining whether an interpreter acts as a language conduit, a court must undertake a case-by-case approach, considering factors such as "which party supplied the interpreter, whether the interpreter had any motive to lead or distort, the interpreter's qualifications and language skill, and whether actions taken subsequent to the conversation were consistent with the statements as translated." The court found that these factors cut in favor of the lower court's finding that the interpreter in this case had acted as a language conduit. Because the interpreter was only a conduit, the witness against the defendant was not the interpreter, but rather himself. The court concluded that when it is the defendant whose statements are translated, "the Sixth Amendment simply has no application because a defendant cannot complain that he was denied the opportunity to confront himself." ***See also United States v. Romo-Chavez*,** 681 F.3d 955 (9th Cir. 2012)(where an interpreter served only as a language conduit, the defendant's own statements were properly admitted under Rule 801(d)(2)(A), and the Confrontation Clause was not violated because the defendant was his own accuser and he had no right to cross-examine himself); ***United States v. Aifang Ye,*** 808 F.3d 395 (9th Cir. 2015) (adhering to pre-*Crawford* case law that a translator acting as a language conduit does not implicate the Confrontation Clause, because that case law "is not clearly irreconcilable with *Crawford*"; finding on the facts that the translator was a language conduit, by applying the four-factor test from *Orm Hieng*). .

**Interpreter's statements were testimonial: *United States v. Charles,*** 722 F.3d 1319 (11th Cir. 2013): The defendant was convicted of knowingly using a fraudulently authored travel document. When the defendant was detained at the airport, he spoke to the Customs Officer through an interpreter. At trial, the defendant's statements were reported by the officer. The interpreter was not called. The court held that the defendant had the right to confront the interpreter. It stated that the interpreter's translations were testimonial because they were rendered in the course of an interrogation and for these purposes the interpreter was the relevant declarant. But the court found that the error was not plain and affirmed the conviction. The court did not address the conflicting authority in the Ninth Circuit, supra. ***See also United States v. Curbelo,*** 726 F.3d 1260 (11th Cir. 2013) (transcripts of a wiretapped conversation that were translated constituted the translator's implicit out-of-court representation that the translation was correct, and the translator's implicit assertions were testimonial; but there was no violation of the Confrontation Clause

because a party to the conversation testified to what was said based on his independent review of the recordings and the transcript, and the transcript itself was never admitted at trial).

## Interrogations, Tips to Law Enforcement, Etc.

**Formal statement to police officer is testimonial: *United States v. Rodriguez-Marrero*,** 390 F.3d 1 (1st Cir. 2004): The defendant's accomplice gave a signed confession under oath to a prosecutor in Puerto Rico. The court held that any information in that confession that incriminated the defendant, directly or indirectly, could not be admitted against him after *Crawford.* Whatever the limits of the term "testimonial," it clearly covers sworn statements by accomplices to police officers.

**Accomplice's statements during police interrogation are testimonial: *United States v. Alvarado-Valdez,*** 521 F.3d 337 (5th Cir. 2008): The trial court admitted the statements of the defendant's accomplice that were made during a police interrogation. The statements were offered for their truth --- to prove that the accomplice and the defendant conspired with others to transport cocaine. Because the accomplice had absconded and could not be produced for trial, admission of his testimonial statements violated the defendant's right to confrontation.

**Identification of a defendant, made to police by an incarcerated person, is testimonial: *United States v. Pugh,*** 405 F.3d 390 (6th Cir. 2005): In a bank robbery prosecution, the court found a *Crawford* violation when the trial court admitted testimony from a police officer that he had brought a surveillance photo down to a person who was incarcerated, and that person identified the defendant as the man in the surveillance photo. This statement was testimonial under *Crawford* because "the term 'testimonial' at a minimum applies to police interrogations." The court also noted that the statement was sworn and that a person who "makes a formal statement to government officers bears testimony." ***See also United States v. McGee****,* 529 F.3d 691 (6th Cir. 2008) (confidential informant's statement identifying the defendant as the source of drugs was testimonial).

**Circuit Court's opinion that an anonymous tip to law enforcement is testimonial was reversed by the Supreme Court on AEPDA grounds: *Etherton v. Rivard,*** 800 F.3d 737 (6th Cir. 2015), ***rev'd sub nom., Woods v. Etherton,*** 136 S.Ct. 1149 (2016): On habeas review, the court held that an anonymous tip to law enforcement, accusing the defendant of criminal misconduct, was testimonial. It further held that the defendant's right to confrontation was violated at his trial where the tip was admitted into evidence for its truth. It noted that "[t]he prosecutor's repeated references both to the existence and the details of the tip went far beyond what was necessary for background --- thereby indicating the content of the tip was admitted for its truth." **But the Supreme Court, in a per curiam opinion, reversed the Sixth Circuit,** holding that it gave insufficient deference to the state court's determination that the anonymous tips were properly admitted for the non-hearsay purpose of explaining the context of the police investigation. The Court stated that a "fairminded jurist" could conclude "that repetition of the tip did not establish

that the uncontested facts it conveyed were submitted for their truth. Such a jurist might reach that conclusion by placing weight on the fact that the truth of the facts was not disputed. No precedent of this Court clearly forecloses that view."

**Accomplice statement to law enforcement is testimonial: *United States v. Nielsen,*** 371 F.3d 574 (9th Cir. 2004): Nielsen resided in a house with Volz. Police officers searched the house for drugs. Drugs were found in a floor safe. An officer asked Volz who had access to the floor safe. Volz said that she did not but that Nielsen did. This hearsay statement was admitted against Nielsen at trial. The court found this to be error, as the statement was testimonial under *Crawford*, because it was made to police officers during an interrogation. The court noted that even the first part of Volz's statement --- that she did not have access to the floor safe --- violated *Crawford* because it provided circumstantial evidence that Nielsen did have access.

**Statement made by an accomplice after arrest, but before formal interrogation, is testimonial: *United States v. Summers,*** 414 F.3d 1287 (10th Cir. 2005): The defendant's accomplice in a bank robbery was arrested by police officers. As he was walked over to the patrol car, he said to the officer, "How did you guys find us?" The court found that the admission of this statement against the defendant violated his right to confrontation under *Crawford.* The court explained as follows:

> Although Mohammed had not been read his *Miranda* rights and was not subject to formal interrogation, he had nevertheless been taken into physical custody by police officers. His question was directed at a law enforcement official. Moreover, Mohammed's statement * * * implicated himself and thus was loosely akin to a confession.

**Statements made by accomplice to police officers during a search are testimonial: *United States v. Arbolaez,*** 450 F.3d 1283 (11th Cir. 2006): In a marijuana prosecution, the court found error in the admission of statements made by one of the defendant's accomplices to law enforcement officers during a search. The government argued that the statements were offered not for truth but to explain the officers' reactions to the statements. But the court found that "testimony as to the details of statements received by a government agent . . . even when purportedly admitted not for the truthfulness of what the informant said but to show why the agent did what he did after he received that information constituted inadmissible hearsay." The court also found that the accomplice's statements were testimonial under *Crawford*, because they were made in response to questions from police officers.

**Statements by victims to an officer about why they were refusing to testify were *not* testimonial: *United States v. Cooper,*** 926 F.3d 718 (11th Cir. 2019): The defendant was charged with fraud and sex trafficking, resulting from a scheme in which he brought foreign exchange students to the U.S. but then hired them out for sex. By the time of trial, two of the victims were back in their country and were refusing to cooperate. An officer testified that he had contacted them and that they were refusing to cooperate because they feared humiliation, embarrassment, and further stress. The defendant argued that this testimony violated the Confrontation Clause because the victims' statements to the officer were testimonial. But the court disagreed. It stated that because the agent had questioned the victims "to understand why they refused to testify, not to investigate or establish any fact that was part of an element of the charged offenses or necessary to prove Cooper's guilt, their statements were not testimonial and did not implicate the Confrontation Clause."

**Statements by customers to police officer about their motivation to obtain sex were testimonial: *United States v. Cooper,*** 926 F.3d 718 (11th Cir. 2019): The defendant was charged with fraud and sex trafficking, resulting from a scheme in which he brought foreign exchange students to the U.S. but then hired them out for sex. At trial the government offered visitor logs for apartments leased by the defendant. The defendant argued that the logbooks did not show that the visitor were seeking sex when they visited. In response, the government called an officer who testified that he interviewed the men who registered on the log and they told him that they had visited the apartment to obtain sexual services. The court held that the officer's testimony violated the Confrontation Clause because the reports of the visitors about their motivation were testimonial. The court stated: "Statements to police officers are generally testimonial if the primary purpose is investigative. Agent Nguyen questioned the visitors during his investigation to gain facts probative of Cooper's guilt. Their statements were testimonial." The court found the error to be harmless.

## Investigative Reports

**Reports by a law enforcement officer on prior statements made by a cooperating witness were testimonial:** ***United States v. Moreno,*** 809 F.3d 766 (3rd Cir. 2016): After a cooperating witness testified on direct, defense counsel attacked his credibility on the ground that he had made a deal. On redirect, the trial court allowed the witness to read into evidence the reports of a law enforcement officer who had interviewed the witness. The reports indicated that the witness had made statements consistent with his in-court testimony. The court of appeals found a violation of the Confrontation Clause, because the officer's hearsay statements (about what the witness had told him) were testimonial and the officer was not produced for cross-examination. The court found that the reports were "investigative reports prepared by a government agent in actual anticipation of trial."

## Joined Defendants

## (See also *Bruton* cases, supra)

**Testimonial hearsay offered by another defendant violates *Crawford* where the statement can be used against the defendant: *United States v. Nguyen,*** 565 F.3d 668 (9th Cir. 2009): In a trial of multiple defendants in a fraud conspiracy, one of the defendants offered statements he made to a police investigator. These statements implicated the defendant. The court found that the admission of the codefendant's statements violated the defendant's right to confrontation. The statements were clearly testimonial because they were made to a police officer during an interrogation. The court noted that the confrontation analysis "does not change because a co-defendant, as opposed to the prosecutor, elicited the hearsay statement. The Confrontation Clause gives the accused the right to be confronted with the witnesses against him. The fact that Nguyen's co-counsel elicited the hearsay has no bearing on her right to confront her accusers."

## Judicial Findings and Judgments

**Judicial findings and an order of judicial contempt are not testimonial: *United States v. Sine,*** 493 F.3d 1021 (9th Cir. 2007): The court held that the admission of a judge's findings and order of criminal contempt, offered to prove the defendant's lack of good faith in a tangentially related fraud case, did not violate the defendant's right to confrontation. The court found "no reason to believe that Judge Carr wrote the order in anticipation of Sine's prosecution for fraud, so his order was not testimonial."

***See also United States v. Ballesteros-Selinger,*** 454 F.3d 973 (9th Cir. 2006) (holding that an immigration judge's deportation order was nontestimonial because it "was not made in anticipation of future litigation").

## Law Enforcement Involvement

**Following *Clark,* the court finds that a report of sex abuse to a nurse by a 4 ½ year old child is not testimonial: *United States v. Barker,*** 820 F.3d 167 (5th Cir. 2016): The court held that a statement by a 4 ½ year-old girl, accusing the defendant of sexual abuse, was not testimonial in light of *Ohio v. Clark.* The girl made the statement to a nurse who was registered by the state to take such statements. The court held that like in *Clark* the statement was not testimonial because: 1) it was made by a child too young to understand the criminal justice system; 2) it was not made to law enforcement; 3) the nurse's primary motive was to treat the child; and 4) the fact that the nurse was required to report the abuse to law enforcement did not change her motivation to treat the child.

**Accusations made to child psychologist appointed by law enforcement were testimonial: *McCarley v. Kelly,*** 759 F.3d 535 (6th Cir. 2014): A three year old boy witnessed a murder but would not talk to the police about it. The police sought out a child psychologist, who interviewed the boy with the understanding that she would try to "extract information" from him about the crime and refer that information to the police. Helping the child was, at best, a secondary motive. Under these circumstances, the court found that the child's statements to the psychologist were testimonial and erroneously admitted in the defendant's state trial. The court noted that the sessions "were more akin to police interrogations than private counseling sessions."

> **Note: *McCarley* was decided before *Ohio v. Clark,* where the Supreme Court held that the statement of a young child is extremely unlikely to be testimonial, because the child would not have a primary motive that the statement would be used in a criminal prosecution. *McCarley* differs in one respect from *Clark,* though. In *McCarley,* the party taking the statement definitely had a primary motive to use it in a criminal prosecution. This was not the case in *Clark,* where the child was being interviewed by his teachers. Still, the result in *McCarley* is questionable after *Clark* --- and especially so in light of the holding in *Michigan v. Bryant* that primary motivation must be assessed from the perspective of a reasonable person in the position of *both* the speaker and the interviewer.**

**Airline official's denial to board a plane after the defendant resists law enforcement officials was not testimonial: *United States v. Buluc,*** 930 F.3d 383 (5th Cir. 2019): The defendant was convicted for taking action to prevent or hamper his removal from the United States. ICE officials brought him to a plane, and, due to his physical resistance, a Turkish Airlines official (Ozel) refused to let him board. The defendant argued that testimony of the ICE agents about Ozel's refusal violated his right to confrontation. But the court found that Ozel's statement was not testimonial even though law enforcement was involved: "Ozel's statement was made, not in response to police questioning, but instead during the heated encounter caused by Buluc's violent

resistance to being boarded. Under these circumstances, we do not find the primary purpose of the statement was to create evidence to incriminate Buluc at trial."

**Note: Ozel's statement did not violation the Confrontation Clause for an independent reason: it wasn't hearsay. "I refuse to let you on the plane" is not hearsay because it is not an assertion of fact that is either true or false.**

**Police officer's count of marijuana plants found in a search is testimonial: *United States v. Taylor,*** 471 F.3d 832 (7th Cir. 2006): The court found plain error in the admission of testimony by a police officer about the number of marijuana plants found in the search of the defendant's premises. The officer did not himself count all of the plants; part of his total count was based on a hearsay statement of another officer who assisted in the count. The court held that the officer's hearsay statement about the amount of plants counted was clearly testimonial as it was an evaluation prepared for purposes of criminal prosecution.

**Social worker's interview of child-victim, with police officers present, was the functional equivalent of interrogation and therefore testimonial: *Bobadilla v. Carlson,*** 575 F.3d 785 (8th Cir. 2009): The court affirmed the grant of a writ of habeas after a finding that the defendant's state conviction for child sexual abuse was tainted by the admission of a testimonial statement by the child-victim. A police officer arranged to have the victim interviewed at the police station five days after the alleged abuse. The officer sought the assistance of a social worker, who conducted the interview using a forensic interrogation technique designed to detect sexual abuse. The court found that "this interview was no different than any other police interrogation: it was initiated by a police officer a significant time after the incident occurred for the purpose of gathering evidence during a criminal investigation." The court found it important that the interview took place at the police station, it was recorded for use at trial, and the social worker utilized a structured, forensic method of interrogation at the behest of the police. Under the circumstances, the social worker "was simply acting as a surrogate interviewer for the police."

**Note: *Bobadilla* was decided before *Ohio v. Clark,* where the Supreme Court held that the statement of a young child is extremely unlikely to be testimonial, because the child would not have a primary motive that the statement would be used in a criminal prosecution. *Bobadilla* differs in one respect from *Clark,* though. In *Bobadilla,* the party taking the statement definitely had a primary motive to use it in a criminal prosecution. This was not the case in *Clark,* where the child was being interviewed by his teachers. Still, the result in *Bobadilla* is questionable after *Clark* --- and especially so in light of the holding in *Michigan v. Bryant* that primary motivation must be assessed from the perspective of a reasonable person in the position of *both* the speaker and the interviewer.**

**Statements made by a child-victim to a forensic investigator are testimonial: *United States v. Bordeaux,*** 400 F.3d 548 (8th Cir. 2005): In a child sex abuse prosecution, the trial court admitted hearsay statements made by the victim to a forensic investigator. The court reversed the conviction, finding among other things that the hearsay statements were testimonial under *Crawford.* The court likened the exchange between the victim and the investigator to a police interrogation. It elaborated as follows:

> The formality of the questioning and the government involvement are undisputed in this case. The purpose of the interview (and by extension, the purpose of the statements) is disputed, but the evidence requires the conclusion that the purpose was to collect information for law enforcement. First, as a matter of course, the center made one copy of the videotape of this kind of interview for use by law enforcement. Second, at trial, the prosecutor repeatedly referred to the interview as a "forensic" interview . . . That [the victim's] statements may have also had a medical purpose does not change the fact that they were testimonial, because *Crawford* does not indicate, and logic does not dictate, that multi-purpose statements cannot be testimonial.
>
> **Note: This case was decided before *Ohio v. Clark,* where the Supreme Court held that the statement of a young child is extremely unlikely to be testimonial, because the child would not have a primary motive that the statement would be used in a criminal prosecution. This case differs in one respect from *Clark,* though --- the party taking the statement definitely had a primary motive to use it in a criminal prosecution. This was not the case in *Clark,* where the child was being interviewed by his teachers. Still, the result here is questionable after *Clark* --- and especially so in light of the holding in *Michigan v. Bryant* that primary motivation must be assessed from the perspective of a reasonable person in the position of *both* the speaker and the interviewer.**
>
> **Moreover, the court concedes that there may have been a dual motive here --- treatment being the other motive. At a minimum, a court would have to make the finding that the prosecutorial motive was primary, and the court did not do this.**

***See also United States v. Eagle,*** 515 F.3d 794 (8th Cir. 2008) (statements from a child concerning sex abuse, made to a forensic investigator, are testimonial). ***Compare United States v. Peneaux,*** 432 F.3d 882 (8th Cir. 2005) (distinguishing *Bordeaux* where the child's statement was made to a treating physician rather than a forensic investigator, and there was no evidence that the interview resulted in any referral to law enforcement: "Where statements are made to a physician seeking to give medical aid in the form of a diagnosis or treatment, they are presumptively nontestimonial."); ***United States v. DeLeon,*** 678 F.3d 317 (4th Cir. 2012) (discussed below under "medical statements" and distinguishing *Bordeaux* and *Bobodilla* as cases where statements were essentially made to law enforcement officers and not for treatment purposes).

## Machine-Generated Information

**Printout from machine is not hearsay and therefore its admission does not violate *Crawford*: *United States v. Washington,*** 498 F.3d 225 (4th Cir. 2007): The defendant was convicted of operating a motor vehicle under the influence of drugs and alcohol. At trial, an expert testified on the basis of a printout from a gas chromatograph machine. The machine issued the printout after testing the defendant's blood sample. The expert testified to his interpretation of the data issued by the machine --- that the defendant's blood sample contained PCP and alcohol. The defendant argued that *Crawford* was violated because the expert had no personal knowledge of whether the defendant's blood contained PCP or alcohol. He read *Crawford* to require the production of the lab personnel who conducted the test. But the court rejected this argument, finding that the machine printout was not hearsay, and therefore its use at trial by the expert could not violate *Crawford* even though it was prepared for use at trial. The court reasoned as follows:

> The technicians could neither have affirmed or denied independently that the blood contained PCP and alcohol, because all the technicians could do was to refer to the raw data printed out by the machine. Thus, the statements to which Dr. Levine testified in court . . . did not come from the out-of-court technicians [but rather from the machine] and so there was no violation of the Confrontation Clause. . . . The raw data generated by the diagnostic machines are the "statements" of the machines themselves, not their operators. But "statements" made by machines are not out-of-court statements made by declarants that are subject to the Confrontation Clause.

The court noted that the technicians might have needed to be produced to provide a chain of custody, but observed that the defendant made no objection to the authenticity of the machine's report.

> **Note: The result in *Washington* appears unaffected by *Williams,* as the Court in *Williams* had no occasion to consider whether a machine output can be testimonial hearsay.**

***See also United States v. Summers,*** 666 F.3d 192 (4th Cir. 2011): (expert's reliance on a "pure instrument read-out" did not violate the Confrontation Clause because such a read-out is not "testimony").

**Printout from machine is not hearsay and therefore does not violate *Crawford*: *United States v. Moon,*** 512 F.3d 359 (7th Cir. 2008): The court held that an expert's testimony about readings taken from an infrared spectrometer and a gas chromatograph (which determined that the substance taken from the defendant was narcotics) did not violate *Crawford* because "data is not 'statements' in any useful sense. Nor is a machine a 'witness against' anyone."

**Google satellite images, and machine-generated location markers, are not hearsay and therefore, even if prepared for trial, their admission does not violate the Confrontation Clause: *United States v. Lizarraga-Tirado,* 789 F.3d 1107 (9th Cir. 2015):** The defendant was convicted of illegal re-entry into the United States. The defendant contended that when he was arrested, he was still on the Mexican side of the border. At trial the arresting officer testified that she contemporaneously recorded the coordinates of the defendant's arrest using a handheld GPS device. To illustrate the location of these coordinates, the government introduced a Google Earth satellite image. The image contained a "tack" showing the location of the coordinates to be on the United States side of the border. There was no testimony on whether the tack was automatically generated or manually placed and labeled. The defendant argued that both the satellite image and the tack were inadmissible hearsay and that their admission violated his right to confrontation. As to the satellite image itself, the court found that "[b]ecause a satellite image, like a photograph, makes no assertion, it isn't hearsay." The court found the tack to be a more difficult question. It noted that "[u]nlike a satellite image itself, labeled markers added to a satellite image do make clear assertions. Indeed, that is what makes them useful." The court concluded that if a tack is placed manually and then labeled, "it's classic hearsay" --- for example, a dot manually labeled with the name of a town "asserts that there's a town where you see the dot." On the other hand, "[a] tack placed by the Google Earth program and automatically labeled with GPS coordinates isn't hearsay" because it is completely machine-generated and so no assertion is being made.

In this case, the court took judicial notice that the tack was automatically generated because the court itself accessed Google Earth and typed in the same coordinates to which the arresting officer testified --- which resulted in a tack identical to the one shown on the satellite image admitted at trial. Thus the program "analyze[d] the GPS coordinates and, without any human intervention, place[d] a labeled tack on the satellite image." The court concluded that "[b]ecause the program makes the relevant assertion --- that the tack is accurately placed at the labeled GPS coordinates --- there's no statement as defined by the hearsay rule." The court noted that any issues of malfunction or tampering present questions of authenticity, not hearsay, and the defendant made no authenticity objection. Finally, "[b]ecause the satellite images and tack-coordinates pair weren't hearsay, their admission also didn't violate the Confrontation Clause."

**Electronic tabulation of phone calls is not a statement and therefore cannot be testimonial hearsay: *United States v. Lamons,*** 532 F.3d 1251 (11th Cir. 2008): Bomb threats were called into an airline, resulting in the disruption of a flight. The defendant was a flight attendant accused of sending the threats. The trial court admitted a CD of data collected from telephone calls made to the airline; the data indicated that calls came from the defendant's cell phone at the time the threats were made. The defendant argued that the information on the CD was testimonial hearsay, but the court disagreed, because the information was entirely machine-generated. The court stated that "the witnesses with whom the Confrontation Clause is concerned are *human* witnesses" and that the purposes of the Confrontation Clause "are ill-served through confrontation of the machine's human operator. To say that a wholly machine-generated statement is unreliable is to speak of mechanical error, not mendacity. The best way to advance the truth-seeking process

* * * is through the process of authentication as provided in Federal Rule of Evidence 901(b)(9)." The court concluded that there was no hearsay statement at issue, and therefore the Confrontation Clause was inapplicable.

**Still photos from surveillance videos are not testimonial hearsay: *United States v. Clotaire,*** 963 F.3d 1288 (11th Cir. 2020): The defendant argued that admission of still photos taken from video surveillance tapes at an ATM violated his right to confrontation. But the court disagreed. It stated: "Surveillance cameras are not witnesses and surveillance photos are not statements."

## Medical/Therapeutic Statements

**Statements of victim to her therapist, discussing the effect of defendants' actions on her emotional condition, were not testimonial: *United States v. Gonzalez,*** 905 F.3d 165 (3rd Cir. 2018): The defendants were charged with stalking and cyberstalking causing death. The victim made statements to her therapist (and others) about the anxiety and depression caused by the defendant's activities. The statements to the therapist were admitted under Rule 803(4), and the appellate court found no error in that ruling. The defendant argued that the statements were testimonial but the court disagreed. The court stated that "the purpose of a visit to a therapist is not to create a record in a criminal case." ***See also United States v. Gonzalez,*** 905 F.3d 165 (3rd Cir. 2018) (Cyberstalking prosecution: "Belford's statements to her therapist are not testimonial in nature. As her therapist testified, the purpose of Belford's visits were to receive therapy to treat her anxiety and depression. The purpose of a visit to a therapist is not to create a record for a future criminal case. * * * Accordingly, the admission of Belford's statements as evidence did not violate the Confrontation Clause.").

**Statements by victim of abuse to treatment manager of Air Force medical program were admissible under Rule 803(4) and non-testimonial: *United States v. DeLeon,*** 678 F.3d 317 (4th Cir. 2012): The defendant was convicted of murdering his eight-year-old son. Months before his death, the victim had made statements about incidents in which he had been physically abused by the defendant as part of parental discipline. The statements were made to the treatment manager of an Air Force medical program that focused on issues of family health. The court found that the statements were properly admitted under Rule 803(4) and (essentially for that reason) were non-testimonial, because their primary purpose was not for use in a criminal prosecution of the defendant. The court noted that the statements were not made in response to an emergency, but that emergency was only one factor under *Bryant.* The court also recognized that the Air Force program "incorporates reporting requirements and a security component" but stated that these factors were not sufficient to render statements to the treatment manager testimonial. The court explained why the "primary motive" test was not met in the following passage:

> We note first that Thomas [the treatment manager] did not have, nor did she tell Jordan [the child] she had, a prosecutorial purpose during their initial meeting. Thomas was not employed as a forensic investigator but instead worked * * * as a treatment manager. And there is no evidence that she recorded the interview or otherwise sought to memorialize Jordan's answers as evidence for use during a criminal prosecution. * * * Rather, Thomas used the information she gathered from Jordan and his family to develop a written treatment plan and continued to provide counseling and advice on parenting techniques in subsequent meetings with family members. * * * Thomas also did not meet with Jordan in an interrogation room or at a police station but instead spoke with him in her office in a building that housed * * * mental health service providers.

> Importantly, ours is also not a case in which the social worker operated as an agent of law enforcement. * * * Here, Thomas did not act at the behest of law enforcement, as there was no active criminal investigation when she and Jordan spoke. * * * An objective review of the parties' actions and the circumstances of the meeting confirms that the primary purpose was to develop a treatment plan --- not to establish facts for a future criminal prosecution. Accordingly, we hold that the contested statements were nontestimonial and that their admission did not violate DeLeon's Sixth Amendment rights.
>
> **Note: The court's analysis is strongly supported by the subsequent Supreme Court decision in *Ohio v. Clark.* The *Clark* Court held that: 1) Statements by children are extremely unlikely to be primarily motivated for use in a criminal prosecution; and 2) public officials do not become an agent of law enforcement by asking about suspected child abuse.**

**Following *Clark,* the court finds that a report of sex abuse to a nurse by a 4 ½ year old child is not testimonial: *United States v. Barker,*** 820 F.3d 167 (5th Cir. 2016): The court held that a statement by a 4 ½ year-old girl, accusing the defendant of sexual abuse, was not testimonial in light of *Ohio v. Clark.* The girl made the statement to a nurse who was registered by the state to take such statements. The court held that like in *Clark* the statement was not testimonial because: 1) it was made by a child too young to understand the criminal justice system; 2) it was not made to law enforcement; 3) the nurse's primary motive was to treat the child; and 4) the fact that the nurse was required to report the abuse to law enforcement did not change her motivation to treat the child.

**Statements admitted under Rule 803(4) are presumptively non-testimonial: *United States v. Peneaux,*** 432 F.3d 882 (8th Cir. 2005): "Where statements are made to a physician seeking to give medical aid in the form of a diagnosis or treatment, they are presumptively nontestimonial."

## Miscellaneous

**Labels on electronic devices, indicating that they were made in Taiwan, are not testimonial: *United States v. Napier*,** 787 F.3d 333 (6th Cir. 2015): In a child pornography prosecution, the government proved the interstate commerce element by offering two cellphones used to commit the crimes. The cellphones were each labeled "Made in Taiwan." The defendant argued that the statements on the labels were hearsay and testimonial. But the court found that the labels clearly were not made with the primary motive of use in a criminal prosecution.

> **Note: The court in *Napier* reviewed the confrontation argument for plain error, because the defendant objected at trial only on hearsay grounds; a hearsay objection does not preserve a claim of error on confrontation grounds.**

**Statement of an accomplice made to his attorney is not testimonial: *Jensen v. Pliler,*** 439 F.3d 1086 (9th Cir. 2006): Taylor was in custody for the murder of Kevin James. He confessed the murder to his attorney, and implicated others, including Jensen. After Taylor was released from jail, Jensen and others murdered him because they thought he talked to the authorities. Jensen was tried for the murder of both James and Taylor, and the trial court admitted the statements made by Taylor to his attorney (Taylor's next of kin having waived the privilege). The court found that the statements made by Taylor to his attorney were not testimonial, as they "were not made to a government officer with an eye toward trial, the primary abuse at which the Confrontation Clause was directed." Finally, while Taylor's statements amounted to a confession, they were not given to a police officer in the course of interrogation.

## Non-Testimonial Hearsay and the Right to Confrontation

**Clear statement and holding that *Crawford* overruled *Roberts* even with respect to non-testimonial hearsay: *Whorton v. Bockting*,** 549 U.S. 406 (2007): The habeas petitioner argued that testimonial hearsay was admitted against him in violation of *Crawford.* His trial was conducted ten years before *Crawford*, however, and so the question was whether *Crawford* applies retroactively to benefit habeas petitioners. Under Supreme Court jurisprudence, a new rule is applicable on habeas only if it is a "watershed" rule that is critical to the truthseeking function of a trial. The Court found that *Crawford* was a new rule because it overruled *Roberts.* It further held that *Crawford* was not essential to the truthseeking function; its analysis on this point is pertinent to whether *Roberts* retains any vitality with respect to non-testimonial hearsay. The Court declared as follows:

> *Crawford* overruled *Roberts* because *Roberts* was inconsistent with the original understanding of the meaning of the Confrontation Clause, not because the Court reached the conclusion that the overall effect of the *Crawford* rule would be to improve the accuracy of fact finding in criminal trials. Indeed, in *Crawford* we recognized that even under the *Roberts* rule, this Court had never specifically approved the introduction of testimonial hearsay statements. Accordingly, it is not surprising that the overall effect of *Crawford* with regard to the accuracy of fact-finding in criminal cases is not easy to assess.
>
> With respect to *testimonial* out-of-court statements, *Crawford* is more restrictive than was *Roberts*, and this may improve the accuracy of fact-finding in some criminal cases. Specifically, under *Roberts*, there may have been cases in which courts erroneously determined that testimonial statements were reliable. But see 418 F.3d at 1058 (O'Scannlain, J., dissenting from denial of rehearing en banc) (observing that it is unlikely that this occurred "in anything but the exceptional case"). *But whatever improvement in reliability Crawford produced in this respect must be considered together with Crawford's elimination of Confrontation Clause protection against the admission of unreliable out-of-court nontestimonial statements. Under Roberts, an out-of-court nontestimonial statement not subject to prior cross-examination could not be admitted without a judicial determination regarding reliability. Under Crawford, on the other hand, the Confrontation Clause has no application to such statements and therefore permits their admission even if they lack indicia of reliability.* (Emphasis added).

One of the main reasons that *Crawford* is not retroactive (the holding in *Bochting*) is that it is not essential to the accuracy of a verdict. And one of the reasons *Crawford* is not essential to accuracy is that, with respect to non-testimonial statements, *Crawford conflicts* with accurate factfinding because it lifts all constitutional reliability requirements imposed by *Roberts.* Thus, if hearsay is non-testimonial, there is no constitutional limit on its admission.

## Non-Verbal Information

***See also the cases under the heading "Machine-Generated Evidence" supra.***

**Videotape of drug transaction was not hearsay and so its introduction did not violate the right to confrontation:** ***United States v. Wallace,*** 753 F.3d 671 (7th Cir. 2014): In a drug prosecution, the government introduced a videotape, without sound, which appeared to show the defendant selling drugs to an undercover informant. The defendant argued that the tape was inadmissible hearsay and violated his right to confrontation, because the undercover informant was never called to testify. But the court disagreed and affirmed his conviction. The court reasoned that the video was

> a picture; it was not a witness who could be cross-examined. The agent narrated the video at trial, and his narration was a series of statements, so he was subject to being cross-examined and was, and thus was "confronted." [The informant] could have testified to what he saw, but what could he have said about the recording device except that the agents had strapped it on him and sent him into the house, whether the device recorded whatever happened to be in front of it? Rule 801(a) of the Federal Rules of Evidence does define "statement" to include "nonverbal conduct," but only if the person whose conduct it was "intended it as an assertion." We can't fit the videotape in this definition.

**Photographs of seized evidence was not testimony so its admission did not violate the Confrontation Clause:** ***United States v. Brooks,*** 772 F.3d 1161 (9th Cir. 2014): In a narcotics trial, the defendant objected to the admission of photographs of a seized package on the ground it would violate his right to confrontation. But the court disagreed. It noted that the *Crawford* Court defined "testimony" as "a solemn declaration or affirmation made for the purpose of establishing or proving some fact." The photographs did not meet that definition because they "were not 'witnesses' against Brooks. They did not 'bear testimony' by declaring or affirming anything with a 'purpose.'"

## Not Offered for Truth

**Statements made to defendant in a conversation were testimonial but were not barred by *Crawford,* as they were admitted to provide context for the defendant's own statements: *United States v. Bostick,*** 791 F.3d 127 (D.C.Cir. 2015): In a surreptitiously taped conversation, the defendant made incriminating statements to a confidential informant in the course of a drug transaction. The defendant argued that admitting the informant's part of the conversation violated his right to confrontation because the informant was motivated to develop the conversation for purposes of prosecution. But the court found that the Confrontation Clause was inapplicable because the informant's statements were not offered for their truth, but rather to provide "context" for the defendant's own statements regarding the drug transaction. (And the defendant had no right to confront his own statements). Statements that are not hearsay cannot violate the Confrontation Clause even if they fit the definition of testimoniality.

**Statements made to defendant in a conversation were testimonial but were not barred by *Crawford,* as they were admitted to provide context for the defendant's own statements: *United States v. Hansen,*** 434 F.3d 92 (1st Cir. 2006): After a crime and as part of cooperation with the authorities, the father of an accomplice surreptitiously recorded his conversation with the defendant, in which the defendant admitted criminal activity. The court found that the father's statements during the conversation were testimonial under *Crawford* --- as they were made specifically for use in a criminal prosecution. But their admission did not violate the defendant's right to confrontation. The defendant's own side of the conversation was admissible as a statement of a party-opponent, and the father's side of the conversation was admitted not for its truth but to provide context for the defendant's statements. *Crawford* does not bar the admission of statements not offered for their truth. ***Accord United States v. Walter,*** 434 F.3d 30 (1st Cir. 2006) (*Crawford* "does not call into question this court's precedents holding that statements introduced solely to place a defendant's admissions into context are not hearsay and, as such, do not run afoul of the Confrontation Clause."); ***United States v. Santiago,*** 566 F.3d 65 (1st Cir. 2009) (statements were not offered for their truth "but as exchanges with Santiago essential to understand the context of Santiago's own recorded statements arranging to 'cook' and supply the crack"); ***United States v. Liriano,*** 761 F.3d 131 (1st Cir. 2014) (even though statements were testimonial, admission did not violation the Confrontation Clause where they were properly offered to place the defendant's responses in context). ***See also Furr v. Brady,*** 440 F.3d 34 (1st Cir. 2006) (the defendant was charged with firearms offenses and intimidation of a government witness; an accomplice's confession to law enforcement did not implicate *Crawford* because it was not admitted for its truth;

rather, it was admitted to show that the defendant knew about the confession and, in contacting the accomplice thereafter, intended to intimidate him).

**Note: Five members of the Court in *Williams* disagreed with Justice Alito's analysis that the Confrontation Clause was not violated because the testimonial lab report was not admitted for its truth. The question left from *Williams* is whether there are any potential not-for-truth uses of testimonial statements that will escape constitutional proscription. The answer is apparently that *Williams* does not extend to situations in which the statement has a *legitimate* not-for-truth purpose. Thus, Justice Thomas distinguishes the expert's use of the lab report from the prosecution's admission of an accomplice's confession in *Tennessee v. Street,* where the confession "was not introduced for its truth, but only to impeach the defendant's version of events." In *Street* the defendant challenged his confession on the ground that he had been coerced to copy Peele's confession. Peele's confession was introduced not for its truth but only to show that it differed from Street's. For that purpose, it didn't matter whether it was true. Justice Thomas stated that "[u]nlike the confession in *Street,* statements introduced to explain the basis of an expert's opinion are not introduced for a plausible nonhearsay purpose" because "to use the inadmissible information in evaluating the expert's testimony, the jury must make a preliminary judgment about whether this information is true." Justice Kagan in her opinion essentially repeats Justice Thomas's analysis and agrees with his distinction between legitimate and illegitimate use of the "not-for-truth" argument. Both Justices Kagan and Thomas agree with the Court's statement in *Crawford* that the Confrontation Clause "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." Both would simply add the proviso that the not-for-truth use must be *legitimate* or *plausible.***

**It follows that the cases under this "not-for-truth" headnote are probably unaffected by *Williams,* as they largely permit admission of testimonial statements as offered "not-for-truth" only when that purpose is legitimate, i.e., *only when the statement is offered for a purpose as to which it is relevant regardless of whether it is true or not.***

**Statements by informant to police officers, offered implausibly to prove the "background" of the police investigation, probably violate *Crawford,* but admission is not plain error: *United States v. Maher,*** 454 F.3d 13 (1st Cir. 2006): At the defendant's drug trial, several accusatory statements from an informant (Johnson) were admitted ostensibly to explain why the police focused on the defendant as a possible drug dealer. The court found that these statements were testimonial under *Crawford*, because "the statements were made while the police were interrogating Johnson after Johnson's arrest for drugs; Johnson agreed to cooperate and he then identified Maher as the source of drugs. . . . In this context, it is clear that an objectively reasonable person in Johnson's shoes would understand that the statement would be used in prosecuting Maher at trial." The court then addressed the government's argument that the informant's statements were not admitted for their truth, but to explain the background of the police investigation:

> The government's articulated justification --- that any statement by an informant to police which sets context for the police investigation is not offered for the truth of the statements and thus not within *Crawford* --- is impossibly overbroad [and] may be used not just to get around hearsay law, but to circumvent *Crawford's* constitutional rule. . . . Here, Officer MacVane testified that the confidential informant had said Maher was a drug dealer, even though the prosecution easily could have structured its narrative to avoid such testimony. The . . . officer, for example, could merely say that he had acted upon "information received," or words to that effect. It appears the testimony was primarily given exactly for the truth of the assertion that Maher was a drug dealer and should not have been admitted given the adequate alternative approach.

The court noted, however, that the defendant had not objected to the admission of the informant's statements. It found no plain error, noting among other things, the strength of the evidence and the fact that the testimony "was followed immediately by a sua sponte instruction to the effect that any statements of the confidential informant should not be taken as standing for the truth of the matter asserted, i.e., that Maher was a drug dealer who supplied Johnson with drugs."

**Accomplice statements purportedly offered for "background" were actually admitted for their truth, resulting in a Confrontation Clause violation: *United States v. Cabrera-Rivera,*** 583 F.3d 26 (1st Cir. 2009): In a robbery prosecution, the government offered hearsay statements that accomplices made to police officers. The government argued that the statements were not offered for their truth, but rather to explain how the government was able to find other evidence in the case. But the court found that the accusations were not properly admitted for the purpose of explaining the police investigation. The government at trial emphasized the details of the

accusations that had nothing to do with leading the government to other evidence; and the government did not contend that one of the accomplice's confessions led to any other evidence. Because the statements were testimonial, and because they were in fact offered for their truth, admission of the statements violated *Crawford.*

> **Note: The result in *Cabrera-Rivera* is certainly unchanged by *Williams.* The prosecution's was not offering the accusations for any *legitimate* not-for-truth purpose.**

**Statements offered to provide context for the defendant's part of a conversation were not hearsay and therefore could not violate the Confrontation Clause: *United States v. Hicks,*** 575 F.3d 130 (1st Cir. 2009): The court found no error in admitting a telephone call that the defendant placed from jail in which he instructed his girlfriend how to package and sell cocaine. The defendant argued that admission of the girlfriend's statements in the telephone call violated *Crawford.* But the court found that the girlfriend's part of the conversation was not hearsay and therefore did not violate the defendant's right to confrontation. The court reasoned that the girlfriend's statements were admissible not for their truth but to provide the context for understanding the defendant's incriminating statements. The court noted that the girlfriend's statements were "little more than brief responses to Hicks's much more detailed statements." ***See also United States v. Occhiuto,*** 784 F.3d 862 (1st Cir. 2015) (statements by undercover informant made to defendant during a drug deal were properly admitted; they were offered not for their truth but to provide context for the defendant's own statements, and so they did not violate the Confrontation Clause).

**Accomplice's confession, when offered in rebuttal to explain why police did not investigate other suspects and leads, is not hearsay and therefore its admission does not violate *Crawford: United States v. Cruz-Diaz,*** 550 F.3d 169 (1st Cir. 2008): In a bank robbery prosecution, defense counsel cross-examined a police officer about the decision not to pursue certain investigatory opportunities after apprehending the defendants. Defense counsel identified "eleven missed opportunities" for tying the defendants to the getaway car, including potential fingerprint and DNA evidence. In response, the officer testified that the defendant's co-defendant had given a detailed confession. The defendant argued that introducing the cohort's confession violated his right to confrontation, because it was testimonial under *Crawford.* But the court found the confession to be not hearsay --- as it was offered for the not-for-truth purpose of explaining why the police conducted the investigation the way they did. Accordingly admission of the statement did not violate *Crawford.*

The defendant argued that the government's true motive was to introduce the confession for its truth, and that the not-for-truth purpose was only a pretext. But the court disagreed, noting that the government never tried to admit the confession until defense counsel attacked the thoroughness of the police investigation. Thus, introducing the confession for a not-for-truth purpose was proper rebuttal. The defendant suggested that "if the government merely wanted to explain why the FBI and police failed to conduct a more thorough investigation it could have had the agent testify in a manner that entirely avoided referencing Cruz's confession" --- for example, by stating that the police chose to truncate the investigation "because of information the agent had." But the court held that this kind of sanitizing of the evidence was not required, because it "would have come at an unjustified cost to the government." Such generalized testimony, without any context, "would not have sufficiently rebutted Ayala's line of questioning" because it would have looked like one more cover-up. The court concluded that "[w]hile there can be circumstances under which Clause concerns prevent the admission of the substance of a declarant's out-of-court statement where a less prejudicial narrative would suffice in its place, this is not such a case." ***See also United States v. Diaz,*** 670 F.3d 332 (1st Cir. 2012) (testimonial statement from one police officer to another to effect an arrest did not violate the right to confrontation because it was not hearsay: "The government offered Perez's out-of-court statement to explain why Veguilla had arrested [the defendant], not as proof of the drug sale that Perez allegedly witnesses. Out-of-court statements providing directions from one individual to another do not constitute hearsay.").

**False alibi statements made to police officers by accomplices are testimonial, but admission does not violate the Confrontation Clause because they are not offered for their truth:** ***United States v. Logan,*** 419 F.3d 172 (2nd Cir. 2005): The defendant was convicted of conspiracy to commit arson. The trial court admitted statements made by his coconspirators to the police. These statements asserted an alibi, and the government presented other evidence indicating that the alibi was false. The court found no Confrontation Clause violation in admitting the alibi statements. The court relied on *Crawford* for the proposition that the Confrontation Clause "does not bar the use of testimonial statements for purposes other than proving the truth of the matter asserted." The statements were not offered to prove that the alibi was true, but rather to corroborate the defendant's own account that the accomplices planned to use the alibi. Thus "the fact that Logan was aware of this alibi, and that [the accomplices] actually used it, was evidence of conspiracy among [the accomplices] and Logan."

> **Note: The *Logan* court reviewed the defendant's Confrontation Clause argument under the plain error standard. This was because defense counsel at trial objected on grounds of hearsay, but did not make a specific Confrontation Clause objection.**

**Statements made to defendant in a conversation were testimonial but were not barred by *Crawford,* as they were admitted to provide context for the defendant's statements: *United States v. Paulino,*** 445 F.3d 211 (2nd Cir. 2006): The court stated: "It has long been the rule that so long as statements are not presented for the truth of the matter asserted, but only to establish a context, the defendant's Sixth Amendment rights are not transgressed. Nothing in *Crawford v. Washington* is to the contrary."

> **Note: This typical use of "context" is not in question after *Williams*, because the focus is on the defendant's statements and not on the truth of the declarant's statements. Use of context could be *illegitimate* however if the focus is in fact on the truth of the declarant's statements. See, e.g., *United States v. Powers* from the Sixth Circuit, infra.**

**Co-conspirator statements made to government officials to cover-up a crime (whether true or false) do not implicate *Crawford* because they were not offered for their truth: *United States v. Stewart*,** 433 F.3d 273 (2nd Cir. 2006)**:** In the prosecution of Martha Stewart, the government introduced statements made by each of the defendants during interviews with government investigators. Each defendant's statement was offered against the other, to prove that the story told to the investigators was a cover-up. The court held that the admission of these statements did not violate *Crawford,* even though they were "provided in a testimonial setting." It noted first that to the extent the statements were false, they did not violate *Crawford* because "*Crawford* expressly confirmed that the categorical exclusion of out-of-court statements that were not subject to contemporaneous cross-examination does not extend to evidence offered for purposes other than to establish the truth of the matter asserted." The defendants argued, however, that some of the statements made during the course of the obstruction were actually true, and as they were made to government investigators, they were testimonial. The court observed that there is some tension in *Crawford* between its treatment of co-conspirator statements (by definition not testimonial) and statements made to government investigators (by their nature testimonial), where truthful statements are made as part of a conspiracy to obstruct justice. It found, however, that admitting the truthful statements did not violate *Crawford* because they were admitted not for their truth, but rather to provide context for the false statements. The court explained as follows:

> It defies logic, human experience and even imagination to believe that a conspirator bent on impeding an investigation by providing false information to investigators would lace the totality of that presentation with falsehoods on every subject of inquiry. To do so would be to alert the investigators immediately that the conspirator is not to be believed, and the effort to obstruct would fail from the outset. * * * The truthful portions of statements in furtherance of the conspiracy, albeit spoken in a testimonial setting, are intended to make

the false portions believable and the obstruction effective. Thus, the truthful portions are offered, not for the narrow purpose of proving merely the truth of those portions, but for the far more significant purpose of showing each conspirator's attempt to lend credence to the entire testimonial presentation and thereby obstruct justice.

**Note: Offering a testimonial statement to prove it is false is a typical and presumably legitimate not-for-character purpose and so would appear to be unaffected by *Williams.* That is, to the extent some members of the Court apply a distinction between legitimate and illegitimate not-for-truth usage, offering the statement to prove it is false is certainly on the legitimate side of the line. It is one of the clearest cases of a statement not being offered to prove that the assertions therein are true. Of course, the government must provide independent evidence that the statement is in fact false.**

**Admission of statement to police officers offered for "context" violated the right to confrontation, given the limited probative value for context: *Orlando v. Nassau County Dist. Attorney's Office,*** 915 F.3d 113 (2nd Cir. 2019): In a habeas proceeding challenging a murder conviction, the court found that Orlando's right to confrontation was clearly violated. Orlando and his accomplice, Jeannot, were arrested and questioned separately. Jeannot confessed, and the confession was offered at Orlando's trial purportedly not for its truth, but only to explain why Orlando changed his confession after hearing what Jeannot had said. The court rejected this "context" argument and found that the statement was offered for its truth. It found that at trial, the government explicitly argued that what Jeannot had told the police was true. Moreover, Jeannot's statement "went far beyond any limited value in showing why Orlando changed his account of what happened that night." The court noted that "Orlando's changing his account of the homicide was no different than many investigations when suspects make a series of statements; absent the substance of Jeannot's statement, the jury still could have learned that after several hours of interrogation, Orlando revised his story and placed himself at the scene of the murder and admitted to lying about his original account. That approach would have significantly advanced the prosecution's case without a critical narrative gap."

**Note: The court reviews the case under *Bruton.* But *Bruton* was not applicable here because the defendant and the accomplice were not tried together. Rather, this is simply a *Crawford* case, where testimonial hearsay was offered against a criminal defendant. There is no reason to complicate things by adding *Bruton* to it.**

**Accomplice statements to a police officer were testimonial, but did not violate the Confrontation Clause because they were admitted to show they were false: *United States v. Trala,*** 386 F.3d 536 (3rd Cir. 2004): An accomplice made statements to a police officer that misrepresented her identity and the source of the money in the defendant's car. While these were accomplice statements to law enforcement, and thus testimonial, their admission did not violate *Crawford*, as they were not admitted for their truth. In fact the statements were admitted because they were false. Under these circumstances, cross-examination of the accomplice would serve no purpose. ***See also United States v. Lore,*** 430 F.3d 190 (3rd Cir. 2005) (relying on *Trala,* the court held that grand jury testimony was testimonial, but that its admission did not violate the Confrontation Clause because the self-exculpatory statements denying all wrongdoing "were admitted because they were so obviously false.").

**Confessions of other targets of an investigation were testimonial, but did not violate the Confrontation Clause because they were offered to rebut charges against the integrity of the investigation: *United States v. Christie,*** 624 F.3d 558 (3rd Cir. 2010): In a child pornography investigation, the FBI obtained the cooperation of the administrator of a website, which led to the arrests of a number of users, including the defendant. At trial the defendant argued that the investigation was tainted because the FBI, in its dealings with the administrator, violated its own guidelines in treating informants. Specifically the defendant argued that these misguided law enforcement efforts led to unreliable statements from the administrator. In rebuttal, the government offered and the court admitted evidence that twenty-four other users identified by the administrator confessed to child pornography-related offenses. The defendant argued that admitting the evidence of the others' confessions violated the hearsay rule and the Confrontation Clause, but the court rejected these arguments and affirmed. It reasoned that the confessions were not offered for their truth, but to show why the FBI could believe that the administrator was a reliable source, and therefore to rebut the charge of improper motive on the FBI's part. As to the confrontation argument, the court declared that "our conclusion that the testimony was properly introduced for a non-hearsay purpose is fatal to Christie's *Crawford* argument, since the Confrontation Clause does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted."

**Accomplice's testimonial statement was properly admitted for impeachment purposes, but failure to give a limiting instruction was error: *Adamson v. Cathel,*** 633 F.3d 248 (3rd Cir. 2011): The defendant challenged his confession at trial by arguing that the police fed him the details of his confession from other confessions by his alleged accomplices, Aljamaar and Napier. On cross-examination, the prosecutor introduced those confessions to show that they

differed from the defendant's confession on a number of details. The court found no error in the admission of the accomplices' confessions. While testimonial, they were offered for impeachment and not for their truth and so did not violate the Confrontation Clause. However, the trial court gave no limiting instruction, and the court found that failure to be error. The court concluded as follows:

> Without a limiting instruction to guide it, the jury that found Adamson guilty was free to consider those facially incriminating statements as evidence of Adamson's guilt. The careful and crucial distinction the Supreme Court made between an impeachment use of the evidence and a substantive use of it on the question of guilt was completely ignored during the trial.
>
> **Note: The use of the cohort's confessions to show differences from the defendant's confession is precisely the situation reviewed by the Court in *Tennessee v. Street.* As noted above, while some Justices in *Williams* rejected the "not-for-truth" analysis as applied to expert reliance on testimonial statements, all of the Justices approved of that analysis as applied to the facts of *Street.***

**Statements made in a civil deposition might be testimonial, but admission does not violate the Confrontation Clause if they are offered to prove they are false: *United States v. Holmes,*** 406 F.3d 337 (5th Cir. 2005): The defendant was convicted of mail fraud and conspiracy, stemming from a scheme with a court clerk to file a backdated document in a civil action. The defendant argued that admitting the deposition testimony of the court clerk, given in the underlying civil action, violated his right to confrontation after *Crawford*. The clerk testified that the clerk's office was prone to error and thus someone in that office could have mistakenly backdated the document at issue. The court considered the possibility that the clerk's testimony was a statement in furtherance of a conspiracy, and noted that coconspirator statements ordinarily are not testimonial under *Crawford*. It also noted, however, that the clerk's statement "is not the run-of-the-mill co-conspirator's statement made unwittingly to a government informant or made casually to a partner in crime; rather, we have a co-conspirator's statement that is derived from a formalized testimonial source --- recorded and sworn civil deposition testimony." Ultimately the court found it unnecessary to determine whether the deposition testimony was "testimonial" within the meaning of *Crawford* because it was not offered for its truth. Rather, the government offered the testimony "to establish its *falsity* through independent evidence." ***See also United States v. Gurrola,*** 898 F.3d 524 (5th Cir. 2018) ("The Confrontation Clause does not bear on non-testimonial statements. And it is well-settled in this circuit that co-conspirator statements are not

testimonial."); ***United States v. Acosta,*** 475 F.3d 677 (5th Cir. 2007) (accomplice's statement offered to impeach him as a witness --- by showing it was inconsistent with the accomplice's refusal to answer certain questions concerning the defendant's involvement with the crime --- did not violate *Crawford* because the statement was not admitted for its truth and the jury received a limiting instruction to that effect); ***United States v. Smith,*** 822 F.3d 755 (5th Cir. 2016)(testimonial statement from an accomplice did not violate the Confrontation Clause because it was "introduced in the context of how Agent Michalik developed suspects . . . for the charged bank robberies. This court has consistently held that out-of-court statements providing background information to explain the actions of investigators are not hearsay" and so do not violate the Confrontation Clause); ***United States v. Sosa,*** 897 F.3d 615 (5th Cir. 2018) (admitting a tip to police about a cohort of the defendant, offered to explain why the officer investigated the cohort, did not violate the right to confrontation; courts must be "vigilant" in assuring that attempts to explain an officer's actions "do not allow the backdoor introduction of highly inculpatory statements that the jury may also consider for their truth"; but the greatest risks of backdoor use occur when the statement implicates the defendant directly; this one did not, and the jury already knew about the cohort, so "at a minimum it was not obvious that this statement was offered for its truth").

**Informant's accusation, purportedly offered to explain the police investigation, was hearsay and violated the Confrontation Clause:** ***United States v. Kizzee,*** 877 F.3d 650 (5th Cir. 2017): In a drug and firearm prosecution, an officer testified (implicitly) that he received information from an arrestee that the arrestee had purchased drugs from the defendant, and he used that information (as well as other observations of the residence) to obtain a warrant. The government argued that the testimony did not violate the hearsay rule (and so could not violate the Confrontation Clause) because it was offered at trial only to explain the background of the police investigation. But the court disagreed and reversed the conviction. The court stated that the information from the arrestee "was not necessary to explain Detective Schulz's actions" because "there was minimal need for Detective Schulz to explain the details forming the basis of the search warrant" and his own observations "would have been sufficient to explain his investigatory actions and provide background information." ***See also United States v. Jones,*** 924 F.3d 219 (5th Cir. 2019) (rejecting the government's argument that an informant's accusation was properly admitted to explain why a police officer followed the defendant as opposed to another person: "A witness's statement to police that the defendant is guilty of the crime charged is highly likely to influence the direction of a criminal investigation. But a police officer cannot repeat such out-of-court accusations at trial, even if helpful to explain why the defendant became a suspect.").

**Informant's accusation, offered to explain why police acted as they did, was testimonial but it was not hearsay, and so its admission did not violate the Confrontation Clause:** ***United States v. Deitz,*** 577 F.3d 672 (6th Cir. 2009): The court found no error in allowing an FBI agent to testify about why agents tailed the defendant to what turned out to be a drug transaction. The agent testified that a confidential informant had reported to them about Deitz's drug activity. The court found that the informant's statement was testimonial --- because it was an accusation made to a police officer --- but it was not hearsay and therefore its admission did not violate Deitz's right to confrontation. The court found that admitting the testimony "explaining why authorities were following Deitz to and from Dayton was not plain error as it provided mere background information, not facts going to the very heart of the prosecutor's case." The court also observed that "had defense counsel objected to the testimony at trial, the court could have easily restricted its scope." ***See also United States v. Al-Maliki,*** 787 F.3d 784 (6th Cir. 2015) (in a prosecution for child sex abuse, the trial court admitted the defendant's wife's statement to police accusing the defendant of sexual abuse; the court found no error because it was offered for the limited purpose of explaining why an official investigation began: "Two conclusions follow: It is not hearsay, * * * and the government did not violate the Confrontation Clause"); ***United States v. Doxey,*** 833 F.3d 692 (6th Cir. 2016) (informant's tip leading to search of the defendant's vehicle was not hearsay as it was offered "merely by way of background"); ***United States v. Davis***, 577 F.3d 660 (6th Cir. 2009): A woman's statement to police that she had recently seen the defendant with a gun in a car that she described along with the license plate was not hearsay ---and so even though testimonial did not violate the defendant's right to confrontation --- because it was offered only to explain the police investigation that led to the defendant and the defendant's conduct when he learned the police were looking for him. ***Accord United States v. Napier,*** 787 F.3d 333 (6th Cir. 2015): In a child pornography prosecution, the government offered a document from Time Warner cable, obtained pursuant to a government subpoena, showing that an email address was accessed at the defendant's home and that the defendant was the subscriber to the account. The court found no confrontation violation because the document was offered not for its truth, but rather "to demonstrate how the Cincinnati office of the FBI located Napier." The court noted that the trial court gave the jury a limiting instruction that the document could be considered only to prove the course of the investigation.

**Undercover statements offered to show representations about money-laundering, in a sting operation, were not offered for truth and so admitting them did not violate the Confrontation Clause:** ***United States v. King,*** 865 F.3d 848 (6th Cir. 2017) (Sutton, J.): The defendant was the target of a sting operation. The undercover informant represented in several conversations with the defendant that he had drug money to launder, and the defendant responded with the details of how he would launder the money. The defendant argued that the undercover

informant's part of the conversation was testimonial because it was primarily motivated for use in a criminal prosecution. But the court noted that the threshold requirement for violating the Confrontation Clause is that the out-of-court statement is admitted for its truth. That was not the case here. The statements were not offered to prove, for example, that the informant had drug money and wanted to clean it. Rather, the prosecution used the statements to prove that the informant made representations about having drug money, and the defendant believed him.

**Statement offered to prove the defendant's knowledge of a crime was non-hearsay and so did not violate the accused's confrontation rights: *United States v. Boyd,*** 640 F.3d 657 (6th Cir. 2011): A defendant charged with being an accessory after the fact to a carjacking and murder had told police officers that his friend Davidson had told him that he had committed those crimes. At trial the government offered that confession, which included the underlying statements of Boyd. The defendant argued that admitting Davidson's statements violated his right to confrontation. But the court found no error because the hearsay was not offered for its truth: "Davidson's statements to Boyd were offered to prove Boyd's knowledge [of the crimes that Davidson had committed] rather than for the truth of the matter asserted."

**Admission of complaints offered for non-hearsay purpose did not violate the Confrontation Clause: *United States v. Adams,*** 722 F.3d 788 (6th Cir. 2013): The defendants were convicted for participation in a vote-buying scheme in three elections. They complained that their confrontation rights were violated when the court admitted complaints that were contained within state election reports. The court of appeals rejected that argument, because the complaints were offered for proper non-hearsay purposes. Some of the information was offered to prove it was false, and other information was offered to show that the defendants adjusted their scheme based on the complaints received. The court did find, however, that the complaints were erroneously admitted under Rule 403, because of the substantial risk that the jury would use the assertions for their truth; that the probative value for the non-hearsay purpose was "minimal at best"; and the government had other less prejudicial evidence available to prove the point. Technically, this should mean that there was a violation of the Confrontation Clause, because the evidence was not *properly* offered for a not-for-truth purpose. But the court did not make that holding. It reversed on evidentiary grounds.

**Informant's statements were not properly offered for "context," so their admission violated *Crawford*: *United States v. Powers,*** 500 F.3d 500 (6th Cir. 2007): In a drug prosecution, a law enforcement officer testified that he had received information about the defendant's prior

criminal activity from a confidential informant. The government argued on appeal that even though the informant's statements were testimonial, they did not violate the Confrontation Clause, because they were offered "to show why the police conducted a sting operation" against the defendant. But the court disagreed and found a *Crawford* violation. It reasoned that "details about Defendant's alleged prior criminal behavior were not necessary to set the context of the sting operation for the jury. The prosecution could have established context simply by stating that the police set up a sting operation." ***See also United States v. Hearn***, 500 F.3d 479 (6th Cir.2007) (confidential informant's accusation was not properly admitted for background where the witness testified with unnecessary detail and "[t]he excessive detail occurred twice, was apparently anticipated, and was explicitly relied upon by the prosecutor in closing arguments").

**Admitting informant's statement to police officer for purposes of "background" did not violate the Confrontation Clause: *United States v. Gibbs,*** 506 F.3d 479 (6th Cir. 2007): In a trial for felon-firearm possession, the trial court admitted a statement from an informant to a police officer; the informant accused the defendant of having firearms hidden in his bedroom. Those firearms were not part of the possession charge. While this accusation was testimonial, its admission did not violate the Confrontation Clause, "because the testimony did not bear on Gibbs's alleged possession of the .380 Llama pistol with which he was charged." Rather, it was admitted "solely as background evidence to show why Gibbs's bedroom was searched." ***See also United States v. Macias-Farias,*** 706 F.3d 775 (6th Cir. 2013) (officer's testimony that he had received information from someone was offered not for its truth but to explain the officer's conduct, thus no confrontation violation).

**Statement offered to prove it was false was not hearsay and so could not violate the defendant's right to confrontation: *United States v. Porter,*** 886 F.3d 562 (6th Cir. 2018): In a prosecution against a mayor for theft from federal programs and bribery, the government offered statements by an accomplice to investigators. The trial court found that the statements were properly admitted to prove they were false, and that the government established the falsity of statements with independent evidence. The court of appeals held that "because the government's position was that Chet Crace's prior statements to investigators during the April 10, 2015 interview were false, Atkins's statements were not hearsay and did not implicate Porter's confrontation rights."

**Admission of the defendant's conversation with an undercover informant does not violate the Confrontation Clause, where the undercover informant's part of the conversation is offered only for "context":** ***United States v. Nettles,*** 476 F.3d 508 (7th Cir. 2007): The defendant made plans to blow up a government building, and the government had an undercover informant contact him and ostensibly offer to help him obtain materials. At trial, the court admitted a recorded conversation between the defendant and the informant. Because the informant was not produced for trial, the defendant argued that his right to confrontation was violated. But the court found no error, because the admission of the defendant's part of the conversation was not barred by the Confrontation Clause, and the informant's part of the conversation was admitted only to place the defendant's part in "context." Because the informant's statements were not offered for their truth, they did not implicate the Confrontation Clause.

The *Nettles* court did express some concern about the breadth of the "context" doctrine, stating: "We note that there is a concern that the government may, in future cases, seek to submit based on 'context' statements that are, in fact, being offered for their truth." But the court found no such danger in this case, noting the following: 1) the informant presented himself as not being proficient in English, so most of his side of the conversation involved asking the defendant to better explain himself; and 2) the informant did not "put words in Nettles's mouth or try to persuade Nettles to commit more crimes in addition to those that Nettles had already decided to commit." ***See also United States v. Tolliver,*** 454 F.3d 660 (7th Cir. 2006) (statements of one party to a conversation with a conspirator were offered not for their truth but to provide context to the conspirator's statements: "*Crawford* only covers testimonial statements proffered to establish the truth of the matter asserted. In this case . . . Shye's statements were admissible to put Dunklin's admissions on the tapes into context, making the admissions intelligible for the jury. Statements providing context for other admissible statements are not hearsay because they are not offered for their truth. As a result, the admission of such context evidence does not offend the Confrontation Clause because the declarant is not a witness against the accused."); ***United States v. Bermea-Boone***, 563 F.3d 621 (7th Cir. 2009): A conversation between the defendant and a coconspirator was properly admitted; the defendant's side of the conversation was a statement of a party-opponent, and the accomplice's side was properly admitted to provide context for the defendant's statements: "Where there is no hearsay, the concerns addressed in *Crawford* do not come in to play. That is, the declarant, Garcia, did not function as a witness against the accused."; ***United States v. York,*** 572 F.3d 415 (7th Cir. 2009) (informant's recorded statements in a conversation with the defendant were admitted for context and therefore did not violate the Confrontation Clause: "we see no indication that Mitchell tried to put words in York's mouth"); ***United States v. Hicks,*** 635 F.3d 1063 (7th Cir. 2011): (undercover informant's part of conversations were not hearsay, as they were offered to place the defendant's statements in context; because they were not offered for truth their admission did not violate the defendant's right to confrontation); ***United***

***States v. Gaytan,*** 649 F.3d 573 (7th Cir. 2011) (undercover informant's statements to the defendant in a conversation setting up a drug transaction were clearly testimonial, but not offered for their truth: "Gaytan's responses ['what you need?' and 'where the loot at?'] would have been unintelligible without the context provided by Worthen's statements about his or his brother's interest in 'rock'"; the court noted that there was no indication that the informant was "putting words in Gaytan's mouth"); ***United States v. Jackson,*** 940 F.3d 347 (7th Cir. 2019) (noting that the confidential informant's statements were properly offered from context and that the defendant "had not identified any statement where the [confidential informant] put word's into Jackson's mouth"); ***United States v. Foster,*** 701 F.3d 1142 (7th Cir. 2012) ("Here, the CI's statement regarding the weight [of the drug] was not offered to show what the weight *actually* was * * * but rather to explain the defendant's acts and make his statements intelligible. The defendant's statement to 'give me sixteen fifty' (because the original price was 17) would not have made sense without reference to the CI's comment that the quantity was off. Because the statements were admitted only to prove context, *Crawford* does not require confrontation."); ***United States v. Faruki*****,** 803 F.3d 847 (7th Cir. 2015) (no confrontation violation where out-of-court statements were offered to place the defendant's own statements in context).

For more on "context" see ***United States v. Wright,*** 722 F.3d 1064 (7th Cir. 2013): In a drug prosecution, the defendant's statement to a confidential information that he was "stocked up" would have been unintelligible without providing the context of the informant's statements inquiring about drugs, "and a jury would not have any sense of why the conversation was even happening." The court also noted that "most of the CI's statements were inquiries and not factual assertions." The court expressed concern, however, that the district court's limiting instruction on "context" was boilerplate, and that the jury "could have been told that the CI's half of the conversation was being played only so that it could understand what Wright was responding to, and that the CI's statements standing alone were not to be considered as evidence of Wright's guilt."

In ***United States v. Smith,*** 816 F.3d 479 (7th Cir. 2016), a public corruption case, the court rejected the use of "context" where placing the defendant's statement in "context" only worked if the informant's statement to the defendant were true. In *Smith,* the court gave an example of an informant saying to the defendant "Last week I paid you $7000 for a letter that my client will use to seek a grant. Do you remember?" And the defendant says "Yes." The court noted that the informant's statement puts the defendant's answer in context, but only if the informant was speaking the truth. In that situation, the informant's statement would be hearsay and potentially trigger the right to confrontation --- but that right was not violated in this case because the informant's statements were not offered for truth but rather were verbal acts establishing a corrupt agreement. ***See also United States v. Amaya,*** 828 F.3d 518 (7th Cir. 2016), where an informant's

statement "that was a big ass pistol" was offered to put the defendant's statement "Hell yea" in context. But the court found that context was unworkable because the informant's statement was only relevant to context if it were true --- only if a gun was present would the "Hell yea" mean anything pertinent to the case. Yet the informant's statement was found not testimonial, because it was simply blurted out, and so was not made with the primary motive that it would be used in a criminal prosecution.

> **Note: The concerns expressed in *Nettles* and the other 7th Circuit cases discussed above --- about possible abuse of the "context" usage --- are along the same lines as those expressed by Justices Thomas and Kagan in *Williams,* when they seek to distinguish legitimate and illegitimate not-for-truth purposes. If context is a pretext and the statement is in fact offered for the truth, then the statement is not being offered for a legitimate not-for-truth purpose.**

**Police report offered for a purpose other than proving the truth of its contents is properly admitted even if it is testimonial: *United States v. Price,*** 418 F.3d 771 (7th Cir. 2005): In a drug conspiracy trial, the government offered a report prepared by the Gary Police Department. The report was an "intelligence alert" identifying some of the defendants as members of a street gang dealing drugs. The report was found in the home of one of the conspirators. The government offered the report at trial to prove that the conspirators were engaging in counter-surveillance, and the jury was instructed not to consider the accusations in the report as true, but only for the fact that the report had been intercepted and kept by one of the conspirators. The court found that even if the report was testimonial, there was no error in admitting the report as proof of awareness and counter-surveillance. It relied on *Crawford* for the proposition that the Confrontation Clause does not bar the use of out-of-court statements "for purposes other than proving the truth of the matter asserted." ***See also United States v. Ambrose,*** 668 F.3d 943 (7th Cir. 2012) (conversation between two crime family members about actions of a cooperating witness were not offered for their truth but rather to show that information had been leaked; because the statements were not offered for their truth, there was no violation of the right to confrontation).

**Accusation offered not for truth, but to explain police conduct, was not hearsay and did not violate the defendant's right to confrontation: *United States v. Dodds,*** 569 F.3d 336 (7th Cir. 2009): Appealing a firearms conviction, the defendant argued that his right to confrontation was violated when the trial court admitted a statement from an unidentified witness

to a police officer. The witness told the officer that a black man in a black jacket and black cap was pointing a gun at people two blocks away. The court found no confrontation violation because "the problem that *Crawford* addresses is the admission of hearsay" and the witness's statement was not hearsay. It was not admitted for its truth --- that the witness saw the man he described pointing a gun at people --- but rather "to explain why the police proceeded to the intersection of 35th and Galena and focused their attention on Dodds, who matched the description they had been given." The court noted that the trial judge did not provide a limiting instruction, but also noted that the defendant never asked the court to do so and that the lack of an instruction was not raised on appeal. ***See also United States v. Taylor,*** 569 F.3d 742 (7th Cir. 2009): An accusation from a bystander to a police officer that the defendant had just taken a gun across the street was not hearsay because it was offered to explain the officers' actions in the course of their investigation: "for example, why they looked across the street * * * and why they handcuffed Taylor when he approached." The court noted that absent "complicating circumstances, such as a prosecutor who exploits nonhearsay statements for their truth, nonhearsay testimony does not present a confrontation problem." The court found no "complicating circumstances" in this case.

> **Note: The Court's reference in *Taylor* to the possibility of exploiting a not-for-truth purpose runs along the same lines as those expressed by Justice Thomas and Kagan in *Williams.***

**Testimonial statement was not legitimately offered for context or background and so was a violation of *Crawford: United States v. Adams,*** 628 F.3d 407 (7th Cir. 2010): In a narcotics prosecution, statements made by confidential informants to police officers were offered against the defendant. For example, the government offered testimony from a police officer that he stopped the defendant's car on a tip from a confidential informant that the defendant was involved in the drug trade and was going to buy crack. A search of the car uncovered a large amount of money and a crack pipe. The government offered the informant's statement not for the truth of the assertion but as "foundation for what the officer did." The trial court admitted the statement and gave a limiting instruction. But the court of appeals found error, though harmless, because the informant's statements "were not necessary to provide any foundation for the officer's subsequent actions." It explained as follows:

> The CI's statements here are different from statements we have found admissible that gave context to an otherwise meaningless conversation or investigation. [cites omitted] Here the CI's accusations did not counter a defense strategy that police officers randomly targeted Adams. And, there was no need to introduce the statements for context --- even if the CI's

statements were excluded, the jury would have fully understood that the officer searched Adams and the relevance of the items recovered in that search to the charged crime.

***See also United States v. Walker,*** 673 F.3d 649 (7th Cir. 2012) (confidential informant's statements to the police --- that he got guns from the defendant --- were not properly offered for context but rather were testimonial hearsay: "The government repeatedly hides behind its asserted needs to provide 'context' and relate the 'course of investigation.' These euphemistic descriptions cannot disguise a ploy to pin the two guns on Walker while avoiding the risk of putting Ringswald on the stand. * * * A prosecutor surely knows that hearsay results when he elicits from a government agent that 'the informant said he got this gun from X' as proof that X supplied the gun."); ***Jones v. Basinger,*** 635 F.3d 1030 (7th Cir. 2011) (accusation made to police was not offered for background and therefore its admission violated the defendant's right to confrontation; the record showed that the government encouraged the jury to use the statements for their truth).

**Note: *Adams, Walker* and *Jones* are all examples of illegitimate use of not-for-truth purposes and so finding a Confrontation violation in these cases is quite consistent with the analysis of not-for-truth purposes in the Thomas and Kagan opinions in *Williams.***

**Statements by a confidential informant included in a search warrant were testimonial and could not be offered at trial to explain the police investigation**: ***United States v. Holmes,*** 620 F.3d 836 (8th Cir. 2010): In a drug trial, the defendant tried to distance himself from a house where the drugs were found in a search pursuant to a warrant. On redirect of a government agent --- after defense counsel had questioned the connection of the defendant to the residence --- the trial judge permitted the agent to read from the statement of a confidential informant. That statement indicated that the defendant was heavily involved in drug activity at the house. The government acknowledged that the informant's statements were testimonial, but argued that the statements were not hearsay, as they were offered only to show the officer's knowledge and the propriety of the investigation. But the court found the admission to be error. It noted that informants' statements are admissible to explain an investigation "only when the propriety of the investigation is at issue in the trial." In this case, the defendant did not challenge the validity of the search warrant and did not dispute the propriety of the investigation. The court stated that if the real purpose of admitting the evidence was to explain the officer's knowledge and the nature of the investigation, "a question asking whether someone had told him that he had seen Holmes at the residence would have addressed the issue * * * without the need to go into the damning details

of what the CI told Officer Singh." ***Compare United States v. Brooks,*** 645 F.3d 971 (8th Cir. 2011) ("In this case, the statement at issue [a report by a confidential informant that Brooks was selling narcotics and firearms from a certain premises] was not offered to prove the truth of the matter asserted --- that is, that Brooks was indeed a drug and firearms dealer. It was offered purely to explain why the officers were at the multi-family dwelling in the first place, which distinguishes this case from *Holmes.* In *Holmes,* it was undisputed that officers had a valid warrant. Accordingly less explanation was necessary. Here, the CI's information was necessary to explain why the officers went to the residence without a warrant and why they would be more interested in apprehending the man on the stairs than the man who fled the scene. Because the statement was offered only to show why the officers conducted their investigation in the way they did, the Confrontation Clause is not implicated here."). ***See also United States v. Shores,*** 700 F.3d 366 (8th Cir. 2012) (confidential informant's accusation made to police officer was properly offered to prove the propriety of the investigation: "From the early moments of the trial, it was clear that Shores would be premising his defense on the theory that he was a victim of government targeting."); ***United States v. Wright,*** 739 F.3d 1160 (8th Cir. 2014) (Officer's statement to another officer, "come into the room, I've found something" was not hearsay because it was offered only to explain why the second officer came into the room and to rebut the defense counsel's argument that the officer entered the room in response to a loud noise: "If the underlying statement is testimonial but not hearsay, it can be admitted without violating the defendant's Sixth Amendment rights.").

**Accusatory statements offered to explain why an officer conducted an investigation in a certain way are not hearsay and therefore admission does not violate *Crawford: United States v. Brown,*** 560 F.3d 754 (8th Cir. 2009): Challenging drug conspiracy convictions, one defendant argued that it was error for the trial court to admit an out-of-court statement from a shooting victim to a police officer. The victim accused a person named "Clean" who was accompanied by a man named Charmar. The officer who took this statement testified that he entered "Charmar" into a database to help identify "Clean" and the database search led him to the defendant. The court found no error in admitting the victim's statement, stating that "it is not hearsay when offered to explain why an officer conducted an investigation in a certain way." The defendant argued that the purported nonhearsay purpose for admitting the evidence "was only a subterfuge to get Williams' statement about Brown before the jury." But the court responded that the defendant "did not argue at trial that the prejudicial effect of the evidence outweighed its nonhearsay value." The court also observed that the trial court twice instructed the jury that the statement was admitted for the limited purpose of understanding why the officer searched the

database for Charmar. Finally, the court held that because the statement properly was not offered for its truth, "it does not implicate the confrontation clause."

**Statement offered as foundation for good faith basis for asking question on cross-examination does not implicate *Crawford: United States v. Spears,*** 533 F.3d 715 (8th Cir. 2008): In a bank robbery case, the defendant testified and was cross-examined and asked about her knowledge of prior bank robberies. In order to inquire about these bad acts, the government was required to establish to the court a good-faith basis for believing that the acts occurred. The government's good-faith basis was the confession of the defendant's associate to having taken part in the prior robberies. The defendant argued that the associate's statements, made to police officers, were testimonial. But the court held that *Crawford* was inapplicable because the associate's statements were not admitted for their truth --- indeed they were not admitted at all. The court noted that there was "no authority for the proposition that use of an out-of-court testimonial statement merely as the good faith factual basis for relevant cross-examination of the defendant at trial implicates the Confrontation Clause."

**Admitting testimonial statements that were part of a conversation with the defendant did not violate the Confrontation Clause because they were not offered for their truth: *United States v. Spencer,*** 592 F.3d 866 (8th Cir. 2010): Affirming drug convictions, the court found no error in admitting tape recordings of a conversation between the defendant and a government informant. The defendant's statements were statements by a party-opponent and admitting the defendant's own statements cannot violate the Confrontation Clause. The informant's statements were not hearsay because they were admitted only to put the defendant's statements in context.

**Statement offered to prove it was false is not hearsay and so did not violate the Confrontation Clause: *United States v. Yielding,*** 657 F.3d 688 (8th Cir. 2011): In a fraud prosecution, the trial court admitted the statement of an accomplice to demonstrate that she used a false cover story when talking to the FBI. The court found no error, noting that "the point of the prosecutor's introducing those statements was simply to prove that the statements were made so as to establish a foundation for later showing, through other admissible evidence, that they were false." The court found that the government introduced other evidence to show that the declarant's assertions that a transaction was a loan were false. The court cited *Bryant* for the proposition that because the statements were not hearsay, their admission did not violate the Confrontation Clause.

**Admitting testimonial statements to show a common (false) alibi did not violate the Confrontation Clause:** *United States v. Young,* 753 F.3d 757 (8th Cir. 2014): Young was accused of conspiring with Mock to murder Young's husband and make it look like an accident. The government introduced the statement that Mock made to police after the husband was killed. The statement was remarkably consistent in all details with the alibi that Young had independently provided, and many of the assertions were false. The government offered Mock's statement for the inference that she had Young had collaborated on an alibi. Young argued that introducing Mock's statement to the police violated her right to confrontation, but the court disagreed. It observed that the Confrontation Clause does not bar the admission of out-of-court statements that are not hearsay. In this case, Mock's statement was not offered for its truth but rather "to show that Young and Mock had a common alibi, scheme, or conspiracy. In fact, Mock's statements to Deputy Salsberry are valuable to the government because they are false."

**Statement offered for impeachment was not hearsay and therefore admission did not violate the defendant's right to confrontation:** ***United States v. Cotton,*** 823 F.3d 430 (8th Cir. 2016): "Cotton first argued that admission of Frazier's post-arrest statement violated his rights under the Confrontation Clause. Because the statement was offered for impeachment [as a prior inconsistent statement of a hearsay declarant] and not to prove the truth of the matter asserted, there was no Confrontation Clause violation in this case."

**Informant's part of a conversation with a coconspirator was properly admitted for context and not for truth:** ***United States v. Barragan,*** 871 F.3d 689 (9th Cir. 2017): In a prosecution for racketeering and drug crimes, the trial court admitted a taped conversation between a defendant's coconspirator and an undercover informant. The defendant conceded that the coconspirator's statement was admissible under Rule 802(d)(2)(E), but contended that admitting the informant's part of the conversation violated his right to confrontation. But the court found no error, because the informant's statements were offered only to place the coconspirator's statements in context, and the jury was instructed to that effect. The court stated that the informant's statements "were not admitted for their truth, and the admission of such context evidence does not offend the Confrontation Clause."

**Accusation offered to rebut the defendant's charge of a sloppy investigation were legitimately offered for a non-hearsay purpose and so admission did not violate the right to confrontation:** ***United States v. Johnson,*** 875 F.3d 1265 (9th Cir. 2017): The defendant was

charged with felon-firearm possession. He claimed that the gun belonged to Jakith Martin and argued at trial that the police investigation was sloppy. The government countered with testimony from an officer that the defendant's girlfriend told him that the gun was the defendant's. The girlfriend's statement was definitely testimonial. But the court found no error, because the Confrontation Clause does not apply to a statement that is not hearsay. In this case, the statement was offered not to prove that the defendant possessed the gun, but rather to show that the police investigation was proper (and not sloppy) when it focused on the defendant. The court noted that "Courts must exercise caution to ensure that out-of-court testimonial statements, ostensibly offered to explain the course of a police investigation, are not used as an end-around *Crawford* and hearsay rules, particularly when those statements directly inculpate the defendant." But in this case, the statements were "relevant to rebutting Johnson's theory of the case: that the police were sloppy and had no reason to investigate Johnson's property rather than investigate Jakith Martin's." The court emphasized that the trial court "properly and contemporaneously instructed the jury that the statements were to be considered only for nonhearsay purposes" and that the jury "was again reminded of this admonition in the final jury instructions."

**Admitting statements to police officer for purposes of "background" did not violate the Confrontation Clause: *United States v. Audette,*** 923 F.3d 1227 (9th Cir. 2019): The defendant defrauded people into giving him money by stating that he was on the run from the Mafia and if he didn't get the money, his wife and stepdaughter would be killed. The defendant claimed that he was ordered to make such statements by various CIA and FBI agents. At trial the government offered testimony by an FBI agent who took part in the investigation, to statements made to him by the wife and stepdaughter that contradicted the defendant's account. The court found no violation of the Confrontation Clause. It recognized that the statements were testimonial because made to an investigating officer in the course of an interrogation. But the statements were not offered to prove that the defendant was responsible for the fraud. Rather, "the government offered Agent Hill's testimony to explain why they focused on Audette --- rather than the various CIA and FBI agents who allegedly ordered Audette to borrow money from the victims --- as a suspect."

**Statements not offered for truth do not violate the Confrontation Clause even if testimonial: *United States v. Faulkner,*** 439 F.3d 1221 (10th Cir. 2006): The court stated that "it is clear from *Crawford* that the [Confrontation] Clause has no role unless the challenged out-of-court statement is offered for the truth of the matter asserted in the statement." ***See also United States v. Mitchell,*** 502 F.3d 931 (9th Cir. 2007) (information given by an eyewitness to a police officer was not offered for its truth but rather "as a basis" for the officer's action, and therefore its admission did not violate the Confrontation Clause); ***United States v. Brinson,*** 772 F.3d 1314 (10th Cir. 2014) (In a prosecution for sex trafficking, statements made to an undercover police officer

that set up a meeting for sex were properly admitted as not hearsay and so their admission did not violate the Confrontation Clause: "The prosecution did not present the out-of-court statements to prove the truth of the statements about the location, price, or lack of a condom. Rather, the prosecution offered these statements to explain why Officer Osterdyk went to Room 123, how he knew the price, and why he agreed to pay for oral sex."; the court also found that the statements were not testimonial anyway because the declarant did not know she was talking to a police officer.); ***United States v. Ibarra-Diaz,*** 805 F.3d 908 (10th Cir. 2015) (confidential informant's statements to a police officer about the defendant's interest in doing a drug deal were testimonial, but the right to confrontation was not violated because the statements were offered to "explain why the officer did not put a body wire on the CI for this significant drug transaction --- i.e., because, unlike situations where the detective is in control of the informant from the outset and * * * of the circumstances of the informant's dealings with a potential target, in this instance the CI just called the detective 'out of the blue' about the possible drug transaction"; other statements from accomplices were properly admitted because they were not offered for their truth but to explain the conduct of the detective who heard the statements).

**Accomplice's confession, offered to explain a police officer's subsequent conduct, was not hearsay and therefore did not violate the Confrontation Clause: *United States v. Jiminez,*** 564 F.3d 1280 (11th Cir. 2009): The court found no plain error in the admission of an accomplice's confession in the defendant's drug conspiracy trial. The police officer who had taken the accomplice's confession was cross-examined extensively about why he had repeatedly interviewed the defendant and about his decision not to obtain a written and signed confession from him. This cross-examination was designed to impeach the officer's credibility and to suggest that he was lying about the circumstances of the interviews and about the defendant's confession. In explanation, the officer stated that he approached the defendant the way he did because the accomplice had given a detailed confession that was in conflict with what the defendant had said in prior interviews. The court held that in these circumstances, the accomplice's confession was properly admitted to explain the officer's motivations, and not for its truth. Accordingly its admission did not violate the Confrontation Clause, even though the statement was testimonial.

> **Note**: **The court assumed that the accomplice's confession was admitted for a proper, not-for-truth purpose, even though there was no such finding on the record, and the trial court never gave a limiting instruction. Part of the reason for this deference is that the court was operating under a plain error standard. The defendant at trial objected only on hearsay grounds, and this did not preserve any claim of error on confrontation clause grounds. The concurring judge noted, however, "that the better practice in this case would have been for the district court to have given an instruction**

**as to the limited purpose of Detective Wharton's testimony" because "there is no assurance, and much doubt, that a typical jury, on its own, would recognize the limited nature of the evidence."**

***See also United States v. Augustin,*** 661 F.3d 1105 (11th Cir. 2011) (no confrontation violation where declarant's statements "were not offered for the truth of the matters asserted, but rather to provide context for [the defendant's] own statements"); ***United States v. Van Buren,*** 940 F.3d 1192 (11th Cir. 2019) ("Albo's [testimonial] statements were admitted only to provide context for Van Buren's statements and to show their effect on Van Buren" --- therefore no confrontation violation in admitting those statements).

## Present Sense Impression

**911 call describing ongoing drug crime is admissible as a present sense impression and not testimonial under *Bryant*: *United States v. Polidore*,** 690 F.3d 705 (5th Cir. 2012): In a drug trial, the defendant objected that a 911 call from a bystander to a drug transaction --- together with the bystander's answers to questions from the 911 operators --- was testimonial and also admitted in violation of the rule against hearsay. On the hearsay question, the court found that the bystander's statements in the 911 call were admissible as present sense impressions, as they were made while the transaction was ongoing. As to testimoniality, the court held that the case was unlike the 911 call cases decided by the Supreme Court, as there was no ongoing emergency --- rather the caller was simply recording that a crime was taking place across the street, and no violent activity was occurring. But the court noted that under *Bryant* an ongoing emergency is relevant but not dispositive of whether statements about a crime are testimonial. Ultimately the court found that the caller's statements were not testimonial, reasoning as follows:

> [A]lthough the 911 caller appeared to have understood that his comments would start an investigation that could lead to a criminal prosecution, the primary purpose of his statements was to request police assistance in stopping an ongoing crime and to provide the police with the requisite information to achieve that objective. * * * The 911 caller simply was not acting as a witness; he was not testifying. What he said was not a weaker substitute for live testimony at trial. In other words, the caller's statements were not ex parte communications that created evidentiary products that aligned perfectly with their courtroom analogues. No witness goes into court to report that a man is currently selling drugs out of his car and to ask the police to come and arrest the man while he still has the drugs in his possession.

**Present sense impression, describing an event that occurred months before a crime, is not testimonial: *United States v. Danford,*** 435 F.3d 682 (7th Cir. 2005): The defendant was convicted of insurance fraud after staging a fake robbery of his jewelry store. At trial, one of the employees testified to a statement made by the store manager, indicating that the defendant had asked the manager how to disarm the store alarm. The defendant argued that the store manager's statement was testimonial under *Crawford,* but the court disagreed. The court stated that "the conversation between [the witness] and the store manager is more akin to a casual remark than it is to testimony in the *Crawford*-sense. Accordingly, we hold that the district court did not err in

admitting this testimony under Fed.R.Evid. 803(1), the present-sense impression exception to the hearsay rule."

**Present-sense impressions of DEA agents during a buy-bust operation were safety-related and so not testimonial: *United States v. Solorio,* 669 F.3d 943 (9th Cir. 2012)**: Appealing from a conviction arising from a "buy-bust" operation, the defendant argued that hearsay statements of DEA agents at the scene --- which were admitted as present sense impressions --- were testimonial and so should have been excluded under *Crawford.* The court disagreed. It concluded that the statements were made in order to communicate observations to other agents in the field and thus assure the success of the operation, "by assuring that all agents involved knew what was happening and enabling them to gauge their actions accordingly." Thus the statements were not testimonial because the primary purpose for making them was not to prepare a statement for trial but rather to assure that the arrest was successful and that the effort did not escalate into a dangerous situation. The court noted that the buy-bust operation "was a high-risk situation involving the exchange of a large amount of money and a substantial quantity of drugs" and also that the defendant was visibly wary of the situation.

**Reports on forensic testing by law enforcement are testimonial: *Melendez-Diaz v. Massachusetts,*** 557 U.S. 305 (2009): In a drug case, the trial court admitted three "certificates of analysis" showing the results of the forensic tests performed on the seized substances. The certificates stated that "the substance was found to contain: Cocaine." The certificates were sworn to before a notary public by analysts at the State Laboratory Institute of the Massachusetts Department of Public Health. The Court, in a highly contentious 5-4 case, held that these certificates were "testimonial" under *Crawford* and therefore admitting them without a live witness violated the defendant's right to confrontation. The majority noted that affidavits prepared for litigation are within the core definition of "testimonial" statements. The majority also noted that the only reason the certificates were prepared was for use in litigation. It stated that "[w]e can safely assume that the analysts were aware of the affidavits' evidentiary purpose, since that purpose --- as stated in the relevant state-law provision --- was reprinted on the affidavits themselves."

The implications of *Melendez-Diaz* --- beyond requiring a live witness to testify to the results of forensic tests conducted primarily for litigation --- are found in the parts of the majority opinion that address the dissent's arguments that the decision will lead to substantial practical difficulties. These implications are discussed in turn:

1. In a footnote, the majority declared in dictum that "documents prepared in the regular course of equipment maintenance may well qualify as nontestimonial records." Apparently these are more like traditional business records than records prepared primarily for litigation, though the question is close --- the reason these records are maintained, with respect to forensic testing equipment, is so that the tests conducted can be admitted as reliable. At any rate, the footnote shows some flexibility, in that not every record involved in the forensic testing process will necessarily be found testimonial.

2. The dissent argued that forensic testers are not "accusatory" witnesses in the sense of preparing factual affidavits about the crime itself. But the majority rejected this distinction, declaring that the text of the Sixth Amendment "contemplates two classes of witnesses: those against the defendant and those in his favor. The prosecution *must* produce the former; the defendant *may* call the latter. Contrary to respondent's assertion, there is not a third category of witnesses, helpful to the prosecution, but somehow immune from confrontation." This statement raises questions about the reasoning of some lower courts that have admitted autopsy reports and other certificates after *Crawford*. These cases are discussed below.

3. Relatedly, the defendant argued that the affidavits at issue were nothing like the affidavits found problematic in the case of Sir Walter Raleigh. The Raleigh affidavits were

a substitute for a witness testifying to critical historical facts about the crime. But the majority responded that while the ex parte affidavits in the Raleigh case were the paradigmatic confrontation concern, "the paradigmatic case identifies the core of the right to confrontation, not its limits. The right to confrontation was not invented in response to the use of the ex parte examinations in Raleigh's Case."

4. The majority noted that cross-examining a forensic analyst may be necessary because "[a]t least some of that methodology requires the exercise of judgment and presents a risk of error that might be explored on cross-examination." This implies that if the evidence is nothing but a machine print-out, it will not run afoul of the Confrontation Clause. As discussed earlier in this Outline, a number of courts have held that machine printouts are not hearsay at all because a machine can't make a "statement," and have also held that a machine's output is not "testimony" within the meaning of the Confrontation Clause. This case law appears to survive the Court's analysis in *Melendez-Diaz* and the later cases of *Bullcoming* and *Williams* do not touch the question of machine evidence.

5. The majority does approve the basic analysis of Federal courts after *Crawford* with respect to business and public records, i.e., that if the record is admissible under FRE 803(6) or 803(8) it is, for that reason, non-testimonial under *Crawford.* For business records, this is because, to be admissible under Rule 803(6), it cannot be prepared primarily for litigation. For public records, this is because law enforcement reports prepared for a specific litigation are excluded under Rule 803(8)(A)(ii) and (A)(iii).

6. In response to an argument of the dissent, the majority states that certificates that merely authenticate proffered documents are not testimonial. As seen below, this probably means that certificates of authenticity prepared under Rules 902(11), (13) and (14) may be admitted without violating the Confrontation Clause.

7. As counterpoint to the argument about prior practice allowing certificates authenticating records, the *Melendez-Diaz* majority cited a line of cases about affidavits offered to prove the *absence* of a public record:

> Far more probative here are those cases in which the prosecution sought to admit into evidence a clerk's certificate attesting to the fact that the clerk had searched for a particular relevant record and failed to find it. Like the testimony of the analysts in this case, the clerk's statement would serve as substantive evidence against the defendant whose guilt depended on the nonexistence of the record for which the clerk searched. Although the clerk's certificate would qualify as an official record under respondent's definition --- it was prepared by a public officer in the regular course of his official duties --- and although the clerk was certainly not a "conventional witness" under the dissent's approach, the clerk was nonetheless subject to confrontation. See People v. Bromwich, 200 N. Y. 385, 388-389, 93 N. E. 933, 934 (1911).

This passage should probably be read to mean that any use of a certificate of absence of a public record in a criminal case is prohibited. But the Court did find that a notice-and-demand provision would satisfy the Confrontation Clause because if, after notice, the defendant made no demand to produce, a waiver could properly be found. Accordingly, the Committee proposed an amendment to Rule 803(10) that added a notice-and-demand provision. That amendment was approved by the Judicial Conference and became effective December 1, 2013.

**Admission of a testimonial forensic certificate through the testimony of a witness with no personal knowledge of the testing violates the Confrontation Clause under *Melendez-Diaz: Bullcoming v. New Mexico*,** 564 U.S. 647 (2011): The Court reaffirmed the holding in *Melendez-Diaz* that certificates of forensic testing prepared for trial are testimonial, and held further that the Confrontation Clause was not satisfied when such a certificate was entered into evidence through the testimony of a person who was not involved with, and had no personal knowledge of, the testing procedure. Justice Ginsburg, writing for the Court, declared as follows:

> The question presented is whether the Confrontation Clause permits the prosecution to introduce a forensic laboratory report containing a testimonial certification --- made for the purpose of proving a particular fact --- through the in-court testimony of a scientist who did not sign the certification or perform or observe the test reported in the certification. We hold that surrogate testimony of that order does not meet the constitutional requirement. The accused's right is to be confronted with the analyst who made the certification, unless that analyst is unavailable at trial, and the accused had an opportunity, pretrial, to cross-examine that particular scientist.

## *Lower Court Cases on Records and Certificates Decided Before Melendez-Diaz*

**Certification of business records under Rule 902(11) is not testimonial: *United States v. Adefehinti,*** 519 F.3d 319 (D.C. Cir. 2007): The court held that a certification of business records under Rule 902(11) was not testimonial even though it was prepared for purposes of litigation. The court reasoned that because the underlying business records were not testimonial, it would make no sense to find the authenticating certificate testimonial. It also noted that Rule 902(11) provided a procedural device for challenging the trustworthiness of the underlying records: the proponent must give advance notice that it plans to offer evidence under Rule 902(11), in order to provide the opponent with a fair opportunity to challenge the certification and the underlying records. The court stated that in an appropriate case, "the challenge could presumably take the form of calling a certificate's signatory to the stand. So hedged, the Rule 902(11) process seems a far cry from the threat of *ex parte* testimony that *Crawford* saw as underlying, and in part defining, the Confrontation Clause." In this case, the Rule 902(11) certificates were used only to admit documents that were acceptable as business records under Rule 803(6), so there was no error in the certificate process.

> **Note: The court's analysis about certificates of authentication is unaffected by *Melendez-Diaz,* as the Supreme Court stated (in dictum) that certificates that simply authenticate non-testimonial records are not themselves testimonial. Every circuit that has decided the question after *Melendez-Diaz* has upheld authenticating certificates. See below.**

**Warrant of deportation is not testimonial: *United States v. Garcia,*** 452 F.3d 36 (1st Cir. 2006): In an illegal reentry case, the defendant argued that his confrontation rights were violated by the admission of a warrant of deportation. The court disagreed, finding that the warrant was not testimonial under *Crawford*. The court noted that every circuit considering the matter has held "that defendants have no right to confront and cross-examine the agents who routinely record warrants of deportation" because such officers have no motivation to do anything other than "mechanically register an unambiguous factual matter."

***Note: Other circuits before Melendez-Diaz reached the same result on warrants of deportation. See, e.g., United States v. Valdez-Matos***, 443 F.3d 910 (5th Cir. 2006) (warrant of deportation is non-testimonial because "the official preparing the warrant had no motivation other than mechanically register an unambiguous factual matter"); ***United States v. Torres-Villalobos,*** 487 F.3d 607 (8th Cir. 2007) (noting that warrants of deportation "are produced under circumstances objectively indicating that their primary purpose is to maintain records concerning the movements of aliens and to ensure compliance with orders of deportation, not to prove facts

for use in future criminal prosecutions."); ***United States v. Bahena-Cardenas,*** 411 F.3d 1067 (9th Cir. 2005) (a warrant of deportation is non-testimonial "because it was not made in anticipation of litigation, and because it is simply a routine, objective, cataloging of an unambiguous factual matter."); ***United States v. Cantellano,*** 430 F.3d 1142 (11th Cir. 2005) (noting that a warrant of deportation "is recorded routinely and not in preparation for a criminal trial").

> **Note: Warrants of deportation still satisfy the Confrontation Clause after *Melendez-Diaz*. Unlike the forensic analysis in that case, a warrant of deportation is prepared for regulatory purposes and is clearly not prepared for the illegal reentry litigation, because by definition that crime has not been committed at the time the certificate is prepared. As seen below, post-*Melendez-Diaz* courts have found warrants of deportation to be non-testimonial. See also *United States v. Lopez,* 747 F.3d 1141 (9th Cir. 2014) (adhering to pre-*Melendez-Diaz* case law holding that deportation documents in an A-file are not testimonial when admitted in illegal re-entry cases).**

**Proof of absence of business records is not testimonial: *United States v. Munoz-Franco,*** 487 F.3d 25 (1st Cir. 2007): In a prosecution for bank fraud and conspiracy, the trial court admitted the minutes of the Board and Executive Committee of the Bank. The defendants did not challenge the admissibility of the minutes as business records, but argued that it was constitutional error to allow the government to rely on the absence of certain information in the minutes to prove that the Board was not informed about such matters. The court rejected the defendants' confrontation argument in the following passage:

> The Court in *Crawford* plainly characterizes business records as "statements that by their nature [are] not testimonial." 541 U.S. at 56. If business records are nontestimonial, it follows that the absence of information from those records must also be nontestimonial.

> **Note: This analysis appears unaffected by *Melendez-Diaz,* as no certificate or affidavit is involved and the record itself was not prepared for litigation purposes.**

**Business records are not testimonial: *United States v. Jamieson,*** 427 F.3d 394 (6th Cir. 2005): In a prosecution involving fraudulent sale of insurance policies, the government admitted summary evidence under Rule 1006. The underlying records were business records. The court found that admitting the summaries did not violate the defendant's right to confrontation. The underlying records were not testimonial under *Crawford* because they did not "resemble the formal

statement or solemn declaration identified as testimony by the Supreme Court." ***See also United States v. Baker,*** 458 F.3d 513 (6th Cir. 2006) ("The government correctly points out that business records are not testimonial and therefore do not implicate the Confrontation Clause concerns of *Crawford*.").

**Note: The court's analysis of business records appears unaffected by *Melendez-Diaz,* because the records were not prepared primarily for litigation and no certificate or affidavit was prepared for use in the litigation.**

**Post office box records are not testimonial: *United States v. Vasilakos,*** 508 F.3d 401 (6th Cir. 2007): The defendants were convicted of defrauding their employer, an insurance company, by setting up fictitious accounts into which they directed unearned commissions. The checks for the commissions were sent to post office boxes maintained by the defendants. The defendants argued that admitting the post office box records at trial violated their right to confrontation. But the court held that the government established proper foundation for the records through the testimony of a postal inspector, and that the records were therefore admissible as business records; the court noted that "the Supreme Court specifically characterizes business records as non-testimonial."

**Note: The court's analysis of business records is unaffected by *Melendez-Diaz.***

**Drug test prepared by a hospital with knowledge of possible use in litigation is not testimonial; certification of that business record under Rule 902(11) is not testimonial: *United States v. Ellis,*** 460 F.3d 920 (7th Cir. 2006): In a trial for felon gun possession, the trial court admitted the results of a drug test conducted on the defendant's blood and urine after he was arrested. The test was conducted by a hospital employee, and indicated a positive result for methamphetamine. At trial, the hospital record was admitted without a qualifying witness; instead, a qualified witness prepared a certification of authenticity under Rule 902(11). The court held that neither the hospital record nor the certification were testimonial within the meaning of *Crawford* and *Davis* --- despite the fact that both records were prepared with the knowledge that they would be used in a prosecution. As to the medical reports, the *Ellis* court concluded as follows:

> While the medical professionals in this case might have thought their observations would end up as evidence in a criminal prosecution, the objective circumstances of this case indicate that their observations and statements introduced at trial were made in nothing else but the ordinary course of business. * * * They were employees simply recording

observations which, because they were made in the ordinary course of business, are "statements that by their nature were not testimonial." *Crawford*, 541 U.S. at 56.

**Note: *Ellis* is cited by the dissent in *Melendez-Diaz* (not a good thing for its continued viability), and the circumstances of preparing the tox-screen in *Ellis* are somewhat similar to those in *Melendez-Diaz.* That said, toxicology tests conducted by *private* organizations may be found nontestimonial if it can be shown that law enforcement was not involved in or managing the testing. The *Melendez-Diaz* majority emphasized that the forensic analyst knew that the test was being done for a prosecution, as that information was right on the form. Essentially, after *Melendez-Diaz,* the less the tester knows about the use of the test, and the less involvement by the government, the better for admissibility. Primary motive for use in a prosecution is obviously less likely to be found if the tester is a private organization --- especially if it is a hospital, because tox-screens might well be done for all patients and for a medical purpose.**

**Note that the Seventh Circuit, in a case after *Melendez-Diaz,* adhered fully to its ruling in *Ellis* that business records are not testimonial. *United States v. Brown,* 822 F.3d 966 (7th Cir. 2016) (relying on *Ellis* to find that Western Union records of wire transfers were not testimonial: "Logically, if they are made in the ordinary course of business, then they are not made for the purpose of later prosecution.").**

As to the certification of business record, prepared under Rule 902(11) specifically to qualify the medical records in this prosecution, the *Ellis* court similarly found that it was not testimonial because the records that were certified were prepared in the ordinary course, and the certifications were essentially ministerial. The court explained as follows:

> The certification at issue in this case is nothing more than the custodian of records at the local hospital attesting that the submitted documents are actually records kept in the ordinary course of business at the hospital. The statements do not purport to convey information about Ellis, but merely establish the existence of the procedures necessary to create a business record. They are made by the custodian of records, an employee of the business, as part of her job. As such, we hold that written certification entered into evidence pursuant to Rule 902(11) is nontestimonial just as the underlying business records are. Both of these pieces of evidence are too far removed from the "principal evil at which the Confrontation Clause was directed" to be considered testimonial.

**Note: Many circuits have held that the reasoning of *Ellis* remains sound after *Melendez-Diaz,* and that 902(11) certificates are not testimonial. *See United States v.***

***Yeley-Davis,*** 632 F.3d 673 (10th Cir. 2011), ***United States v. Johnson***, 688 F.3d 494 (8th Cir. 2012), ***United States v. Ayelotan,*** 917 F.3d 394 (5th Cir. 2019), ***United States v. Denton,*** 944 F.3d 170 (4th Cir. 2019), ***United States v. Clotaire,*** 963 F.3d 1288 (11th Cir. 2020), and ***United States v. Anekwu,*** 695 F.3d 967 (9th Cir. 2012) all infra. ***See also Washington v. Griffin,*** 876 F.3d 395 (2nd Cir. 2017) (noting that a certification of a business record "does not transform the underlying notations of the lab analysts into formalized testimonial materials" and relying on the passage from *Melendez-Diaz* which stated that a clerk's authenticating affidavit authenticating an otherwise admissible record does not violate the Confrontation Clause); ***United States v. Clotaire,*** 963 F.3d 1288 (11th Cir. 2020) (relying on the passage from *Melendez-Diaz* to find that a certification authenticating a business record is not testimonial). Cf. ***United States v. Farrad,*** 895 F.3d 859, 876 (6th Cir. 2018)(holding that the defendant forfeited his argument that a 902(11) certificate violated his confrontation rights; but even if not forfeited, "it is unlikely that it would have been a winning argument * * * in light of the Supreme Court's discussion of the 'narrowly circumscribed' exception at common law that allowed a clerk to present a certification authenticating an official record.").

**Odometer statements, prepared before any crime of odometer-tampering occurred, are not testimonial:** ***United States v. Gilbertson,*** 435 F.3d 790 (7th Cir. 2006): In a prosecution for odometer-tampering, the government proved its case by introducing the odometer statements prepared when the cars were sold to the defendant, and then calling the buyers to testify that the mileage on the odometers when they bought their cars was substantially less than the mileage set forth on the odometer statements. The defendant argued that introducing the odometer statements violated *Crawford.* He contended that the odometer statements were essentially formal affidavits, the very kind of evidence that most concerned the Court in *Crawford*. But the court held that the concern in *Crawford* was limited to affidavits prepared for trial as a testimonial substitute. This concern did not apply to the odometer statements. The court explained as follows:

> The odometer statements in the instant case are not testimonial because they were not made with the respective declarants having an eye towards criminal prosecution. The statements were not initiated by the government in the hope of later using them against Gilbertson (or anyone else), nor could the declarants (or any reasonable person) have had such a belief. The reason is simple: each declaration was made *prior* to Gilbertson even engaging in the crime. Therefore, there is no way for the sellers to anticipate that their statements regarding the mileage on the individual cars would be used as evidence against Gilbertson for a crime he commits in the future.

**Note: this result is unaffected by *Melendez-Diaz* as the records clearly were not prepared for purposes of litigation --- the crime had not occurred at the time the records were prepared.**

**Tax returns are business records and so not testimonial: *United States v. Garth,*** 540 F.3d 766 (8th Cir. 2008): The defendant was accused of assisting tax filers to file false claims. The defendant argued that her right to confrontation was violated when the trial court admitted some tax returns of the filers. But the court found no error. The tax returns were business records, and the defendant made no argument that they were prepared for litigation, "as is expected of testimonial evidence."

**Note: this result is unaffected by *Melendez-Diaz.***

**Certificate of a record of a conviction found not testimonial: *United States v. Weiland,*** 420 F.3d 1062 (9th Cir. 2006): The court held that a certificate of a record of conviction prepared by a public official was not testimonial under *Crawford*: "Not only are such certifications a 'routine cataloguing of an unambiguous factual matter,' but requiring the records custodians and other officials from the various states and municipalities to make themselves available for cross-examination in the countless criminal cases heard each day in our country would present a serious logistical challenge without any apparent gain in the truth-seeking process. We decline to so extend *Crawford*, or to interpret it to apply so broadly."

***Note:* The reliance on burdens in countless criminal cases is precisely the argument that was rejected in *Melendez-Diaz.* Nonetheless, certificates of conviction are quite probably non-testimonial, because the *Melendez-Diaz* majority states that a certificate is not testimonial if it does nothing more than authenticate another document --- and specifically uses as an example a certificate of conviction.**

**In *United States v. Albino-Loe,* 747 F.3d 1206 (9th Cir. 2014), the court adhered to its ruling in *Weiland,* declaring that a routine certification of authenticity of a record (in that case documents in an A-file) are not testimonial in nature, because they "did not accomplish anything other than authenticating the A-file documents to which they were attached."**

**Absence of records in database is not testimonial; and drug ledger is not testimonial:** ***United States v. Mendez,*** 514 F.3d 1035 (10th Cir. 2008): In an illegal entry case, an agent testified that he searched the ICE database for information indicating that the defendant entered the country legally, and found no such information. The ICE database is "a nation-wide database of information which archives records of entry documents, such as permanent resident cards, border crossing cards, or certificates of naturalization." The defendant argued that the entries into the database (or the asserted lack of entries in this case) were testimonial. But the court disagreed, because the records "are not prepared for litigation or prosecution, but rather administrative and regulatory purposes." The court also observed that Rule 803(8) tracked *Crawford* exactly: a public record is admissible under Rule 803(8) unless it is prepared with an eye toward litigation or prosecution; and under *Crawford,* "the very same characteristics that preclude a statement from being classified as a public record are likely to render the statement testimonial."

*Mendez* also involved drug charges, and the defendant argued that admitting a drug ledger with his name on it violated his right to confrontation under *Crawford.* The court also rejected this argument. It stated first that the entries in the ledger were not hearsay at all, because they were offered to show that the book was a drug ledger and thus a "tool of the trade." As the entries were not offered for truth, their admission could not violate the Confrontation Clause. But the court further held that even if the entries were offered for truth, they were not testimonial, because "[a]t no point did the author keep the drug ledger for the *primary purpose* of aiding police in a criminal investigation, the focus of the *Davis* inquiry." (emphasis the court's). The court noted that it was not enough that the statements were relevant to a criminal prosecution, otherwise "any piece of evidence which aids the prosecution would be testimonial."

> **Note: Both holdings in the above case survive *Melendez-Diaz.* The first holding is about the absence of public records, where the records themselves were not prepared in testimonial circumstances. If that absence had been proved by a *certificate*, then the Confrontation Clause, after *Melendez-Diaz*, would have been violated. But the absence was proved by a testifying agent. The second holding states the accepted proposition that business records admissible under Rule 803(6) are, for that reason, non-testimonial. Drug ledgers in particular are absolutely not prepared for purposes of litigation.**

## *Lower Court Cases on Records and Certificates After Melendez-Diaz*

**Letter describing results of a search of court records is testimonial after *Melendez-Diaz: United States v. Smith,*** 640 F.3d 358 (D.C. Cir. 2011): To prove a felony in a felon firearm case, the government admitted a letter from a court clerk stating that "it appears from an examination of the files in this office" that Smith had been convicted of a felony. Each letter had a seal and a signature by a court clerk. The court found that the letters were testimonial. The clerk did not merely authenticate a record, rather he created a record of the search he conducted. The letters were clearly prepared in anticipation of litigation --- they "respond[ed] to a prosecutor's question with an answer."

> **Note: The analysis in *Smith* provides more indication that certificates of the absence of a record are testimonial after *Melendez-Diaz.* The clerk's letters in *Smith* are exactly like a CNR; the only difference is that they report on the presence of a record rather than an absence.**

**Autopsy reports generated through law enforcement involvement found testimonial after *Melendez-Diaz: United States v. Moore,*** 651 F.3d 30 (D.C. Cir. 2011): The court found autopsy reports to be testimonial. The court emphasized the involvement of law enforcement in the generation of the autopsy reports admitted in this case:

> The Office of the Medical Examiner is required by D.C.Code 5-1405(b)(11) to investigate "[d]eaths for which the Metropolitan Police Department ["MPD"], or other law enforcement agency, or the United States Attorney's Office requests, or a court orders investigation." The autopsy reports do not indicate whether such requests were made in the instant case but the record shows that MPD homicide detectives and officers from the Mobile Crimes Unit were present at several autopsies. Another autopsy report was supplemented with diagrams containing the notation: "Mobile crime diagram (not [Medical Examiner] --- use for info only)." Still another report included a "Supervisor's Review Record" from the MPD Criminal Investigations Division commenting: "Should have indictment re John Raynor for this murder." Law enforcement officers thus not only observed the autopsies, a fact that would have signaled to the medical examiner that the autopsy might bear on a criminal investigation, they participated in the creation of reports. Furthermore, the autopsy reports were formalized in signed documents titled "reports."

> These factors, combined with the fact that each autopsy found the manner of death to be a homicide caused by gunshot wounds, are "circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Melendez-Diaz*, 129 S.Ct. at 2532 (citation and quotation marks omitted).

In a footnote, the court emphasized that it was *not* holding that all autopsy reports are testimonial:

> Certain duties imposed by the D.C. Code on the Office of the Medical Examiner demonstrate, the government suggests, that autopsy reports are business records not made for the purpose of litigation. It is unnecessary to decide as a categorical matter whether autopsy reports are testimonial, and, in any event, it is doubtful that such an approach would comport with Supreme Court precedent.

Finally, the court rejected the government's argument that there was no error because the expert witness simply relied on the autopsy reports in giving independent testimony. In this case, the autopsy reports were clearly entered into evidence. ***See also United States v. McGill,*** 815 F.3d 846 (D.C.Cir. 2016) (relying on *Moore* to find a Confrontation violation where drug analysis reports and autopsy reports were admitted through testimony from witnesses other than the reports' authors).

**State court did not unreasonably apply federal law in admitting autopsy report as non-testimonial: *Nardi v. Pepe,*** 662 F.3d 107 (1st Cir. 2011): The court affirmed the denial of a habeas petition, concluding that the state court did not unreasonably apply federal law in admitting an autopsy report as non-testimonial. The court reasoned as follows:

> Abstractly, an autopsy report can be distinguished from, or assimilated to, the sworn documents in *Melendez-Diaz* and *Bullcoming*, and it is uncertain how the Court would resolve the question. We treated such reports as not covered by the Confrontation Clause, *United States v. De La Cruz*, 514 F.3d 121, 133-34 (1st Cir. 2008), but the law has continued to evolve and no one can be certain just what the Supreme Court would say about that issue today. However, our concern here is with "clearly established" law when the SJC acted. * * * That close decisions in the later Supreme Court cases extended *Crawford* to new situations hardly shows the outcomes were clearly preordained. And, even now it is uncertain whether, under its primary purpose test, the Supreme Court would classify autopsy reports as testimonial.

**Immigration interview form was not testimonial: *United States v. Phoeun Lang,*** 672 F.3d 17 (1st Cir. 2012): The defendant was convicted of making false statements and unlawfully applying for and obtaining a certificate of naturalization. The defendant argued that his right to confrontation was violated because the immigration form (N-445) on which he purportedly lied contained verification checkmarks next to his false responses. Thus the contention was that the verification checkmarks were testimonial hearsay of the immigration agent who conducted the interview. But the court found no error. The court concluded that the form was not "primarily to be used in court proceedings." Rather it was a record prepared as "a matter of administrative routine, for the primary purpose of determining Lang's eligibility for naturalization." For essentially the same reasons, the court held that the form was admissible under Rule 803(8)(A)(ii) despite the fact that the rule appears to exclude law enforcement reports. The court distinguished between "documents produced in an adversarial setting and those produced in a routine non-adversarial setting for purposes of Rule 803(8)(A)(ii)." The court relied on the passage in *Melendez-Diaz* which declared that the test for admissibility or inadmissibility under Rule 803(8) was the same as the test of testimoniality under the Confrontation Clause, i.e., whether the primary motive for preparing the record was for use in a criminal prosecution.

> **Note: This case was decided before *Williams,* but it would appear to satisfy both the Alito and the Kagan version of the "primary motive" test. Both tests agree that a statement cannot be testimonial unless the primary motive for making it is to have it used in a criminal prosecution. The difference is that Justice Alito provides another qualification: the statement is testimonial only if it was made to be used in the *defendant's* criminal prosecution. In *Phoeun Lang* the first premise was not met --- the statements were made for administrative purposes, and not primarily for use in *any* criminal prosecution.**

**Expert's reliance on standard samples for comparison does not violate the Confrontation Clause because any communications regarding the preparation of those samples was not testimonial: *United States v. Razo*, 782 F.3d 31 (1st Cir. 2015).** A chemist testified about the lab analysis she performed on a substance seized from the defendant's coconspirator. The crime lab used a "known standard" methamphetamine sample to create a reference point for comparison with seized evidence. That sample was received from a chemical company. The chemist testified that in comparing the seized sample with the known standard sample, she relied on the manufacturer's assurance that the known standard sample was 100% pure. The court found no confrontation violation because the known standard sample --- and the manufacturer's assurance about it --- were not testimonial. Any statements regarding the known

standard sample were not made with the primary motivation that they would be used at a criminal trial, because the sample was prepared for general use by the laboratory. The court noted that the chemist's conclusions about the *seized* sample would raise confrontation questions, but the government produced the chemist to be cross-examined about those conclusions. As to the standard sample, it was prepared "prior to and without regard to any particular investigation, let alone any particular prosecution."

> **Note: In reaching its result, the *Razo* court provided a good interpretation of *Williams*. The court saw support in the fact that the Alito plurality would find any communications regarding the known standard sample to be non-testimonial because that sample was "not prepared for the primary purpose of accusing a targeted individual." And Justice Thomas would be happy, because nothing about the known standard sample was in the nature of a formalized statement.**

**Certain records of internet activity sent to law enforcement found testimonial: *United States v. Cameron***, 699 F.3d 621 (1st Cir. 2012): In a child pornography prosecution, the court held that certain records about suspicious internet activity were testimonial and their admission violated the defendant's right to confrontation. The evidence principally at issue related to accounts with Yahoo. Yahoo received an anonymous report that child pornography images were contained in a Yahoo account. Yahoo sent a report --- called a "CP Report"--- to the National Center for Missing and Exploited Children (NCMEC), listing the images being sent with the report, attaching the images, and listing the date and time at which the image was uploaded and the IP Address from which it was uploaded. NCMEC in turn sent a report of child pornography to the Maine State Police Internet Crimes Against Children Unit (ICAC), which obtained a search warrant for the defendant's computers. The government introduced testimony of a Yahoo employee as to how certain records were kept and maintained by the company, but the government did not introduce the Image Upload Data indicating the date and time each image was uploaded to the Internet. The government also introduced testimony by a NCMEC employee explaining how NCMEC handled tips regarding child pornography. The court held that admission of various data collected by Yahoo and Google automatically in order to further their business purposes was proper, because the data was contained in business records and was not testimonial for Sixth Amendment purposes. But the court held, 2-1, that the reports Yahoo prepared and sent to NCMEC were different and were testimonial because the primary purpose for the reports was to record past events that were potentially relevant to a criminal prosecution. The court relied on the following considerations to conclude that the CP Reports were testimonial: 1) they referred to a "suspect" screen name, email address, and IP address --- and Yahoo did not treat its customers as "suspects" in the ordinary course of its business; 2) before a CP Report is created, someone in the

legal department at Yahoo has to determine that an account contained child pornography images; 3) Yahoo did not simply keep the reports but sent them to NCMEC, which was under the circumstances an agent of law enforcement, because it received a government grant to accept reports of child pornography and forward them to law enforcement. The government argued that Confrontation was not at issue because the CP Reports contained business records that were unquestionably nontestimonial, such as records of users' IP addresses. But the court responded that the CP Reports were themselves statements. The court noted that "[i]f the CP Reports simply consisted of the raw underlying records, or perhaps underlying records arranged and formatted in a reasonable way for presentation purposes, the Reports might well have been admissible."

The government also argued that the CP Reports were not testimonial under the Alito definition of primary motive in *Williams.* Like the DNA reports in *Williams*, the CP Reports were prepared at a time when the perpetrator was unknown and so they were not targeted toward a particular individual. The court distinguished *Williams* by relying on a statement in the Alito opinion that at the time of the DNA report, the technicians had "no way of knowing whether it will turn out to be incriminating or exonerating." In contrast, when the CP Reports were prepared, Yahoo personnel knew that they were incriminating: "Yahoo's employees may not have known *whom* a given CP Report might incriminate, but they almost certainly were aware that a Report would incriminate *somebody."*

Finally, the court held that the NCMEC reports sent to the police were testimonial, because they were statements independent of the CP Reports, and they were sent to law enforcement for the primary purpose of using them in a criminal prosecution. One judge, dissenting in part, argued that the connection between an identified user name, the associated IP address, and the digital images archived from that user's account all existed well before Yahoo got the anonymous tip, were an essential part of the service that Yahoo provided, and thus were ordinary business records that were not testimonial.

> **Note: *Cameron* cannot be read to hold that business records admissible under Rule 803(6) can be testimonial under *Crawford.* The court notes that under *Palmer v. Hoffman,* 318 U.S. 109 (1943), records are not admissible as business records when they are calculated for use in court. *Palmer* is still good law under Rule 803(6), as the Court recognized in *Melendez-Diaz.* The *Cameron* court noted that the Yahoo reports were subject to the same infirmity as the records found inadmissible in *Hoffman:* they were not made for business purposes, but rather for purposes of litigation. Thus according to the court, the Yahoo reports were probably not admissible as business records anyway.**

**Airline records of passengers on a plane are not testimonial:** ***Tran v. Roden,*** 847 F.3d 44 (1st Cir. 2017): On habeas review of a murder conviction, the court considered whether the admission of a manifest prepared by United Airlines violated the defendants' right to confrontation. The manifest showed that two people with the same names as the defendants were on a flight out of the country. This was evidence of consciousness of guilt. The court found that the manifest was a business record prepared by United, outside the context of litigation, and therefore it was not testimonial. The defendants argued that the record was testimonial because it was *delivered* by United to the prosecution. But the court found this irrelevant, because the question under the Confrontation Clause is whether a document was *prepared* with the primary motive of use in a criminal prosecution. The defendants relied on *Cameron,* immediately above, but the court distinguished *Cameron* by noting that the Yahoo records in that case were *prepared* by Yahoo with the intent to send them to the government in order to investigate and prosecute child pornography.

**Telephone records are not testimonial:** ***United States v. Burgos-Montes,*** 786 F.3d 92 (1st Cir. 2015): The government introduced phone records of a conspirator. They were accompanied by a certification made under Rule 902(11). The defendant argued that the phone records were testimonial but the court disagreed. The defendant argued that the records were produced by the phone company in response to a demand from the government, but the court found this irrelevant. The records were gathered and maintained by the phone company in the routine course of business. "The fact that the print-out of this data in this particular format was requested for litigation does not turn the data contained in the print-out into information created for litigation."

**Routine autopsy report was not testimonial:** ***United States v. James,*** 712 F.3d 79 (2nd Cir. 2013): The court considered whether its *pre-Melendez-Diaz* case law --- stating that autopsy reports were not testimonial --- was still valid. The court adhered to its view that "routine" autopsy reports were not testimonial because they are not prepared with the primary motivation that they will be used in a criminal trial. Applying the test of "routine" to the facts presented, the court found as follows:

> Somaipersaud's autopsy was nothing other than routine --- there is no suggestion that Jindrak or anyone else involved in this autopsy process suspected that Somaipersaud had been murdered and that the medical examiner's report would be used at a criminal trial. [A government expert] testified that causes of death are often undetermined in cases like this because it could have been a recreational drug overdose or a suicide. The autopsy report

> itself refers to the cause of death as "undetermined" and attributes it both to "acute mixed intoxication with alcohol and chlorpromazine" combined with "hypertensive and arteriosclerotic cardiovascular disease."
>
> The autopsy was completed on January 24, 1998, and the report was signed June 16, 1998, substantially before any criminal investigation into Somaipersaud's death had begun. [N]either the government nor defense counsel elicited any information suggesting that law enforcement was ever notified that Somaipersaud's death was suspicious, or that any medical examiner expected a criminal investigation to result from it. Indeed, there is reason to believe that none is pursued in the case of most autopsies.

The court noted that "something in the order of ten percent of deaths investigated by the OCME lead to criminal investigations." It distinguished the 11th Circuit's opinion --- discussed below --- which found an autopsy report to be testimonial, noting that "the decision was based in part on the fact that the Florida Medical Examiner's Office was created and exists within the Department of Law Enforcement. Here, the OCME is a wholly independent office." Thus, an autopsy report prepared outside the auspices of a criminal investigation is very unlikely to be found testimonial under the Second Circuit's view.

> **Note: In considering the effect of *Williams,* the court found that in fact there was no lesson at all to be derived from *Williams,* as there was no rationale on which five members of the Court could agree. Thus, the Court found that *Williams* controlled only cases exactly like it.**

**Business records are not testimonial: *United States v. Bansal,*** 663 F.3d 634 (3rd Cir. 2011): In a prosecution related to a controlled substance distribution operation, the trial court admitted records kept by domestic and foreign businesses of various transactions. The court rejected the claim that the records were testimonial, stating that "the statements in the records here were made for the purpose of documenting business activity, like car sales and account balances, and not for providing evidence to law enforcement or a jury."

**Rule 902(11) certifications are not testimonial: *United States v. Denton,*** 944 F.3d 170 (4th Cir. 2019): The court found no error in admitting certifications of business records of Facebook, Google, and Time Warner Cable. These certifications authenticated the business records under Rule 902(11). The court noted that "the Supreme Court has differentiated between an affidavit that is created for the sole purpose of providing evidence against a defendant and an

affidavit that is created to authenticate or provide a copy of an otherwise admissible record. Put simply, the former is testimonial and therefore subject to confrontation, while the latter is not."

**Admission of credit card company's records identifying customer accounts that had been compromised did not violate the right to confrontation: *United States v. Keita,*** 742 F.3d 184 (4th Cir. 2014): In a prosecution for credit card fraud, the trial court admitted "common point of purchase" records prepared by American Express. These were internal documents revealing which accounts have been compromised. American Express creates the reports daily as part of regular business practice, and they are used by security analysts to determine whether to contact law enforcement or to investigate the matter internally in the first instance. The court held that the records were not testimonial (even though they could possibly be used for criminal prosecution), relying on the language in *Melendez-Diaz* stating that "business records are generally admissible absent confrontation." The court concluded that the records were primarily prepared for the administration of Amex's regularly conducted business.

**Warrant of removal, offered in an illegal reentry prosecution, is non-testimonial: *United States v. Garcia,*** 887 F.3d 205 (5th Cir. 2018): In an illegal re-entry prosecution, to prove that the defendant had been deported, the government offered the warrant of removal that was entered just after the defendant was removed. The defendant argued that the warrant was testimonial under *Melendez-Diaz,* but the court disagreed. The court stated that the problem with the forensic certificates in *Melendez-Diaz* was that they were produced specifically for purposes of trial. In contrast, warrants of removal are prepared "to memorialize an alien's departure --- not specifically or primarily to prove facts in a hypothetical future criminal prosecution."

**Certificate of non-existence of a record, while testimonial, did not violate the Confrontation Clause because the person who authored and signed the certificate testified: *United States v. Arellano-Banuelos,*** 927 F.3d 355 (5th Cir. 2019): In an illegal reentry prosecution, the government offered a certificate of the non-existence of a record permitting reentry. The defendant argued that the certificate was testimonial, and the court conceded that it had found such a certificate testimonial after *Melendez-Diaz,* in *United States v. Martinez-Rios,* 595 F.3d 581 (5th Cir. 2010), because the affidavit was prepared solely to prove a fact in a criminal prosecution. But the court held that the Confrontation Clause was not violated in this case because the person who authored and signed the certificate was presented at trial, and testified to the search process. The defendant did not cross-examine the witness, but the witness was available for cross-examination, which is all that the Constitution requires. The defendant argued that the Confrontation Clause was

nonetheless violated because the witness did not personally check all the systems that led to the certification --- a staff member ran the initial checks and created the printout. But the court found that this did not matter, finding no authority "for the proposition that every individual involved in the preparation of a document such as a CNR must testify at trial." It was enough that the defendant "had an opportunity to cross-examine the person who prepared and signed the CNR."

**Certifications by Google and Yahoo of email traffic were not testimonial: *United States v. Ayelotan,*** 917 F.3d 394 (5th Cir. 2019): In a fraud scheme involving emails, the trial court admitted the emails, including transmittal data, that were accompanied by certificates from Google and Yahoo. The certificate authenticated the business records of the providers, stating that these providers recorded the transmittal data as part of the regular practice of a regularly conducted business activity. The court found that the transmittal certificates were not testimonial, because the providers "didn't create the records to prove a particular fact at a particular trial --- let alone this trial."

**Admission of purported drug ledgers violated the defendant's confrontation rights where the proof of authenticity was the fact that they were produced by an accomplice at a proffer session: *United States v. Jackson,*** 625 F.3d 875 (5th Cir. 2010), amended 636 F.3d 687 (5th Cir. 2011): In a drug prosecution, purported drug ledgers were offered to prove the defendant's participation in drug transactions. An officer sought to authenticate the ledgers as business records but the court found that he was not a "qualified witness" under Rule 803(6) because he had no knowledge that the ledgers came from any drug operation associated with the defendant. The court found that the only adequate basis of authentication was the fact that the defendant's accomplice had produced the ledgers at a proffer session with the government. But because the production at the proffer session was unquestionably a testimonial statement --- and because the accomplice was not produced to testify --- admission of the ledger against the defendant violated his right to confrontation under *Crawford.*

> ***Note:*** **The *Jackson* court does *not* hold that business records are testimonial. The reasoning is muddled, but the best way to understand it is that the evidence used to *authenticate* the business record --- the cohort's production of the records at a proffer session --- was testimonial.**

**Pseudoephedrine logs are not testimonial: *United States v. Towns,*** 718 F.3d 404 (5th Cir. 2013): In a methamphetamine prosecution, the agent testified to patterns of purchasing pseudoephedrine at various pharmacies. This testimony was based on logs kept by the pharmacies of pseudoephedrine purchases. The court found that the logs --- and the certifications to the logs provided by the pharmacies --- were properly admitted as business records. It further held that the records were not testimonial. As to the Rule 803(6) question, the court found irrelevant the fact that the records were required by statute to be kept and were pertinent to law enforcement. The court stated that "the regularly conducted activity here is selling pills containing pseudoephedrine; the purchase logs are kept in the course of that activity. Why they are kept is irrelevant at this stage." As to the certifications from the records custodians of the pharmacies, the court found them proper under Rule 803(6) and 902(11) ---the certifications tracked the language of Rule 803(6) and there was no requirement that the custodians do anything more, such as explain the process of record keeping. As to the Confrontation Clause, the court noted that the Supreme Court in *Melendez-Diaz* had declared that business records are ordinarily non-testimonial. Moreover, the logs were not prepared solely with an eye toward trial. The court concluded as follows:

> The pharmacies created these purchase logs *ex ante* to comply with state regulatory measures, not in response to an active prosecution. Additionally, requiring a driver's license for purchases of pseudoephedrine deters crime. The state thus has a clear interest in businesses creating these logs that extends beyond their evidentiary value. Because the purchase logs were not prepared specifically and solely for use at trial, they are not testimonial and do not violate the Confrontation Clause.

**Biographical information contained in a Form I-213 is not testimonial: *United States v. Noria,*** 945 F.3d 847 (5th Cir. 2019): In an illegal-reentry prosecution, the government proved biographical information about the defendant by offering statements made on an I-213 form that documented encounters between the defendant and ICE agents. The defendant argued that the statements on the form were testimonial, but the court disagreed. The court reasoned as follows:

> Here, it is uncontested that the Form I-213s are routinely produced by DHS and are not generated solely for use at trial. Moreover, there is no indication that the specific Form I-213s introduced at Noria's trial are untrustworthy or unusually litigation-focused; by all accounts, they are standard I-213s created contemporaneously with each of Noria's interviews by immigration agents. No doubt, the biographical portion of an I-213 can be helpful to the Government in a later criminal prosecution. However, we agree with the Ninth and Eleventh Circuits that the forms' primary purpose is administrative, not investigative or prosecutorial. After all, immigration agents prepare an I-213 every time

> they encounter an alien suspected of being removable, regardless of whether that alien is ever criminally prosecuted or civilly removed. The forms are then stored in the regular course of business. * * * I-213's serve primarily as administrative records used to track undocumented entries, not as evidence in criminal trials.

The court also rejected the defendant's argument that the reports were not admissible under Rule 803(8), the public records exception to the hearsay rule. That rule does not bar all law enforcement reports in criminal cases, but only those prepared for purposes of litigation. Thus, the public records exception tracks the "primary purpose" test of the Confrontation Clause.

**Court rejects the "targeted individual" test in reviewing an affidavit pertinent to illegal immigration: *United States v. Duron-Caldera,*** 737 F.3d 988 (5th Cir. 2013): The defendant was charged with illegal reentry. The dispute was over whether he was in fact an alien. He claimed he was a citizen because his mother, prior to his birth, was physically present in the U.S. for at least ten years, at least five of which were before she was 14. To prove that this was not the case, the government offered an affidavit from the defendant's grandmother, prepared 40 years before the instant case. The affidavit was prepared in connection with an investigation into document fraud, including the alleged filing of fraudulent birth certificates by the defendant's parents and grandmother. The affidavit accused others of document fraud, and stated that the defendant's mother did not reside in the United States for an extended period of time. The trial court admitted the affidavit but the court of appeals held that it was testimonial and reversed. The government argued that the affidavit was a business record because it was found in regularly kept immigration records. But the court noted that it could not qualify as a business record because the grandmother was not acting in the ordinary course of regularly conducted activity.

The court found that the government had not shown that the affidavit was prepared outside the context of a criminal investigation, and therefore the affidavit was testimonial under the primary motive test. The government relied on the Alito opinion in *Williams*, under which the affidavit would not be testimonial, because it clearly was *not targeted toward the defendant*, as he was only a child when it was prepared. But the court rejected the targeted individual test. It noted first that five members of the court in *Williams* had rejected the test. It also stated that the targeted individual limitation could not be found in any of the *Crawford* line of cases before *Williams*: noting, for example, that in *Crawford* the Court defined testimonial statements as those one would expect to be used "at *a* later trial." Finally, the court contended that the targeted individual test was inconsistent with the terms of the Confrontation Clause, which provide a right of the accused to be

confronted with the "*witnesses against him."* In this case, the grandmother, by way of affidavit, was a witness against the defendant.

> ***Reporter's Note:*** **The court's construction of the Confrontation Clause could come out the other way. The reference to "witnesses against him" in the Sixth Amendment could be interpreted as *at the time the statement was made*, it was being directed at the defendant. The *Duron-Caldera* court reads "witnesses" as of the time the statement is being introduced. But at that time, the witness is not there. All the "witnessing" is done at the time the statement is made; and if the witness is not targeting the individual at the time the statement is made, it could well be argued that the witness is not testifying "against *him*."**
>
> **Another note from *Duron-Caldera:* The court notes that there is no rule to be taken from *Williams* under the *Marks* test --- under which you take the narrowest view on which the plurality and the concurrence can agree. In *Williams,* there is nothing on which the plurality and Justice Thomas agreed.**

**Pseudoephedrine purchase records are not testimonial: *United States v. Collins,*** 799 F.3d 554 (6th Cir. 2015): Relying on the Fifth Circuit's decision in *United States v. Towns, supra,* the court held that pharmaceutical records of pseudoephedrine purchases were not testimonial. The court noted that while law enforcement officers use the records to track purchases, the "system is designed to prevent customers from purchasing illegal quantities of pseudoephedrine by indicating to the pharmacy employee whether the customer has exceeded federal or state purchasing restrictions" --- and accordingly was not primarily motivated to generate evidence for a prosecution.

**Pseudoephedrine logs are not testimonial: *United States v. Lynn,*** 851 F.3d 786 (7th Cir. 2017): Affirming convictions for methamphetamine manufacturing and related offenses, the court found no error in admitting logs of pseudoephedrine purchases prepared by pharmacies. These logs indicated that the defendant and associates had purchased pseudoephedrine, a necessary ingredient of methamphetamine. The defendant argued that introducing the logs violated his right to confrontation because they were prepared in anticipation of a prosecution and so were testimonial. But the court disagreed. It stated that "regulatory bodies may have legitimate interests in maintaining these records that far exceed their evidentiary value in a given case. For example,

requiring identification for each pseudoephedrine purchase may deter misuse or pseudoephedrine-related drug offenses." The logs were therefore not testimonial.

**Preparing an exhibit for trial is not testimonial: *United States v. Vitrano,*** 747 F.3d 922 (7th Cir. 2014): In a prosecution for fraud and perjury, the government offered records of phone calls made by the defendant. The defendant argued that there was a confrontation violation because the technician who prepared the phone calls as an exhibit did not testify. The court found that the confrontation argument was properly rejected, because no statements of the technician were admitted at trial. The court declared that "[p]reparing an exhibit for trial is not itself testimonial."

**Records of wire transfers are not testimonial: *United States v. Brown,*** 822 F.3d 966 (7th Cir. 2016): In a drug prosecution, the government offered records of Western Union wire transfers. The court found that the records were not testimonial, noting that "[l]ogically, if they are made in the ordinary course of business, then they are not made for the purpose of later prosecution." It concluded that the records were "routine and prepared in the ordinary course of business, not in anticipation of prosecution."

> **Note: The Western Union records in *Brown* were proven up by way of certificates offered under Rule 902(11). The court did not even mention any possible concern that those certifications would themselves be testimonial. It focused only on the testimoniality of the underlying records.**

**Certifications that a gun dealer was federally licensed were testimonial: *United States v. Barber,*** 937 F.3d 965 (7th Cir. 2019): The defendant was charged with stealing guns from a federally licensed gun dealer. To prove the federal license, the government offered a License Registration Report – a database search report --- which showed when the license was issued, expiration date, and its status as active. Appended to that report, the government submitted two affidavits from ATF officials, which explained the purposes of the records, that the records were for firearm licensing, that a search of the records was conducted, and concluded that the dealer was licensed during the relevant period. The court found that the affidavits were testimonial because "they go beyond simple authentication of a copy." The court reasoned that the affidavits rested "on an inference about the *continuing validity* of the license, and that inference requires an interpretation of what the records shows or a certification about its substance or effect. In other words, the government is relying on information [in the affidavit] beyond what the license itself says." As an example, the court stated that "the affidavit could imply that ATF has a practice of

documenting on its copy of a license information about suspensions (if any), or it might suggest that the affiant agent ran a search in order to confirm that [the dealer] did not have a licensing issue at the time of the robbery." The court concluded that the defendant was "entitled to know about and challenge whatever process went into generating this type of evidence."

> **Note: The internet search and the affidavits were clearly in anticipation of the prosecution, and were generated to prove an element of the crime. So the case is like those about certificates about the absence of a public record in the illegal re-entry prosecutions. And it is unlike the cases in which business records are authenticated by certificate under Rule 902(11), or in which electronic information is authenticated by certificate under Rule 902(13) and (14). In the latter cases, the underlying information being authenticated is not itself testimonial.**

**Records of sales at a pharmacy are business records and not testimonial under *Melendez-Diaz: United States v. Mashek,*** 606 F.3d 922 (8th Cir. 2010): The defendant was convicted of attempt to manufacture methamphetamine. At trial the court admitted logbooks from local pharmacies to prove that the defendant made frequent purchases of pseudoephedrine. The defendant argued that the logbooks were testimonial under *Melendez-Diaz,* but the court disagreed and affirmed his conviction. The court first noted that the defendant probably waived his confrontation argument because at trial he objected only on the evidentiary grounds of hearsay and Rule 403. But even assuming the defendant preserved his confrontation argument, the pseudoephedrine logs were kept in the ordinary course of business pursuant to Iowa law were business records under Federal Rule of Evidence 803(6) and so not testimonial. ***Accord, United States v. Ali,*** 616 F.3d 745 (8th Cir. 2010) (business records prepared by financial services company, offered as proof that tax returns were false, were not testimonial, as "*Melendez-Diaz* does not apply to the HSBC records that were kept in the ordinary course of business."); ***United States v. Wells,*** 706 F.3d 908 (8th Cir. 2013) (*Melendez-Diaz* did not preclude the admission of pseudoephedrine logs, because they constitute non-testimonial business records under Federal Rule of Evidence 803(6)).

**Rule 902(11) authentication was not testimonial: *United States v. Thompson,*** 686 F.3d 575 (8th Cir. 2012): To prove unexplained wealth in a drug case, the government offered and the court admitted a record from the Iowa Workforce Development Agency showing no reported wages for Thompson's social security number during 2009 and 2010. The record was admitted through an affidavit of self-authentication offered pursuant to Rule 902(11). The court found that the earnings records themselves were non-testimonial because they were prepared for

administrative purposes. As to the exhibit, the court stated that "[b]ecause the IWDA record itself was not created for the purpose of establishing or proving some fact at trial, admission of a certified copy of that record did not violate Thompson's Confrontation Clause rights." The court emphasized that "[b]oth the majority and dissenting opinions in *Melendez-Diaz* noted that a clerk's certificate authenticating a record --- or a copy thereof --- for use as evidence was traditionally admissible even though the certificate itself was testimonial, having been prepared for use at trial." It concluded that "[t]o the extent Thompson contends that a copy of an existing record or a printout of an electronic record constitutes a testimonial statement that is distinguishable from the non-testimonial statement inherent in the original business record itself, we reject this argument." ***See also United States v. Johnson***, 688 F.3d 494 (8th Cir. 2012) (certificates of authenticity presented under Rule 902(11) are not testimonial, and the notations on the lab report by the technician indicating when she checked the samples into and out of the lab did not raise a confrontation question because they were offered only to establish a chain of custody and not to prove the truth of any matter asserted).

**GPS tracking reports were properly admitted as non-testimonial business records: *United States v. Brooks,*** 715 F.3d 1069 (8th Cir. 2013): Affirming bank robbery and related convictions, the court rejected the defendant's argument that admission at trial of GPS tracking reports violated his right to confrontation. The reports recorded the tracking of a GPS device that was hidden by a teller in the money taken from the bank. The court held that the records were properly admitted as business records under Rule 803(6), and they were not testimonial. The court reasoned that the primary purpose of the tracking reports was to track the perpetrator in an ongoing pursuit --- not for use at trial. The court stated that "[a]lthough the reports ultimately were used to link him to the bank robbery, they were not *created* . . . to establish some fact at trial. Instead, the GPS evidence was generated by the credit union's security company for the purpose of locating a robber and recovering stolen money."

**Certificates attesting to Indian blood are not testimonial: *United States v. Rainbow,*** 813 F.3d 1097 (8th Cir. 2016): To prove a jurisdictional element of a charge that the defendants committed an assault within Indian Country, the government offered certificates of degree of Indian blood. The certificates certified that the respective defendants possessed the requisite degree of Indian blood. The defendants argued that, because the certificates were formalized and prepared for litigation, they were testimonial and so admitting them violated their right to confrontation. The certificates were prepared by a clerk of an officer of the BIA, and introduced at trial by the assistant supervisor of that office. The certificates reflected information about what was in records

regularly kept by the BIA. The court found that the certificates were not testimonial. It explained as follows:

> Although Archambault [the assistant supervisor] testified that he had these particular certificates prepared for his testimony, BIA officials regularly certify blood quantum for the purpose of establishing eligibility for federal programs available only to Indians. Archambault explained that his office maintained the records of tribal enrollment and of each member's blood quantum. He could look up an individual's enrollment status and blood quantum at any time—that information existed regardless of whether any crime was committed. Unlike the analysts in *Melendez–Diaz* and *Bullcoming,* the enrollment clerk here did not complete forensic testing on evidence seized during a police investigation, but instead performed the ministerial duty of preparing certificates based on information that was kept in the ordinary course of business. An objective witness would not necessarily know that the certificates would be used at a later trial, because certificates of degree of Indian blood are regularly used in the administration of the BIA's affairs. Simply put, the enrollment clerk prepared certificates using records maintained in the ordinary course of business by the Standing Rock Agency, and the BIA routinely issues certificates in the administration of its affairs. Thus, the certificates were admissible as non-testimonial business records.

**Prior conviction in which the defendant did not have the opportunity to cross-examine witnesses cannot be used in a subsequent trial to prove the facts underlying the conviction: *United States v. Causevic,*** 636 F.3d 998 (8th Cir. 2011): The defendant was charged with making materially false statements in an immigration matter --- specifically that he lied about committing a murder in Bosnia. To prove the lie at trial, the government offered a Bosnian judgment indicating that the defendant was convicted in absentia of the murder. The court held that the judgment was testimonial to prove the underlying facts, and there was no showing that the defendant had the opportunity to cross-examine the witnesses in the Bosnian court. The court distinguished proof of the *fact* of a conviction being entered (such as in a felon-firearm prosecution), as in that situation the public record is prepared for recordkeeping and not for a trial. In contrast the factual findings supporting the judgment were obviously generated for purposes of a criminal prosecution.

**Affidavit that birth certificate existed was testimonial: *United States v. Bustamante,*** 687 F.3d 1190 (9th Cir. 2012): The defendant was charged with illegal entry and the dispute was whether he was a United States citizen. The government contended that he was a citizen of the Philippines but could not produce a birth certificate, as the records had been degraded and were poorly kept. Instead it produced an affidavit from an official who searched birth records in the Philippines as part of the investigation into the defendant's citizenship by the Air Force 30 years earlier. The affidavit stated that birth records indicated that the defendant was born in the Philippines, and the affidavit purported to transcribe the information from the records. The court held that the affidavit was testimonial under *Melendez-Diaz* and reversed the conviction. The court distinguished this case from cases finding that birth records and certificates of authentication are not testimonial:

> Our holding today does not question the general proposition that birth certificates, and official duplicates of them, are ordinary public records "created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial." *Melendez-Diaz*, 129 S.Ct. at 2539-40. But Exhibit 1 is not a copy or duplicate of a birth certificate. Like the certificates of analysis at issue in *Melendez-Diaz*, despite being labeled a copy of the certificate, Exhibit 1 is "quite plainly" an affidavit. It is a typewritten document in which Salupisa testifies that he has gone to the birth records of the City of Bacolod, looked up the information on Napoleon Bustamante, and summarized that information at the request of the U.S. government for the purpose of its investigation into Bustamante's citizenship. Rather than simply authenticating an existing non-testimonial record, Salupisa created a new record for the purpose of providing evidence against Bustamante. The admission of Exhibit 1 without an opportunity for cross examination therefore violated the Sixth Amendment.

**Filed statement of registered car owner, made after impoundment, that he sold the car to the defendant, was testimonial: *United States v. Esparza,*** 791 F.3d 1067 (9th Cir. 2015): The defendant was arrested entering the United States with marijuana hidden in the gas tank and dashboard; the fact in dispute was the defendant's knowledge, and specifically whether he owned the car he was driving. At the time of arrest, the registered owner was Donna Hernandez. The government relied on two hearsay statements made in records filed with the DMV by Hernandez that she had sold the car to the defendant six days before the defendant's arrest. But these records were filed *after* the defendant was arrested and Hernandez had received a notice indicating that the car had been seized because it was used to smuggle marijuana into the country. Under the circumstances, the court found that the post-hoc records filed by Hernandez with the DMV were testimonial. The court noted that Hernandez did not create the record "for the routine

administration of the DMV's affairs." Nor was Hernandez merely "a private citizen who, in the course of a routine sale, simply notified the DMV of the transfer of her car. Instead, her car had already been seized for serious criminal violations, and she sent the transfer form to the DMV only after receiving a notice of seizure from [Customs and Border Protection]."

> **Note: This is an interesting case in which a statement was found testimonial in the absence of significant law enforcement involvement in the generation of the statement. As the Court has noted in *Bryant* and *Clark*, law enforcement involvement is critical to finding a statement testimonial, because a statement not made to or with law enforcement is unlikely to be sufficiently formal, and unlikely to be primarily motivated for use in a criminal trial. But at least it can be said that there is formality here --- Hernandez filed formal statements claiming that the ownership was transferred. And there was involvement of the state both in spurring her interest in filing (by sending her the notice) and in receiving her filing.**

**Government concedes a *Melendez-Diaz* error in admitting affidavit on the absence of a public record: *United States v. Norwood,*** 603 F.3d 1063 (9th Cir. 2010): In a drug case, the government sought to prove that the defendant had no legal source for the large amounts of cash found in his car. The trial court admitted an affidavit of an employee of the Washington Department of Employment Security, which certified that a diligent search failed to disclose any record of wages reported for the defendant in a three-month period before the crime. On appeal, the government conceded that the affidavit was erroneously admitted in light of the intervening decision in *Melendez-Diaz.* (The court found the error to be harmless).

**CNR is testimonial but a warrant of deportation is not: *United States v. Orozco-Acosta,*** 607 F.3d 1156 (9th Cir. 2010): In an illegal reentry case, the government proved removal by introducing a warrant of deportation under Rule 803(8), and it proved unpermitted reentry by introducing a certificate of non-existence of permission to reenter (CNR) under Rule 803(10). The trial was conducted and the defendant convicted before *Melendez-Diaz.* On appeal, the government conceded that introducing the CNR violated the defendant's right to confrontation because under *Melendez-Diaz* that record is testimonial. The court in a footnote agreed with the government's concession, stating that its previous cases holding that CNRs were not testimonial were "clearly inconsistent with *Melendez-Diaz*" because like the certificates in that case, a CNR is prepared solely for purposes of litigation, after the crime has been committed. In contrast, however, the court found that the warrant of deportation was properly admitted even under *Melendez-Diaz.* The court reasoned that "neither a warrant of removal's sole purpose nor even its primary purpose is

use at trial." It explained that a warrant of removal must be prepared in every case resulting in a final order of removal, and only a "small fraction of these warrants are used in immigration prosecutions." The court concluded that "*Melendez-Diaz* cannot be read to establish that the mere possibility that a warrant of removal --- or, for that matter, any business or public record --- could be used in a later criminal prosecution renders it testimonial under *Crawford*." The court found that the error in admitting the CNR was harmless and affirmed the conviction. ***See also United States v. Rojas-Pedroza,*** 716 F.3d 1253 (9th Cir. 2013) (adhering to *Orozco-Acosta* in response to the defendant's argument that it had been undermined by *Bullcoming* and *Bryant;* holding that a Notice of Intent in the defendant's A-File --- which apprises the alien of the determination that he is removable --- was non-testimonial because its "primary purpose is to effect removals, not to prove facts at a criminal trial."); ***United States v. Lopez,*** 762 F.3d 852 (9th Cir. 2014) (verification of removal, recording the physical removal of an alien across the border, is not testimonial; like a warrant of removal, it is made for administrative purposes and not primarily designed to be admitted as evidence at a trial; the only difference from a warrant of removal "is that a verification of removal is used to record the removal of aliens pursuant to expedited removal procedures, while the warrant of removal records the removal of aliens following a hearing before an immigration judge"; also holding that, for the same reasons, the verification of removal was admissible as a public record under Rule 803(8)(A)(ii), despite the Rule's apparent exclusion of law enforcement reports); ***United States v. Albino-Loe,*** 747 F.3d 1206 (9th Cir. 2014) (statements concerning the defendant's alienage in a notice of removal --- which is the charging document for deportation --- are not testimonial in an illegal entry case; the primary purpose of a notice of removal "is simply to effect removals, not to prove facts at a criminal trial"); ***United States v. Torralba-Mendia,*** 784 F.3d 652 (9th Cir. 2015) (I-213 Forms, offered to show that passengers detained during an investigation were deported, were admissible under the public records hearsay exception and were not testimonial: "The admitted record of a deportable alien contains the same information as a verification of removal: The alien's name, photograph, fingerprints, as well as the date, port and method of departure . . . .[T]he admitted forms are a ministerial, objective observation [and] Agents complete I-213 forms regardless of whether the government decides to prosecute anyone criminally.").

**Documents in alien registration file not testimonial: *United States v. Valdovinos-Mendez,*** 641 F.3d 1031 (9th Cir. 2011): In an illegal re-entry prosecution, the defendant argued that admission of documents from his A-file violated his right to Confrontation. The court held that the challenged documents a --- Warrant of Removal, a Warning to Alien ordered Deported, and the Order from the Immigration Judge --- were not testimonial. They were not prepared with the primary motive of use in a criminal prosecution, because at the time they were prepared the crime of illegal reentry had not occurred.

**Forms prepared by border patrol agents interdicting aliens found not testimonial: *United States v. Morales,*** 720 F.3d 1194 (9th Cir. 2013): In a prosecution for illegally transporting aliens, the trial court admitted Field 826 forms, prepared by Border Patrol agents who interviewed the aliens. The Field 826 form records the date and location of arrest, the funds found in the alien's possession, and basic biographical data about the alien, and also provides the alien options, including the making of a concession that the alien is illegally in the country and wishes to return home. The court of appeals rejected the defendant's argument that these forms were testimonial. It stated as follows:

> A Border Patrol agent uses the form in the field to document basic information, to notify the aliens of their administrative rights, and to give the aliens a chance to request their preferred disposition. The Field 826s are completed whether or not the government decides to prosecute the aliens or anyone else criminally. The nature and use of the Field 826 makes clear that its primary purpose is administrative, not for use as evidence at a future criminal trial. Even though statements within the form may become relevant to later criminal prosecution, this potential future use does not automatically place the statements within the ambit of 'testimonial.'

The court did find that the part of the report that contained information from the aliens was improperly admitted in violation of the *hearsay* rule. The Field 826 is a public record but information coming from the alien is not information coming from a public official. The court found the violation of the hearsay rule to be harmless error.

> **Note: The court appears to be wrong about the hearsay rule because statements coming from the alien would be admissible as party-opponent statements in a public record.**

**Return of Service, offered to prove that the Defendant had been provided with notice of a hearing on a domestic violence protection order, was not testimonial: *United States v. Fryberg,*** 854 F.3d 1126 (9th Cir. 2017): The defendant was convicted for possession of a firearm by a prohibited person. The prohibition was that he was subject to a domestic violence protection order. Critical to the validity of that order was that the defendant was served with notice of a hearing on a permanent protection order. As proof of that the defendant was served with that notice, the government offered the return of service by a law enforcement officer, completed on

the day that service was purportedly made. The court held that the return of service was admissible over a hearsay exception as a public record; it was not barred by the law enforcement prohibition of Rule 803(8) because it was a ministerial, non-adversarial record, proving only that service was made. The court further held that the return of service was admissible over a confrontation objection, because it was not testimonial. The court likened the return of service to the certificate of deportation upheld in *Orozco-Acosta, supra.* The court stated that the primary purpose for preparing the return of service was not to have it used as evidence in a prosecution but rather to inform the court "that the defendant had been served with notice of the hearing on the protection order, which enabled the hearing to proceed." At the time the notice was filed, no crime had yet occurred and so the return of service was not primarily prepared for the purpose of a criminal prosecution.

**Social Security application was not testimonial as it was not prepared under adversarial circumstances: *United States v. Berry***, 683 F.3d 1015 (9th Cir. 2012): The court affirmed the defendant's conviction for social security fraud for taking money paid for maintenance of his son while the defendant was a representative payee. The trial judge admitted routine Social Security Administration records showing that the defendant applied for benefits on behalf of the son. The defendant argued that an SSA application was tantamount to a police report and therefore the record was inadmissible under Rule 803(8), and also that its admission violated his right to confrontation. The court disagreed, reasoning that "a SSA interviewer completes the application as part of a routine administrative process" and such a record is prepared for each and every request for benefits. "No affidavit was executed in conjunction with preparation of the documents, and there was no anticipation that the documents would become part of a criminal proceeding. Rather, every expectation was that Berry would use the funds for their intended purpose." The court quoted *Melendez-Diaz* for the proposition that "[b]usiness and public records are generally admissible absent confrontation not because they qualify under an exception to the hearsay rules, but because --- having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial --- they are not testimonial." The court concluded as follows:

> [N]o reasonable argument can be made that the agency documents in this case were created solely for evidentiary purposes and/or to aid in a police investigation. Importantly, no police investigation even existed when the documents were created. * * * Because the evidence at trial established that the SSA application was part of a routine, administrative procedure unrelated to a police investigation or litigation, we conclude that the district court did not abuse its discretion by admitting the application under Fed.R.Evid. 803(8), and no constitutional violation occurred.

**Affidavit seeking to amend a birth certificate, prepared by border patrol agents for use at trial, was testimonial: *United States v. Macias,*** 789 F.3d 1011 (9th Cir. 2015): The defendant was arrested for illegal reentry but claimed that he had a California birth certificate and was a U.S. citizen. He was charged with illegal reentry and making a false claim of citizenship. During his trial he introduced a "delayed registration of birth" document issued by the State of California, and the jury deadlocked. After the trial, border patrol agents conducted an investigation into the defendant's place of birth, interviewing family members and reviewing family documents, and determined that he had been born in Mexico. They then attempted to correct the birthplace on the California document; pursuant to California law, they submitted sworn affidavits in an application to amend the California document. At the second trial, the government introduced the delayed registration as well as the amending affidavit. On appeal, the defendant argued that the amending affidavit was testimonial and its admission violated his right to confrontation. The court reviewed this claim for plain error because at trial the defendant's objection was on hearsay grounds only. The court found that the amending affidavit was clearly testimonial, as its sole purpose was to create evidence for the defendant's second trial. However, the court found that the plain error did not affect the defendant's substantial rights, because the government at trial introduced the defendant's Mexican birth certificate, as well as testimony from family members that the defendant was born in Mexico.

**Affidavits authenticating business records and foreign public records are not testimonial: *United States v. Anekwu,*** 695 F.3d 967 (9th Cir. 2012): In a fraud case, the government authenticated foreign public records and business records by submitting certificates of knowledgeable witnesses. This is permitted by 18 U.S.C.§ 3505 for foreign records in criminal cases. The court found that the district court did not commit plain error in finding that the certificates were not testimonial. The certificates were not themselves substantive evidence but rather a means to authenticate records. The court relied on the 10th Circuit's decision in *Yeley-Davis,* immediately below, and on the statement in *Melendez-Diaz* that certificates that do no more than authenticate non-testimonial records are not themselves testimonial.

**Records of cellphone calls kept by provider as business records are not testimonial, and Rule 902(11) affidavit authenticating the records is not testimonial: *United States v. Yeley-Davis,*** 632 F.3d 673 (10th Cir. 2011): In a drug case the trial court admitted cellphone records indicating that the defendant placed calls to coconspirators. The foundation for the records was provided by an affidavit of the records custodian that complied with Rule 902(11). The defendant

argued that both the cellphone records and the affidavit were testimonial. The court rejected both arguments and affirmed the conviction. As to the records, the court found that they were not prepared "simply for litigation." Rather, the records were kept for Verizon's business purposes, and accordingly were not testimonial. As to the certificate, the court relied on pre-*Melendez-Diaz* cases such as *United States v. Ellis, supra*, which found that authenticating certificates were not the kind of affidavits that the Confrontation Clause was intended to cover. The defendant responded that cases such as *Ellis* had been abrogated by *Melendez-Diaz*, but the court disagreed:

> If anything, the Supreme Court's recent opinion supports the conclusion in *Ellis.* * * * Justice Scalia expressly described the difference between an affidavit created to provide evidence against a defendant and an affidavit created to authenticate an admissible record: "A clerk could by affidavit authenticate or provide a copy of an otherwise admissible record, but could not do what the analysts did here: create a record for the sole purpose of providing evidence against a defendant." Id. at 2539. In addition, Justice Scalia rejected the dissent's concern that the majority's holding would disrupt the long-accepted practice of authenticating documents under Rule 902(11) and would call into question the holding in *Ellis*. See *Melendez-Diaz*, 129 S.Ct. at 2532 n. 1 ("Contrary to the dissent's suggestion, ... we do not hold, and it is not the case, that anyone whose testimony may be relevant in establishing the ... authenticity of the sample ... must appear in person as part of the prosecution's case."); see also id. at 2547 (Kennedy, J., dissenting) (expressing concern about the implications for evidence admitted pursuant to Rule 902(11) and future of *Ellis*). The Court's ruling in *Melendez-Diaz* does not change our holding that Rule 902(11) certifications of authenticity are not testimonial.

**The court found *Yeley-Davis* "dispositive" in *United States v. Brinson,*** 772 F.3d 1314 (10th Cir. 2014), in which the court admitted a certificate of authenticity of credit card records. The court again distinguished *Melendez-Diaz* as a case concerned with affidavits showing the results of a forensic analysis --- whereas the certificate of authenticity "does not contain any 'analysis' that would constitute out-of-court testimony. Without that analysis, the certificate is simply a non-testimonial statement of authenticity." ***See also United States v. Keck,*** 643 F.3d 789 (10th Cir. 2011): Records of wire-transfer transactions were not testimonial because they "were created for the administration of Moneygram's affairs and not the purpose of establishing or proving some fact at trial. And since the wire-transfer data are not testimonial, the records custodian's actions in preparing the exhibits [by cutting and pasting the data] do not constitute a Confrontation Clause violation."

**Notation on a fax attaching documents sent to law enforcement was not testimonial:** ***United States v. Stegman,*** 873 F.3d 1215 (10th Cir. 2017): In a tax fraud prosecution, the government introduced the defendant's records, as sent by the defendant's accountant. The defendant objected that the fax cover sheet transmitting the document contained a notation made by the accountant that was potentially incriminating. The court found that the notation was not testimonial. It explained that the accountant's notation was "cooperative and informal in nature and there is no indication that [the accountant] would have reasonably expected the notation to be used prosecutorially."

**Immigration forms containing biographical data, country of origin, etc. are not testimonial:** ***United States v. Caraballo,*** 595 F.3d 1214 (11th Cir. 2010): In an alien smuggling case, the trial court admitted I-213 forms prepared by an officer who found aliens crammed into a small room in a boat near the shore of the United States. The forms contained basic biographical information, and were used at trial to prove that the persons were non-citizens and not admittable. The defendant argued that the forms were inadmissible hearsay and also testimonial. The court of appeals found no error. On the hearsay question, the court held that the forms were properly admitted as public records --- the exclusion of law enforcement records in Rule 803(8) did not apply because the forms were routine and nonadversarial documents requested from every alien entering the United States. Nor were the forms testimonial, even after *Melendez-Diaz.* The court distinguished *Melendez-Diaz* in the following passage:

> Like a Warrant of Deportation * * * (and unlike the certificates of analysis in *Melendez-Diaz*), the basic biographical information recorded on the I-213 form is routinely requested from every alien entering the United States, and the form itself is filled out for anyone entering the Untied States without proper immigration papers. * * * Rose gathered that biographical information from the aliens in the normal course of administrative processing at the Pembroke Pines Border Patrol Station in Pembroke Pines, Florida. * * *
>
> The I-213 form is primarily used as a record by the INS for the purpose of tracking the entry of aliens into the United States. This routine, objective cataloging of unambiguous biographical matters becomes a permanent part of every deportable/inadmissible alien's A-File. It is of little moment that an incidental or secondary use of the interviews underlying the I-213 forms actually furthered a prosecution. The Supreme Court has instructed us to look only at the *primary* purpose of the law enforcement officer's questioning in determining whether the information elicited is testimonial. The district court properly ruled that the primary purpose of Rose's questioning of the aliens was to elicit routine biographical information that is required of every foreign entrant for the proper administration of our immigration laws and policies. The district court did not

violate Caraballo's constitutional rights in admitting the smuggled aliens's redacted I-213 forms.

***See also United States Santos,*** 947 F.3d 711 (11th Cir. 2020) (Information entered on a naturalization form (Form N-400 application), was not testimonial, because preparing such a record is a matter of administrative routine, for the primary purpose of determining the applicant's eligibility for naturalization).

**Summary charts of admitted business records is not testimonial: *United States v. Naranjo,*** 634 F.3d 1198 (11th Cir. 2011): In a prosecution for concealing money laundering, the defendant argued that his confrontation rights were violated when the government presented summary charts of business records. The court found no error. The bank records and checks that were the subject of the summary were business records and "[b]usiness records are not testimonial." And "[s]ummary evidence also is not testimonial if the evidence underlying the summary is not testimonial."

**Surveillance tapes of ATM transactions are business records and so not testimonial; submitting still frames from the videos is not hearsay and so not testimonial; and foundation by certificate is permissible under *Melendez-Diaz: United States v. Clotaire,*** 963 F.3d 1288 (11th Cir. 2020): Identification of the defendant as having made ATM transactions was essential to the prosecution. The government admitted still photos taken from the ATM surveillance tapes; the foundation was through a certificate under Rule 902(11). The defendant challenged, on confrontation grounds, the extraction of still photos and the certification. (As to the video surveillance itself, the court found that it was a business record and non-testimonial).

As to the extraction of still images, the court found that they were business records as well, as they were just a change in format. But the defendant argued that the process of extracting the still frames was for purposes of litigation and therefore testimonial. The court rejected this argument, finding that the surveillance photos themselves were not statements at all, and there was nothing to indicate the photos were somehow "enhanced in a manner that turned them into the testimony of the bank employee who pulled them." It concluded that "[i]n her role as photo processor, Moran was doing nothing but getting the clearest image; she made no assertion about what the image showed or who it might be. We cannot see how the photo itself or the person who pulled it was intending to assert anything." The court further found that the Rule 902(11) certificate was not testimonial as it merely authenticated records that were not themselves testimonial.

**Database of purchases of controlled substances constitutes business records and is not testimonial: *United States v. Ruan,*** 966 F.3d 1101 (11th Cir. 2020): The State of Alabama established a database of all controlled substances dispensed in the state; each doctor or pharmacist is required to report the patient's name, dosage, etc. Law enforcement has access to the database. At his trial for dispensing controlled substances without a legitimate medical reason, the defendant objected to admission of entries from the Alabama database. The court found that the entries were admissible as business records under Rule 803(6). The defendant contended that the records were testimonial, because the database assisted law enforcement in prosecuting violators of controlled substances laws. But the court noted that a statement is testimonial only when "its primary purpose is to establish or prove past events potentially relevant to later criminal prosecution . . . and when the statement is formal, akin to affidavits, depositions, prior testimony, or confessions." Under this narrow test, the database entries were not testimonial, first, "because they are business records." Second, even if they were not business records, the entries are not testimonial because "the fact that pharmacists may be aware when they input the data that law enforcement also has access to the database if needed during an investigation does not transform the data entry into the type of formal statement required for testimonial evidence." [Perhaps the better point is made in *Towns, supra*: controlled substances databases are primarily for purposes of regulation, deterrence, and prevention, as opposed to prosecution.]

As to the certification of the business record, the court found that the defendant's contention was "foreclosed by *Melendez-Diaz."* The court explained that in *Melendez-Diaz*, "the Supreme Court distinguished between authentication and creation of a record." The court "join[ed] other circuits in concluding that business records certifications are not testimonial."

**Admission of a summary of non-testimonial records does not violate the Confrontation Clause: *United States v. Melgen,*** 967 F.3d 1250 (11th Cir. 2020): In a trial on charges of Medicaid fraud, the government offered a summary chart comparing the defendant's billing to peer physicians. The billing records were not testimonial, but the defendant argued that he had a right under the Confrontation Clause to cross-examine those members of the prosecution team who prepared the chart, in order to challenge the criteria they used to make the exhibit. The court rejected this argument. The court noted that prosecutors "routinely make decisions about which evidence they believe is relevant to establishing a particular point --- decisions that may include, for example, which witnesses to call, or, as here, which summaries to enter into evidence." But this process of selection does not make prosecutors a witness against the defendant for purposes of the Confrontation Clause.

**Autopsy reports prepared as part of law enforcement are found testimonial under *Melendez-Diaz: United States v. Ignasiak,*** 667 F.3d 1217 (11th Cir. 2012): In a prosecution against a doctor for health care fraud and illegally dispensing controlled substances, the court held that autopsy reports of the defendant's former patients were testimonial under *Melendez-Diaz.* The court relied heavily on the fact that the autopsy reports were prepared by an arm of law enforcement. The court reasoned as follows:

> We think the autopsy records presented in this case were prepared "for use at trial." Under Florida law, the Medical Examiners Commission was created and exists within the Department of Law Enforcement. Fla. Stat. 406.02. Further, the Medical Examiners Commission itself must include one member who is a state attorney, one member who is a public defender, one member who is sheriff, and one member who is the attorney general or his designee, in addition to five other non-criminal justice members. Id. The medical examiner for each district "shall determine the cause of death" in a variety of circumstances and "shall, for that purpose, make or have performed such examinations, investigations, and autopsies as he or she shall deem necessary or as shall be requested by the state attorney." Fla. Stat. 406.11(1). Further, any person who becomes aware of a person dying under circumstances described in section 406.11 has a duty to report the death to the medical examiner. Failure to do so is a first degree misdemeanor.
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> * * *
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> In light of this statutory framework, and the testimony of Dr. Minyard, the autopsy reports in this case were testimonial: "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." As such, even though not all Florida autopsy reports will be used in criminal trials, the reports in this case are testimonial and subject to the Confrontation Clause.

**Note: The Court's test for testimoniality is broader than that used by the Supreme Court. The Supreme Court finds statements to be testimonial only when they are *primarily motivated* to be used in a criminal prosecution. The 11th Circuit's "reasonable anticipation" test would cover many more statements, and accordingly the court's decision in *Ignasiak* is subject to question.**

## State of Mind Statements

**Statement admissible under the state of mind exception is not testimonial: *Horton v. Allen*,** 370 F.3d 75 (1st Cir. 2004): Horton was convicted of drug-related murders. At his state trial, the government offered hearsay statements from Christian, Horton's accomplice. Christian had told a friend that he was broke; that he had asked a drug supplier to front him some drugs; that the drug supplier declined; and that he thought the drug supplier had a large amount of cash on him. These statements were offered under the state of mind exception to show the intent to murder and the motivation for murdering the drug supplier. The court held that Christian's statements were not "testimonial" within the meaning of *Crawford*. The court explained that the statements "were not ex parte in-court testimony or its equivalent; were not contained in formalized documents such as affidavits, depositions, or prior testimony transcripts; and were not made as part of a confession resulting from custodial examination. . . . In short, Christian did not make the statements under circumstances in which an objective person would reasonably believe that the statement would be available for use at a later trial."

## Testifying Declarant

**Admission of prior consistent statements under Rule 801(d)(1)(B)(ii), even though testimonial, did not violate the Confrontation Clause: *United States v. Purcell,*** 967 F.3d 159 (2nd Cir. 2020): The defendant was charged with promoting prostitution. One of the victims made accusatory statements to investigators. The victim testified at trial, and was cross-examined about inconsistent statements she had made. On redirect the trial court allowed the admission of the initial accusatory statements, as they helped to place the inconsistencies in context and properly rehabilitated the witness. The court found that the prior statements were properly admitted for their truth under Rule 801(d)(1)(B)(ii), which was added by a 2014 amendment. The defendant argued that admitting the prior consistent statements violated his right to confrontation because they were made to law enforcement and so were testimonial. But the court found no confrontation violation, explaining as follows:

> Royer's testimony regarding Wood's statements to the State College police did not implicate Purcell's Confrontation rights, irrespective of whether those statements were "testimonial," because Wood testified at trial. Purcell had a full opportunity to confront the declarant, Wood, and to cross-examine her regarding her out-of-court statements to the State College police.

**Cross-examination sufficient to admit prior statements of the witness that were testimonial: *United States v. Acosta,*** 475 F.3d 677 (5th Cir. 2007): The defendant's accomplice testified at his trial, after informing the court that he did not want to testify, apparently because of threats from the defendant. After answering questions about his own involvement in the crime, he refused on direct examination to answer several questions about the defendant's direct participation in the crime. At that point the government referenced statements made by the accomplice in his guilty plea. On cross-examination, the accomplice answered all questions; the questioning was designed to impeach the accomplice by showing that he had a motive to lie so that he could receive a more lenient sentence. The government then moved to admit the accomplice's statements made to qualify for a safety valve sentence reduction --- those statements directly implicated the defendant in the crime. The court found that statements made pursuant to a guilty plea and to obtain a safety valve reduction were clearly testimonial. However, the court found no error in admitting these statements, because the accomplice was at trial subject to cross-examination. The court noted that the accomplice admitted making the prior statements, and answered every question he was asked on cross-examination. While the cross-examination did not probe into the underlying facts of the crime or the accomplice's previous statements implicating the defendant, the court noted that "Acosta could have probed either of these subjects on cross-

examination." The accomplice was therefore found sufficiently subject to cross-examination to satisfy the Confrontation Clause. ***See also, United States v. Smith,*** 822 F.3d 755 (5th Cir. 2016) (defendant's accomplice gave testimonial statements to a police officer, but admission of those statements did not violate the right to confrontation because the accomplice testified at trial subject to cross-examination).

**Certificate of non-existence of a record, while testimonial, did not violate the Confrontation Clause because the person who authored and signed the certificate testified and could have been cross-examined: *United States v. Arellano-Banuelos,*** 927 F.3d 355 (5th Cir. 2019): In an illegal reentry prosecution, the government offered a certificate of the non-existence of a record permitting reentry. The defendant argued that the certificate was testimonial, and the court conceded that it had found such a certificate testimonial after *Melendez-Diaz,* in *United States v. Martinez-Rios,* 595 F.3d 581 (5th Cir. 2010), because the affidavit was prepared solely to prove a fact in a criminal prosecution. But the court held that the Confrontation Clause was not violated in this case because the person who authored and signed the certificate was presented at trial, and testified to the search process. The defendant did not cross-examine the witness, but the witness was available for cross-examination, which is all that the Constitution requires.

***Crawford*** **inapplicable where hearsay statements are made by a declarant who testifies at trial: *United States v. Kappell,*** 418 F.3d 550 (6th Cir. 2005): In a child sex abuse prosecution, the victims testified and the trial court admitted a number of hearsay statements the victims made to social workers and others. The defendant claimed that the admission of hearsay violated his right to confrontation under *Crawford.* But the court held that *Crawford* by its terms is inapplicable if the hearsay declarant is subject to cross-examination at trial. The defendant complained that the victims were unresponsive or inarticulate at some points in their testimony, and therefore they were not subject to effective cross-examination. But the court found this claim foreclosed by *United States v. Owens,* 484 U.S. 554 (1988). Under *Owens*, the Constitution requires only an opportunity for cross-examination, not cross-examination in whatever way the defendant might wish. The defendant's complaint was that his cross-examination would have been more effective if the victims had been older. "Under *Owens,* however, that is not enough to establish a Confrontation Clause violation."

**Admission of testimonial statements does not violate the Confrontation Clause because declarant testified at trial --- even though the declarant did not recall making the statements: *Cookson v. Schwartz,*** 556 F.3d 647 (7th Cir. 2009): In a child sex abuse prosecution, the trial court admitted the victim's hearsay statements accusing the defendant. These statements were testimonial. The victim then testified at trial, describing some incidents perpetrated by the defendant. But the victim could not remember making any of the hearsay statements that had previously been admitted into evidence. The court found no error in admitting the victim's testimonial hearsay, because the victim had been subjected to cross-examination at trial. The defendant argued that the victim was in effect unavailable because she lacked memory about the statements. But the court found this argument was foreclosed by *United States v. Owens,* 484 U.S. 554 (1988). The court noted that the defendant in this case was better off than the defendant in *Owens* because the victim in this case "could remember the underlying events described in the hearsay statements." ***See also United States v. Al-Alawi,*** 873 F.3d 592 (7th Cir. 2017) (admission of the victim's videotaped statement to police, accusing the defendant of sexual abuse, did not violate the Confrontation Clause, because the victim testified at trial: "When the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements.").

**Witness's reference to statements made by a victim in a forensic report did not violate the Confrontation Clause because the declarant testified at trial: *United States v. Charbonneau,*** 613 F.3d 860 (8th Cir. 2010): Appealing from child-sex-abuse convictions, the defendant argued that it was error for the trial court to allow the case agent to testify that he had conducted a forensic interview with one of the victims and that the victim identified the perpetrator. The court recognized that the statements by the victim may have been testimonial. But in this case the victim testified at trial. The court declared that "*Crawford* did not alter the principle that the Confrontation Clause is satisfied when the hearsay declarant, here the child victim, actually appears in court and testifies in person."

**Statements of interpreter do not violate the right to confrontation where the interpreter testified at trial: *United States v. Romo-Chavez*,** 681 F.3d 955 (9th Cir. 2012): The court held that even if the translator of the defendant's statements could be thought to have served as a witness against the defendant, there was no confrontation violation because the translator testified at trial. "He may not have remembered the interview, but the Confrontation Clause includes no guarantee that every witness called by the prosecution will refrain from giving testimony that is marred by forgetfulness, confusion, or evasion. All the Confrontation Clause requires is the ability to cross-examine the witness about his faulty recollections."

**Statements to police officers implicating the defendant in the conspiracy are testimonial, but no confrontation violation because the declarant testified: *United States v. Allen,*** 425 F.3d 1231 (9th Cir. 2005): The court held that a statement made by a former coconspirator to a police officer, after he was arrested, identifying the defendant as a person recruited for the conspiracy, was testimonial. There was no error in admitting this statement, however, because the declarant testified at trial and was cross-examined. ***See also United States v. Lindsey,*** 634 F.3d 541 (9th Cir. 2011) ("Although Gibson's statements to Agent Arbuthnot qualify as testimonial statements, they do not offend the Confrontation Clause because Gibson himself testified at trial and was cross-examined by Lindsey's counsel.").

**Admitting hearsay accusation did not violate the right to confrontation where the declarant testified and was subject to cross-examination about the statement: *United States v. Pursley*,** 577 F.3d 1204 (10th Cir. 2009): A victim of a beating identified the defendant as his assailant to a federal marshal. That accusation was admitted at trial as an excited utterance. The victim testified at trial to the underlying event, and he also testified that he made the accusation, but he did not testify on either direct or cross-examination *about* the statement. The defendant argued that admitting the hearsay statement violated his right to confrontation. The court assumed arguendo that the accusation was testimonial --- even though it had been admitted as an excited utterance. But even if it was testimonial hearsay, the defendant's confrontation rights were not violated because he had a full opportunity to cross-examine the victim about the statement. The court stated that the defendant's "failure to seize this opportunity demolishes his Sixth Amendment claim." The court observed that the defendant had a better opportunity to confront the victim "than defendants have had when testifying declarants have indicated that they cannot remember their out-of-court statements. Yet, courts have found no Confrontation Clause violation in that situation."

**Statement to police admissible as past recollection recorded is testimonial but admission does not violate the right to confrontation: *United States v. Jones***, 601 F.3d 1247 (11th Cir. 2010): Affirming firearms convictions, the court held that the trial judge did not abuse discretion in admitting as past recollection recorded a videotaped police interview of a 16-year-old witness who sold a gun to the defendant and rode with him to an area out of town where she witnessed the defendant shoot a man. The court also rejected a Confrontation Clause challenge. Even though the videotaped statement was testimonial, the declarant testified at trial --- as is

necessary to qualify a record under Rule 803(5) --- and was subject to unrestricted cross-examination.

## Unavailability

**Admitting a video deposition of a deported witness violated the Confrontation Clause because the government did not establish that the witness was unavailable: *United States v. Burden,*** 934 F.3d 675 (D.C. Cir. 2019): In a trial for an arms control violation, the government offered a video deposition of a witness who was subsequently deported. The defendant had an opportunity to cross-examine the witness at the deposition, but the court nonetheless found a violation of the Confrontation Clause, because the government had not shown that the witness was unavailable to testify at the trial. The court stated that where "the government itself bears some of the responsibility for the difficulty of procuring the witness, the government will have to make greater exertions to satisfy the standard of good-faith and reasonable efforts that it would have if it had not played any role. Failing to factor the government's own contribution to the witness's absence into the Confrontation Clause analysis would warp the government's incentives." Satisfying the good-faith standards requires the government to make reasonable efforts to ensure the witness's presence *before* the witness is deported. Here, the government's efforts to procure the witness did not begin until after he was deported. The government "did not give [the witness] a subpoena, offer to permit and pay for him to remain in the U.S. or to return here from Thailand, obtain his commitment to appear, confirm his contact information, or take any other measures."

**Admitting deposition testimony violated the defendant's right to confrontation because the government did not sufficiently establish unavailability: *United States v. Foster,*** 910 F.2d 813 (5th Cir. 2018): Reversing a conviction for transporting aliens, the court found that admitting the videotaped depositions of the deported aliens violated the defendant's right to confrontation. Had the defendant's been unavailable, there would have been no confrontation violation, but the court found that the government had not made a "good faith and reasonable" effort to procure their presence for trial. The government deported the aliens, and while that may be consistent with good faith, the government "made no attempt to verify or confirm the authenticity or workability of the witnesses' contact information, or offer the option of remaining in the United States pending Foster's trial." More importantly "the government made no attempt to remain in contact with either witness."

**Admitting deposition testimony did not violate the defendant's right to confrontation where the declarant was properly found unavailable: *United States v. Porter,*** 886 F.3d 562 (6th Cir. 2018): The defendant objected to the trial court's decision to allow a witness to be deposed. He argued that the witness was available to testify at trial. The court found that the trial court did not err in finding that the witness would not be available to testify at trial. The witness had stage IV cancer and was unable to get out of bed. The court noted that the doctor's letter to the court "was specific as to the nature of Miller's illness and very clearly opined that Miller's health would be jeopardized if she were required to testify at trial." The court concluded that "because Porter was able to, and did, cross-examine Miller at her deposition, and because the government sufficiently demonstrated he unavailability to testify at trial, no Confrontation Clause violation occurred."

# Waiver

**Waiver found where defense counsel's cross-examination opened the door for testimonial hearsay:** ***United States v. Lopez-Medina,*** 596 F.3d 716 (10th Cir. 2010): In a drug trial, an officer testified about the investigation that led to the defendant. On cross-examination, defense counsel inquired into the information that the officer received from an informant --- presumably to discredit the basis for the police having targeted the defendant. The trial court then on redirect allowed the government to question the officer and elicit some of the accusations about the defendant that the informant's had made to the officer. The court found no error. It recognized that "a confidential informant's statements to a law enforcement officer are clearly testimonial." But the court concluded that the defendant "opened the door to further questioning of Officer Johnson regarding the information he received from the confidential informant. Where, as here, defense counsel purposefully and explicitly opens the door on a particular (and otherwise inadmissible) line of questioning, such conduct operates as a limited waiver allowing the government to introduce further evidence on that same topic." The court observed that a waiver would not be found if there was any indication that the defendant had disagreed with defense counsel's decision to open the door. But there was no indication of dissent in this case. ***Accord, United States v. Acosta,*** 475 F.3d 677 (5th Cir. 2007) (waiver found where defense counsel opened the door to testimonial hearsay). ***Contra, and undoubtedly wrong, United States v. Cromer,*** 389 F.3d 662, 679 (6th Cir. 2004) ("the mere fact that Cromer may have opened the door to the testimonial, out-of-court statement that violated his confrontation right is not sufficient to erase that violation").


September 30, 2020

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

Re: Amending Federal Rule of Evidence 702

**BAYER CORPORATION'S COMMENTS TO THE RULE 702 SUBCOMMITTEE OF THE ADVISORY COMMITTEE ON EVIDENCE RULES**

September 30, 2020

Over two hundred expert admissibility rulings decided in federal courts since January 2015 incorrectly state that "the factual basis of an expert opinion goes to the credibility of the testimony, not the admissibility[.]"[1] More than 150 federal gatekeeping decisions issued since January 2015 incorporate the similar problematic statement 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[.]"[2] This widespread misunderstanding of Rule 702's standards has directly impacted Bayer Corporation and the Bayer family of companies ("Bayer"). Bayer appreciates the opportunity to submit these Comments to the Advisory Committee on Evidence Rules (the "Committee") and its Rule 702 Subcommittee (the "Subcommittee"), and urges an amendment to Rule 702 that clarifies the courts' gatekeeping responsibility.

Bayer has observed great inconsistency in how courts assess proposed opinion testimony. The varied application of what is nominally a uniform national standard demonstrates confusion about the admissibility determinations that courts must make. In recent years, Bayer has seen judges fail to apply Rule 702(b)'s requirement that the court must find an expert's opinion has a sufficient factual basis and Rule 702(d)'s direction that the court must conclude the expert has reasonably applied the principles and methods to the facts of the case. Bayer has also experienced courts not employing the applicable burden of production, in which the expert's

[1] A September 14, 2020 Westlaw search for the quoted phrase identified 212 federal cases issued in this period. The referenced statement originated in *Loudermill v. Dow Chem. Co*., 863 F.2d 566, 570 (8th Cir. 1988).

[2] The quoted language was first stated in *Viterbo v. Dow Chem. Co*., 826 F.2d 420, 422 (5th Cir. 1987). A Westlaw search performed on September 14, 2020 returned 152 federal cases decided after 2014 that reiterate this statement.

sponsor must establish by a preponderance of the evidence that the opinion testimony meets the Rule 702 requirements. Stated simply, Bayer has frequently been party to cases where court gatekeeping departs from the intent of Rule 702.[3] Such erroneous rulings may have enormous repercussions.

In Bayer's view, rulings that inadequately evaluate a proffered expert's opinions do not indicate a refusal to accept the Rule 702 standard. Rather, they show that courts may genuinely misunderstand their gatekeeping role in determining the admissibility of expert testimony. Often, the confusion stems from formulations passed down by prior rulings that improperly characterize the standard of admissibility or do not align with Rule 702's requirements. Regardless of the source of the misunderstanding, courts need direction on gatekeeping practices that are consistent with the intent of Rule 702. Only an amendment of Rule 702 will have the weight to displace problematic formulations that have become entrenched and establish a consistent understanding of how courts should determine the admissibility of opinion testimony. Bayer also urges the Committee to address the problem of overstatement in a manner that reaches civil cases.

## A. Too Many Courts Misunderstand Rule 702's Expert Admissibility Standard

### 1. Incorrect rulings influence courts to ignore the expert's factual basis and methodological application in determining admissibility

The numerous decisions incorrectly declaring that the factual basis of an expert's opinion, or the expert's application of the principles and methods to the facts of the case, involve only the weight of the opinion evidence, not its admissibility, have created a great deal of confusion about the gatekeeping responsibility. In Bayer's experience, inaccurate statements in prior decisions often mislead district courts about what assessments the court must make. As a

[3] Bayer understands, based on a number of statements issued by the Advisory Committee and the Reporter, that Rule 702 intends that district judges as a matter of admissibility determine by a preponderance of the evidence that proffered expert testimony meets each of the elements set forth in the text of the rule. *See* Advisory Committee Note to 2000 Amendments to Rule 702 ("The trial judge in all cases of proffered expert testimony must find that it is properly grounded, well-reasoned, and not speculative before it can be admitted."); Hon. Fern M. Smith, Report of the Advisory Committee on Evidence Rules (May 1, 1999) at 5, *in* ADVISORY COMMITTEE ON EVIDENCE RULES OCTOBER 1999 AGENDA BOOK 52 (1999) ("The proposed amendment to Evidence Rule 702 . . . requires a showing of reliable methodology and sufficient basis, and provides that the expert's methodology must be applied properly to the facts of the case."). *See also* Memorandum from Daniel J. Capra, Reporter, Advisory Comm. on Evidence Rules, to Advisory Comm. on Evidence Rules, *Possible Amendment to Rule 702* (Oct. 1, 2019) at 1 *in* ADVISORY COMMITTEE ON EVIDENCE RULES OCTOBER 2019 AGENDA BOOK 131 (2019) (Rule 702 "reliability requirements are questions for the court, to be decided by a preponderance of the evidence."); Memorandum from Daniel J. Capra, Reporter, Advisory Comm. on Evidence Rules, to Advisory Comm. on Evidence Rules, *Possible Amendments to Rule 702* (April 1, 2019) at 23 *in* ADVISORY COMMITTEE ON EVIDENCE RULES MAY 2019 AGENDA BOOK 95 (2019)("The Rule provides that the requirements of sufficient basis and reliable application must be treated as questions of admissibility, and so must be established by a preponderance of the evidence under Rule 104(a)."); Memorandum from Daniel J. Capra, Reporter, Advisory Comm. on Evidence Rules, to Advisory Comm. on Evidence Rules, *Forensic Evidence, Daubert and Rule 702* (April 1, 2018) at 43 *in* ADVISORY COMMITTEE ON EVIDENCE RULES APRIL 2018 AGENDA BOOK 49 (2018)("In sum, the 2000 amendment specifies that sufficient basis and application of method are admissibility requirements – the judge must be satisfied by a preponderance of the evidence that the expert has relied on sufficient facts or data, and that the expert has reliably applied the methods.").

result, many courts do not recognize that Rule 702 requires the judge to scrutinize and determine, as a matter of admissibility, whether an expert has a sufficient factual basis to support the proffered opinions and has reliably applied the methodology to the circumstances at issue in the case.

Bayer has first-hand experience that incorrect caselaw descriptions of the admissibility analysis distract judges from the actual Rule 702 requirements. One example arose in litigation involving Bayer's Mirena IUD contraceptive system. In two of the cases in that litigation, Bayer challenged the admissibility of proffered specific causation opinion testimony due to the expert's inadequate factual basis for concluding that the Mirena device played a role in the development of the plaintiffs' condition.[4] Although the court initially noted Rule 702(b)'s requirement that an expert's opinions are admissible only if "based on sufficient facts or data," an Eighth Circuit ruling convinced the judge that the adequacy of the expert's factual foundation related only to the weight, not the admissibility of, the testimony.[5] The court quoted *Loudermill v. Dow Chem. Co*.,[6] which pre-dates both the current version of Rule 702 and the Supreme Court's *Daubert*[7] ruling, for its foundational perspective of the court's gatekeeping role:

> 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.[8]

This inaccurate Eighth Circuit directive induced the court to shift its duty onto Bayer, stating "[i]t is Defendants[']<u> responsibility to examine the factual basis of Dr. Tang's opinions at trial through cross-examination</u> and through the presentation of contrary evidence[.]"[9] The court, once again citing to *Loudermill*, admitted the challenged expert testimony without analyzing whether sufficient facts or data supported her opinions. This court simply did not grasp the scope of its gatekeeping function.

Bayer saw similar confusion in the MDL proceeding concerning Yasmin and Yaz. In that litigation, Bayer sought to exclude certain case-specific opinions for several reasons, including the expert's inadequate factual basis.[10] Although the court recited the elements of

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[4] Bayer asserted its motions to exclude in multiple cases, and the court issued nearly identical decisions on the same day in *Miller v. Bayer Healthcare Pharms. Inc*., No. 4:14-CV-00652-SRB, 2016 WL 9047152, at *1 (W.D. Mo. Dec. 5, 2016) and *Sellers v. Bayer Healthcare Pharms. Inc*., No. 4:14-CV-00954-SRB, 2016 WL 9049599 at *1 (W.D. Mo. Dec. 5, 2016).

[5] *Miller*, 2016 WL 9047152, at *1 - *2; *Sellers*, 2016 WL 9049599 at *1 - *2.

[6] 863 F.2d 566, 570 (8th Cir. 1988).

[7] *Daubert v. Merrell Dow Pharms., Inc*., 509 U.S. 579 (1993).

[8] *Miller*, 2016 WL 9047152, at *2; *Sellers*, 2016 WL 9049599 at *2.

[9] *Miller*, 2016 WL 9047152, at *2 (emphasis added); *Sellers*, 2016 WL 9049599 at *2 (same statement; emphasis added).

[10] *In re Yasmin and Yaz (Drospirenone) Marketing, Sales Practices and Product Liability Litigation*, No. 3:09-MD-02100-DRH-PMF, 2011 WL 6732245, at *1, *12 (S.D. Ill. Dec. 16, 2011).

Rule 702, it ruled that judicial gatekeeping focuses only on the expert's methodology. The court drew on the following passage from *Smith v. Ford Motor Co.*,[11] another decision that pre-dates the current Rule 702, to conclude that sufficiency of the expert's factual basis is not an admissibility consideration:

> 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.[12]

Having dismissed the notion that an expert's insufficient factual foundation will render opinion testimony inadmissible, the court addressed only the experts' qualifications and methodological reliability.[13] This court took the same approach in another ruling it issued the same day.[14] This time the court relied on *Walker v. Soo Line R. Co.*[15] to hold that the court's gatekeeping role is "limited to determining whether expert testimony is pertinent to an issue in the case and whether the methodology underlying that testimony is sound."[16] The court allowed the disputed testimony, dismissing without analysis Rule 702(b) concerns stating "[t]he defendant is welcome to cross examine the witnesses and challenge the bases for their conclusions[.]"[17]

Another example of caselaw misleading a court about its duty to evaluate the sufficiency of an expert's factual basis occurred during the Xarelto MDL litigation. In an initial trial case, Bayer moved to exclude opinion testimony describing the state of mind of both Bayer and the FDA. Bayer asserted that the proffered experts lacked sufficient facts to support their opinions. In rejecting Bayer's motions, the court recognized that "Rule 702 of the Federal Rules of Evidence governs the admissibility of expert testimony,"[18] but relied instead on the Fifth Circuit case *Moore v. Ashland Chemical Inc.*[19] to conclude that it should examine the expert's methodology exclusively in determining admissibility:

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[11] 215 F.3d 713, 719 (7th Cir. 2000).

[12] *In re Yasmine and Yaz*, 2011 WL 6732245, at *3.

[13] *See id*. at *13:

> The Court finds Drs. Botney, Disciullo, Rinder, and Sehizadeh are all qualified to opine as to the statements for which Bayer seeks exclusion. Further, the methods underlying their opinions are reliable. Accordingly, Bayer's motion to exclude certain statements of plaintiff's experts pursuant to Fed.R.Evid. 702 and *Daubert* is DENIED**.**

[14] *In re Yasmin and Yaz (Drospirenone) Marketing, Sales Prac. and Prod. Liab. Litig.*, No. 3:09-MD-02100-DRH-PMF, 2011 6728885, at *3 (S.D. Ill. Dec. 16, 2011).

[15] 208 F.3d 581, 589-90 (7th Cir. 2000).

[16] *In re Yasmin and Yaz*, 2011 6728885, at *3.

[17] *Id*. at *4.

[18] *In re Xarelto (Rivaroxaban) Prods. Liab. Litig.*, MDL No. 2592, 2017 WL 1352860, at *1 (E.D. La. Apr. 13, 2017).

[19] 151 F.3d 269 (5th Cir. 1998).

> The focus is not on the result or conclusion, but on the methodology. *Moore*, 151 F.3d at 275-76. The proponent need not prove that the expert's testimony is correct, but must prove by a preponderance of the evidence that the expert's methodology was proper. *Id*.[20]

Based on this overly narrow understanding of the admissibility analysis, the court ruled that Bayer's challenges did not address the experts' "methodology or qualifications" but were "better reserved for cross-examination at trial," and the court admitted the testimony without considering if the experts had a proper factual foundation.[21]

Bayer's experiences are not unique. Even a cursory review of recent caselaw reveals that many courts are misinformed about Rule 702(b) by earlier rulings stating that the sufficiency of an expert's factual basis is a matter for cross-examination, not an admissibility consideration.[22] Courts can be expected to follow earlier cases,[23] but in the case of expert gatekeeping this has led to a systemic misunderstanding of Rule 702(b)'s admissibility standard.[24]

Of course, some courts properly apply Rule 702 despite the misleading direction of prior rulings, and Bayer has observed courts appropriately examine experts' factual basis and methodological application as part of the admissibility assessment. In another case involving the same Mirena product at issue in *Miller* and *Sellers* (discussed above, where the opinion testimony was allowed), the court excluded a specific causation expert who "had no factual basis for linking the Mirena to the infection" apart from temporal proximity, finding "such an inference is insufficiently scientific to pass muster under *Daubert* and Rule 702."[25] And another

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[20] *In re Xarelto*, 2017 WL 1352860, at *2 (emphasis added).

[21] *Id*. at *2 (testimony of Dr. Laura Plunkett), *3 (testimony of Dr. David Kessler).

[22] *See*, *e.g*., *Hale v. Denton Cty.*, No. 4:19-CV-00337, 2020 WL 4431860, at 4 (E.D. Tex. July 31, 2020)(quoting *Viterbo* for the principle 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" and admitting opinion challenged for insufficient bases finding "cross examination is the proper way to expose these alleged deficiencies."); *Jayne v. City of Sioux Falls*, No. 4:18-CV-04088-KES, 2020 WL 2129599, at *7 (D.S.D. May 5, 2020)(quoting *Loudermill* for the proposition that "the factual basis of an expert opinion goes to the credibility of the testimony, not the admissibility" and allowing testimony because it "is not so fundamentally unsupported that it can offer no assistance to the jury."); *Bakov v. Consol. World Travel, Inc*., No. 15 C 2980, 2019 WL 1294659, at *12 (N.D. Ill. Mar. 21, 2019)(quoting *Smith* that "[t]he soundness of the factual underpinnings of the expert's analysis . . . [is a] factual matter[] to be determined by the trier of fact" and concluding that "an expert's reliance on allegedly faulty information is a matter to be explored on cross-examination.").

[23] Bayer agrees with Judge Schroeder that "courts tend to defer to statements from caselaw, even if it is outdated." Thomas D. Schroeder, *Toward a More Apparent Approach to Considering the Admission of Expert Testimony*, 95 NOTRE DAME L. REV. 2039, 2060 (2020).

[24] *Id*. at 2039 ("some trial and appellate courts misstate and muddle the admissibility standard, suggesting that questions of the sufficiency of the expert's basis and the reliability of the application of the expert's method raise questions of weight that should be resolved by a jury, where they can be subject to cross-examination and competing evidence.")(emphasis original).

[25] *Mercado v. Bayer Healthcare Pharms. Inc*., No 14 C 6699, 2017 WL 1477939, at *4 -*5 (N.D.Ill. Apr. 25, 2017).

court, in *In re Mirena IUD Products Liability Litigation,*[26] excluded the opinions of several experts due to an insufficient factual basis to support the opinions expressed.[27] But a national evidence rule should not give rise to such widely differing understandings of the admissibility standard. The divergent approaches that courts currently take on challenges to the sufficiency of an expert's factual basis and the reliability of the expert's methodological application demonstrate a failure in Rule 702 and the need to clarify proper gatekeeping practices.

**2. Courts often misunderstand that the proponent bears the burden of production**

Consistent with Rule 104(a), courts should require the sponsor of an expert witness to demonstrate by a preponderance of the evidence that the proffered opinion testimony meets each of Rule 702's elements.[28] One court in a Mirena case captured the essence of this burden of production:

> The proponent of expert testimony bears the burden of proving its admissibility, and where the proponent makes no substantive response to a *Daubert* challenge, the district court may decide to exclude the testimony within its sound discretion.[29]

In Bayer's experience, however, judges frequently do not have a firm grasp of how to apply the burden of production and in practice employ a much different threshold.

Bayer witnessed such court confusion about the proponents' burden of production in one of the cases in the Mirena litigation. In ruling on Bayer's motion to exclude the plaintiffs' expert's general causation opinions in that case, the court began its analysis by noting that "expert testimony should be liberally admitted."[30] The court then denied the motion using the lowest imaginable admissibility hurdle, stating "the Court finds the opinions of Plaintiff's experts are not so 'fundamentally unsupported' that they must be excluded."[31] The court did not recognize that the proponent bears a burden of production to Rule 104(a)'s specifications.

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[26] 169 F.Supp.3d 396 (S.D.N.Y. 2016).

[27] *Id.* at 445 (noting that expert's "lack of access to reliable data does not justify use of unreliable data, and militates against admission under *Daubert*."); 460 (excluding opinion "[b]ecause each of the facts on which [the expert] relied in formulating his opinion . . . does not reliably support that conclusion[.]").

[28] *See* Advisory Committee Note to 2000 Amendments to Rule 702 ("the admissibility of all expert testimony is governed by the principles of Rule 104(a). Under that Rule, the proponent has the burden of establishing that the pertinent admissibility requirements are met by a preponderance of the evidence.").

[29] *Mercado*, 2017 WL 1477939, at *2 n.1. *See also In re Mirena*, 169 F. Supp. 3d at 456 ("it is Plaintiffs' burden to prove the reliability of their experts' opinions, which in Dr. Wray's case they have failed to do. See Fed. R. Evid. 702 advisory committee's note to 2000 amendment; *Bourjaily*, 483 U.S. at 175-76").

[30] *Miller v. Bayer Healthcare Pharms. Inc.*, No. 4:14-cv-00652-SRB, 2016 WL 9047163, at *1 (W.D.Mo. Dec. 20, 2016); *Sellers v. Bayer Healthcare Pharms. Inc.*, No. 4:14-cv-00954-SRB, 2016 WL 9045740, at *1 (W.D.Mo. Dec. 20, 2016). The court also quoted a statement from *Lauzon v. Senco Products, Inc.*, 270 F.3d 681, 686 (8th Cir. 2001) that Rule 702 "clearly is one of admissibility rather than exclusion." *Miller*, 2016 WL 9047163, at *1; *Sellers*, 2016 WL 9045740, at *1.

[31] *Miller*, 2016 WL 9047163, at *3; *Sellers*, 2016 WL 9045740, at *3 (both quoting *Neb. Plastics, Inc. v. Holland Colors Americas, Inc.*, 408 F.3d 410, 416 (8th Cir. 2005).

In another case, this one concerning Bayer's YAZ product, the court not only failed to recognize the appropriate burden of production, but actually inverted it. Rather than determine if the proponent had satisfied the Rule 702 requirements, the court put the burden on Bayer to establish that its opponent's opinions did not arise from sufficient relevant data and a reliable methodology.[32] In allowing the opinions, the court cited to the *Joiner*[33] yardstick for exclusion instead of the Rule 104(a) requirement for admission, concluding that "[t]here is not a great analytical gap between the studies relied on by Dr. Rinder and his opinion."[34]

Failing to apply Rule 104(a)'s burden of production eviscerates the admissibility standard. Rule 702 should not be read to prefer an outcome.[35] The burden of production is a fundamental component of Rule 702, and the fact that courts often leave it out of the admissibility analysis demonstrates a flawed understanding of how Rule 702 operates.[36] For Rule 702 to be a national rule, courts must have a consistent understanding that the proponent must satisfy each Rule 702 requirement by a preponderance of the evidence.[37]

### B. Rule 702 Should Be Amended To Clarify the Court's Responsibilities

Caselaw demonstrates an inconsistent understanding of the Rule 702 gatekeeping process. With no guidance from either the Committee or the U.S. Supreme Court over the last twenty years, misunderstandings about the court's role have become entrenched as judges carry forward the errors of prior rulings. The fact that more than three hundred fifty federal rulings decided since January 2015 reiterate incorrect statements such as "the factual basis of an expert opinion goes to the credibility of the testimony, not the admissibility" or "questions relating to the bases and sources of an expert's opinion affect the weight to be assigned that opinion rather

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[32] *Hamilton v. Bayer Healthcare Pharms., Inc*., No. CIV-18-1240-C, 2019 WL 2448328, at *2 (W.D.Okla. June 11, 2019)("The Court finds that the arguments raised by Defendants fail to provide any basis for excluding the testimony[.]").

[33] *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997).

[34] *Hamilton*, 2019 WL 2448328, at *2.

[35] The *In re Mirena* court aptly observed that descriptions of Rule 702 as a "liberal standard" simply reflect how it compares to the previous "general acceptance" standard followed by some courts and is not a commentary on how courts should rule: "Rule 702 represents a liberal standard of admissibility for expert opinions, as compared to the previous and more restrictive standard set out in *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923)." 169 F. Supp. 3d at 411 (citing discussion in *Daubert*, 509 U.S. at 588-89, of the *Frye* "general acceptance" standard) (emphasis added).

[36] Courts frequently assert and seemingly employ characterizations of Rule 702 that lower the burden of production. *See*, *e.g*., *Penny v. State Farm Mut. Auto. Ins. Co*., No. C18-5195RBL, 2020 WL 4261370, at *3 (W.D. Wash. July 24, 2020)("Rule 702 should be applied with a 'liberal thrust' favoring admission")(citation omitted); *Chapman v. Tristar Prods., Inc*., No. 1:16-CV-1114, 2017 WL 1718423, at *1 (N.D. Ohio Apr. 28, 2017)("Under this liberal approach, expert testimony is presumptively admissible."); *Hogland v. Town & Country Grocer of Fredericktown Missouri, Inc*., No. 3:14CV00273 JTR, 2015 WL 3843674, at *1 n.4 (E.D. Ark. June 22, 2015)("Rule 702 favors admissibility if the testimony will assist the trier of fact, and doubts regarding whether an expert's testimony will be useful should generally be resolved in favor of admissibility.")(citation omitted).

[37] As Judge Schroeder puts it, judges are "bound by Rule 104(a)'s requirement that there be a preponderance of evidence supporting each of the requirements of Rule 702(a) through (d)." Schroeder, 95 NOTRE DAME L. REV. at 2062.

than its admissibility"[38] leaves no room for doubt. Indeed, these flawed conceptions are now so ingrained in the caselaw that recent rulings adopting this phrase often do not directly reference *Loudermill* or *Viterbo*, but instead cite to second- or even third-generation decisions.[39] Without an amendment, the fundamental misconceptions of the court's Rule 702(b) and (d) responsibilities and the proponent's burden of production will perpetuate as courts continue to recycle flawed descriptions of the gatekeeping role.

Bayer urges the Committee to adopt an amendment to Rule 702 that provides courts with critical direction about the steps they must take and gives them the necessary confidence to disregard erroneous caselaw descriptions of the gatekeeping function. Because of the recurrent misunderstanding about the court's responsibility to perform the Rule 702(b) and (d) assessments,[40] the amendment should specify that the court must undertake these steps as part of the admissibility evaluation, rather than defer to the jury. Additionally, because courts have struggled to understand the burden of proof applicable to the gatekeeping function despite the directive in the Advisory Committee Note, the amendment should incorporate that standard into the rule itself. These two goals can be accomplished without a major re-structuring of the text by adding a reference to the court and the burden of production to the end of Rule 702's initial section, such as:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the court finds by a preponderance of the evidence:

This new language would confirm that the requirements of Rule 702(b) and (d) are questions for the court to decide, and would constitute authority of sufficient weight to displace

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[38] *See supra*, n.1 & n.2.

[39] *See*, *e.g.*, *In re Crash of Aircraft N93PC on July 7, 2013 at Soldotna, Alaska*, No. 3:15-cv-0112-HRH, 2020 WL 1956823, at *6 (D. Alaska Apr. 22, 2020)(quoting *Hangarter v. Provident Life & Acc. Ins. Co*., 373 F.3d 998, 1018 n.14 (9th Cir. 2004), which itself quotes *Children's Broad. Corp. v. Walt Disney Co*., 357 F.3d 860, 865 (8th Cir. 2004), which quotes *Loudermill*, 863 F.2d at 570); *In re RFC & ResCap Liquidating Tr. Litig*., No. 13-CV-3451 (SRN/HB), 2018 WL 4489685, at *2 (D. Minn. Sept. 19, 2018)(quoting *United States v. Finch*, 630 F.3d 1057, 1062 (8th Cir. 2011), which in turn quotes *United States v. Rodriguez,* 581 F.3d 775, 795 (8th Cir.2009), which reiterates *Loudermill*, 863 F.2d at 570). *See also MCI Commc'ns Serv. Inc. v. KC Trucking & Equip. LLC*, 403 F. Supp. 3d 548, 556 (W.D. La. 2019)(quoting *Primrose Operating Co. v. Nat'l Am. Ins. Co.*, 382 F.3d 546, 562 (5th Cir. 2004), which in turn quotes *United States v. 14.38 Acres of Land, More or Less Situated in Leflore County,* 80 F.3d 1074, 1077 (5th Cir.1996), which quotes *Viterbo*, 826 F.2d at 422).

[40] *See* Schroeder, 95 NOTRE DAME L. REV. at 2039; Oct. 1, 2019 Memorandum from Daniel J. Capra, Reporter, *supra* n.3, at 30 (some courts "routinely state the misguided notion that arguments about sufficiency of basis and reliability of application almost always go to weight and not admissibility"); Apr. 1, 2019 Memorandum from Daniel J. Capra, Reporter, *supra* n.3, at 23 (rulings indicating that "challenges to the sufficiency of an expert's basis raise questions of weight and not admissibility" are "misstatement[s] made by circuit courts in a disturbing number of cases[.]"); Apr. 1, 2018 Memorandum from Daniel J. Capra, Reporter, *supra* n.3, at 52 ("[T]he fact remains that some courts are ignoring the requirements of Rule 702(b) and (d). That is frustrating."). *See also* cases referenced at n.1 & n.2, *supra*, and accompanying text.

the influence of misguided caselaw such as *Loudermill* and *Viterbo*.[41] This structure would be consistent with other rules, including Rule 411(b)(2) and Rule 403, that identify that the court will decide if admissibility conditions are established and incorporate the burden of production into the rule's text.[42]

This new language would not change the court's responsibilities or the requirements that a party must establish.[43] The proposed language only makes explicit those elements that are presently implicit to remedy court confusion. Adjustment of the language to align practice with the rule's intent is an appropriate rulemaking action. For example, Federal Rule of Civil Procedure 26 was changed in 2015 to relocate discovery proportionality considerations to a more prominent position. Doing so did "not change the existing responsibilities of the court and the parties" or alter "the burden of addressing" these considerations – but the amendment was enacted to prevent courts from overlooking this factor and to "reinforce" that it must receive consideration.[44] Rule 702, likewise, has produced confusion among the courts, and that situation warrants action to communicate the intent of the rule with greater clarity.

### C. If the Committee Proceeds with an Amendment to Address Expert Overstatement, that Amendment Should Be Suited to Civil as Well as Criminal Cases

Bayer understands that the Committee continues to consider an amendment addressing "overstatement" – expression of opinions that go beyond the limits of what the expert's methodology and factual basis will support. Bayer is concerned that the draft under consideration focuses too narrowly on criminal cases and does not reflect the needs of civil

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[41] *See* Schroeder, 95 NOTRE DAME L. REV. at 2060 ("the elements of Rule 702, not the caselaw, are the starting point for the requirements of admissibility.").

[42] Rule 411(b)(2) provides, in relevant part:

> In a civil case, the court may admit evidence offered to prove a victim's sexual behavior or sexual predisposition if its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. (emphasis added)

Rule 403 states:

> The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence. (emphasis added)

The Advisory Committee Note to the 1994 Amendments of Rule 412 describes the burden of production established by the "substantially outweighs" verbiage as "a balancing test [that] requires the proponent of the evidence, whether plaintiff or defendant, to convince the court that the probative value of the proffered evidence 'substantially outweighs the danger of harm to any victim and of unfair prejudice of any party.'"

[43] *See*, *e.g.*, Oct. 1, 2019 Memorandum from Daniel J. Capra, Reporter, *supra* n.3, at 1 (Rule 702 "already establishes that the reliability requirements are questions for the court, to be decided by a preponderance of the evidence.").

[44] Advisory Committee Note to the 2015 Amendments to Federal Rule of Civil Procedure 26.

lawsuits. The current draft would add the following language to Rule 702's list of admissibility factors:

> If the expert's principles and methods produce quantifiable results, the expert does not claim a degree of certainty unsupported by the results.[45]

Limited to "quantifiable results," this amendment seemingly would not reach problematic overstatement instances that have occurred in Bayer's civil cases. For example, one expert was allowed, on the basis of a methodology that purported to "rule out" a proportion of known alternative causes and comorbidities, to testify that exposure to a product "in all medical certainty" was the cause of a disease.[46] Another court allowed a witness with expertise in pharmacology and toxicology who simply reviewed certain Bayer and FDA documents to describe opinions about "the state of mind or knowledge of both Defendants and the FDA."[47]

Although some courts will restrict experts in civil cases who try to expand their opinions beyond the available support,[48] rulings permitting experts to exaggerate their conclusions demonstrate a need for an amendment directing courts to regulate overstatement. Less restrictive verbiage than the current proposal, while potentially requiring courts to examine closely the opinions that an expert would express,[49] would ensure that courts are empowered to address all unsupported expressions of confidence or overstatements in an expert's conclusion.[50] Bayer urges the Committee to adopt broader language that would reach these situations that arise in civil cases.

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[45] Hon. Debra A. Livingston, Report of the Advisory Committee on Evidence Rules (Nov. 15, 2019) at 5, *in* COMMITTEE ON RULES OF PRACTICE AND PROCEDURE JANUARY 2020 AGENDA BOOK 439 (2020).

[46] *In re Trasylol Prod. Liab. Litig.*, No. 08-MD-01928, 2010 WL 8354662, at *8(S.D. Fla. Nov. 23, 2010) (product exposure "was a substantial contributing cause to her acute renal dysfunction in all medical certainty."). This case has been identified as one in which expert opinion testimony was allowed that "appears to overstate the conclusions that reliably flow from the expert's methodology." Oct. 1, 2019 Memorandum from Daniel J. Capra, Reporter, *supra* n.3, at 24-25.

[47] *In re Xarelto*, 2017 WL 1352860, at *2.

[48] The same expert allowed by the *In re Xarelto* court to describe Bayer's state of mind was limited in another case, when the court found that she "extrapolated conclusions beyond the scope of her sources" -- exactly the conclusion the *In re Xarelto* court should have reached. *Rodman v. Otsuka America Pharm., Inc.*, No. 18-cv-03732-WHO, 2020 WL 2525032, at *7 (N.D. Cal. May 18, 2020).

[49] The current draft language "is intended to avoid wordsmithing the testimony of experts who testify to a conclusion that is not grounded i[n] a numerical probability – such as an electrician testifying that 'the house was not properly wired.'" Hon. Debra A. Livingston, Report of the Advisory Committee on Evidence Rules (Nov. 15, 2019) at 5, in COMMITTEE ON RULES OF PRACTICE AND PROCEDURE JANUARY 2020 AGENDA BOOK 439 (2020). While micromanagement of opinion verbiage may be undesirable, restricting the amendment only to quantifiable subjects would be problematic if doing so would allow the practice of overstating conclusions to continue in many expert fields commonly heard in court.

[50] One example of amendment language allowing for broader application to expert overstatement is a prior draft considered by the Advisory Committee for insertion into the Rule 702 list of requirements: "the expert does not claim a degree of confidence that is unsupported by reliable application of the principles and methods." *See* Advisory Committee on Evidence Rules, Conference Agenda for Miniconference on Best Practices of Managing Daubert Questions at 4 (Oct. 25, 2019).

Expert testimony plays a central role in civil litigation, and the improper admission of expert testimony may change the outcome of a case or even an entire MDL collection of cases. The gatekeeping responsibility is too important to leave untouched when courts have demonstrated they do not understand how to apply it. Bayer urges the Committee to adopt an amendment to guide court practices into alignment with Rule 702's intent.

Sincerely,

Scott S. Partridge
General Counsel, Bayer U.S.


October 2, 2020

Rebecca A. Womeldorf, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, DC 20544
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**Re: Proposed Rulemaking on Federal Rule of Evidence 702**

Dear Ms. Womeldorf:

The American Association for Justice (AAJ) submits this comment regarding the Advisory Committee on Rules of Evidence's (hereinafter "Committee") consideration of rulemaking related to Federal Rule of Evidence 702. AAJ is a national, voluntary bar association established in 1946 to strengthen the civil justice system, preserve the right to trial by jury, and protect access to the courts for those who have been wrongfully injured. With members in the United States, Canada, and abroad, AAJ is the world's largest plaintiff trial bar. AAJ members primarily represent plaintiffs in personal injury actions, employment rights cases, consumer cases, class actions, and other civil actions, and regularly use the federal rules in their practice.

The Committee has undertaken a thoughtful and careful review process on changes to Federal Rule of Evidence 702 (hereinafter "Rule 702"). The proposed amendment language being considered by the Committee "provides that 'if the expert's principles and methods produce quantifiable results, the expert does not claim a degree of confidence unsupported by the results.'"[1] The proposed amendment should be rejected as it is confusing in its language and would result in delay and burden to the courts and its litigants.

Some in the defense community have reacted to the Committee's deliberate consideration of the rule by pushing for expanded changes to Rule 702.[2] AAJ is concerned about the direction of these expanded rule suggestions, which do not reflect the consensus of the Committee's "Miniconference on Best Practices for Managing *Daubert* Questions" held at Vanderbilt Law School on October 1, 2019 and the information generally gathered by the Committee. The

[1] https://www.uscourts.gov/sites/default/files/2020-06_standing_agenda_book.pdf at 643. "This language is intended to avoid wordsmithing the testimony of experts who testify to a conclusion that is not grounded in a numerical probability — such as an electrician testifying that 'the house was not properly wired.'" *Id.*

[2] *See, i.e.*, Suggestions from International Association of Defense Counsel; Federation of Defense & Corporate Counsel; and Lawyers for Civil Justice, *available at* https://www.uscourts.gov/rules-policies/records-and-archives-rules-committees/rules-suggestions.

defense suggestions, all of which contain similar recommendations, have been filed since March 2020 even though no informal comment period occurred and the Committee's spring meeting was cancelled due to the pandemic. Many of these suggestions are likely to be met with opposition from attorneys who represent plaintiffs.

AAJ members are concerned that an amendment to Rule 702, such as that recently contemplated by the Committee, would be confusing and cause disagreements over application, lead to more litigation and significant delays,[3] and create more problems than it would help solve. To that end, any rule change must be written clearly and ensure that its meaning is unambiguous and comprehensible.

**The proposed amendment fails to clarify the rule or its application.**

The current draft rule contains rule language written in the negative ("the expert does not claim a degree of confidence unsupported by the results"), making it particularly difficult to understand. This statement puts the emphasis on "not claiming with a degree of confidence," which seems at odds with the remaining requirements of the witness under Rule 702, all of which are stated in the affirmative. Indeed, if the purpose of the expert is to "help the trier of fact to understand the evidence or to determine a fact in issue,"[4] it seems paradoxical to then question the confidence with which the expert's opinion is presented.

Moreover, a rule amendment that is meant to primarily focus on a particular type of expert – here, forensic experts[5] – will cause uncertainty in relation to those other experts to which it may nevertheless apply, even if they were not the source of the Committee's initial focus.[6] Were the proposed amendment to be adopted, it would unquestionably be urged to apply to non-forensic experts. That means that medical, accounting, securities, vocational, engineering, financial, and mental health experts, all with varying principles and methodologies, will be impacted by a rule amendment largely imposed due to perceived issues with forensic experts.

Similarly, a rule on overstatement that applies only to experts who produce quantitative results is sure to result in arguments as to whether or not a designated expert fits into that box and what constitutes a "quantifiable result." And, what about the expert who combines quantitative and qualitative results into a single report? Qualitative and quantitative distinctions can be challenging. In fact, qualitative and quantitative data are often used together to draw conclusions and illustrate a larger picture, and qualitative data can be easily turned into quantitative evidence grounded in numerical probability. For example, a vocational expert may offer statistical evidence about a plaintiff's ability to return to work that is based on qualitative

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[3] As Rule 702 governs expert testimony in both civil and criminal cases, the Committee must also consider the implication of the rule in criminal cases. This is beyond the scope of this comment. However, with proposed changes to Criminal Rule 16 currently in a formal comment period, AAJ urges the Committee to consider waiting to make any amendments to Rule 702 until the Criminal Rule 16 rulemaking has concluded.

[4] FED. R. EVID. 702(a).

[5] The Committee has stated that this rule is "especially directed toward forensic experts." *See* https://www.uscourts.gov/sites/default/files/2020-06_standing_agenda_book.pdf at 69-70.

[6] In discussing the Boston October 2017 Symposium, the Reporter's memo notes, "…it is about whether there is a problem with forensic evidence that can and should be addressed by rulemaking." *See* https://www.uscourts.gov/sites/default/files/a3_0.pdf at 379.

research. A securities expert may combine quantitative data about the state of the market with qualitative data about a company's practices to determine whether there was fraud or a breach of fiduciary duties. A medical expert may provide qualitative testimony about a plaintiff's medical condition but also testify about the probable lifespan of patients suffering from the condition based on quantitative results.

Questions will also arise as to how such amendment language will be defined and by whom. For example, is it the judge who will determine whether a principle or method is quantifiable, the measure of the "degree of confidence," and whether or not the results are unsupported by the statement? If so, what guidelines does a judge have for making those determinations? AAJ cautions that there is a fine line between a judge deciding an expert's "degree of confidence" and invading the province of the jury. In addition, AAJ members often find themselves in federal court as well as state court. The "degree of confidence" test fails to work in federal cases stemming from diversity jurisdiction, where state substantive law often controls and requires "a reasonable degree of certainty." Again, this would be a change made with forensic evidence in mind that is, in practice, unworkable in many civil cases.

**The proposed amendment would result in delay and burden courts and litigants.**

AAJ is also concerned that an amendment to Rule 702 will lead to delay in cases, burden on courts and litigants, and gamesmanship by defendants in civil cases who wish to delay cases to the detriment of injured plaintiffs.[7] Litigants are sure to be mired in endless disputes over the opposing parties' experts. Longer, more involved hearings will be necessary to help to build the record, demonstrate that the requirements of any amendment are met, and resolve application of the amendment as to qualitative and quantitative testimony.[8] And, as new evidence is developed, there are likely to be repeated *Daubert* hearings on exclusionary motions. Defendants will attempt to show that new evidence is distinct, requiring its own findings. Thus, such an amendment will be used as a delay tactic even with respect to experts in cases where nothing has changed regarding factors to determine reliability, increasing the burden on the courts and stretching judicial resources. The impact will disproportionately affect plaintiffs, who would have the burden of qualifying an expert who may offer multiple opinions, some of which are not elicited until cross examination thus restarting the process of qualification.

Suggestions have been made to add the standard of proof to the rule itself, but it is AAJ's position that doing so would only further burden the courts with needless litigation. Admissibility, including as it relates to Rule 702, is already covered by Rule 104(a). It would be a mistake to include the standard in just one rule, or even in the committee note, when other rules are also governed by Rule 104(a).[9] With the addition of the preponderance of the evidence standard to Rule 702, the courts would be subjected to arguments or inferences about the standards that apply in other rules.

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[7] Delay and gamesmanship also lead to increased litigation costs.

[8] There could also be satellite litigation over whether various statements constitute a single opinion or multiple ones, as well as over whether each opinion has the same degree of reliability.

[9] The result would not only be additional litigation on whether the standard was met for Rule 702 matters, but whether it was indeed the standard for other rules that do not explicitly include it in the rule text or note. This would open the door to arguments for explicitly including a standard in each rule of evidence or committee note.

The proposals to revise Rule 702 are coming at a time when there is no evidence of incorrect decision-making by juries or courts generally.[10] AAJ members anecdotally have reported instances where a federal judge told defense counsel that *Daubert* challenges could be submitted but that there was no guarantee they would be heard, which allowed the court to avoid frivolous, time consuming challenges. Judges must be able to exercise such discretion. If the Advisory Committee is concerned that courts need further direction about the use of forensic experts or that the courts are systematically misapplying Rule 702 as it is currently written, perhaps judicial education would be more effective than a rule change that will only invite more confusion and misapplication.

***

AAJ thanks the Committee for its continued work on this rulemaking and respectfully requests that the Committee consider the points herein. During the COVID-19 pandemic when many cases have been put on hold while courts determine the safest way to proceed, it is important that any rules amendment not risk creating further delay.

Please direct any questions regarding these comments to Susan Steinman, AAJ Senior Director of Policy and Senior Counsel, at susan.steinman@justice.org or (202) 944-2885.

Sincerely,

Tobi Millrood
President
American Association for Justice

[10] "The Chair noted that all of the judges at the Denver symposium raised questions about amending Rule 702, suggesting that it was functioning properly in its current form." https://www.uscourts.gov/sites/default/files/advisory_committee_on_rules_of_evidence_-_final_draft_agenda_book.pdf at 89.

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October 2, 2020

***Submitted via Email: RulesCommittee_Secretary@ao.uscourts.gov***

Rebecca A. Womeldorf, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, NE Room 7-300
Washington, D.C. 20544

**Re: Suggestion on Potential Amendment to Federal Rule of Evidence 702**

Dear Ms. Womeldorf:

We respectfully write in support of a potential amendment to Federal Rule of Evidence 702. We are co-chairs of Dechert's products liability and mass torts practice, a group of attorneys who together have decades of experience representing companies who manufacture and sell consumer products, pharmaceuticals, and medical devices.

Many of our clients are life science companies who develop life-saving medicines and devices. It is important to them and the broader pharmaceutical and life sciences industry that courts apply Rule 702 correctly and uniformly. In addition to the impact on individual cases and large multidistrict litigations such as those in which we have been involved, rulings on the admissibility of expert evidence can have significant public policy implications.

As Justice Breyer observed in his concurrence in *General Electric Co. v. Joiner*:

> [M]odern life, including good health as well as economic well-being, depends upon the use of artificial or manufactured substances, such as chemicals. And it may, therefore, prove particularly important to see that judges fulfill their *Daubert* gatekeeping function, so that they help assure that the powerful engine of tort liability, which can generate strong financial incentives to reduce, or to eliminate, production, points toward the right substances and does not destroy the wrong ones. It is, thus, essential in this science-related area that the courts administer the Federal Rules of Evidence in order to achieve the 'end[s]' that the Rules themselves set forth, not only so that proceedings may be 'justly determined,' but also so 'that the truth may be ascertained.'"[1]

In many products liability and toxic tort cases, science is central to decisions on the merits. A judge or jury cannot fairly and effectively evaluate such claims without scientifically reliable expert testimony. We know that judges, the majority of whom are not scientists, are faced with the enormous task of mastering science in various areas in short periods of time. We appreciate that judges endeavor to do their best to apply the Rules and fulfill their role as gatekeepers scrutinizing scientific evidence to ensure juries hear testimony grounded in reliable scientific methods that are reliably applied. Unfortunately, in our experience and as other commenters have catalogued, too often, unreliable expert evidence is allowed to reach juries due to misapprehension of Rule 702 and confusion and unevenness in its application across circuits.

While the practice of law requires us to appreciate nuances in the laws of different jurisdictions, we rely on the Federal Rules of Evidence to provide a level of predictability and uniformity in evidentiary rulings. This is particularly important for evidence subject to Rule 702 because, in our experience, an entire case can turn on expert testimony. In preparing for trial, courts and parties should be focused on ensuring that a jury hears

[1] 522 U.S. 136, 148-49 (1997) (Breyer, J., concurring) (quoting Fed. R. Evid. 102).

reliable scientific evidence, not whether a jury will be able to see through bad science dressed up in a lab coat.

Where the standard or approach a court will apply in evaluating expert evidence under Rule 702 is unpredictable, pretrial resolution considerations and settlement pressures are skewed. They reflect not what a case actually may be worth, but what a jury may award if it is unable to distinguish reliable scientific opinions from what, in a purely scientific context, would be deemed unreliable. Resolution based on the potential for an inflated verdict due to a jury's reliance on unsound scientific evidence does little to further the search for truth or the interests of justice.

Given our extensive experience with expert testimony and these important practical and policy considerations, we believe that an amendment to Rule 702 would help courts apply the correct standards and scrutiny to ensure that only scientifically reliable expert opinions are presented to juries. We support an amendment at the outset of the Rule that instructs courts to find each of the Rule's admissibility requirements fulfilled by a preponderance of the evidence before admitting expert testimony.[2] We also support adding a Committee Note explaining the rationale behind the amendment and clarifying that the court's gatekeeping role includes determining whether the proffering party has established not only the reliability of an expert's methods, but also the reliability of the application of the methods and the sufficiency of the data.

Very truly yours,

*/s/ Sheila L. Birnbaum*
Sheila L. Birnbaum

*/s/ Mark S. Cheffo*
Mark S. Cheffo

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[2] *See* Daniel Capra, *Memorandum to Rule 702 Subcommittee re: Rule 702(b) and (d) - Weight and Admissibility Questions* (Oct. 1, 2018) (*Agenda Book, Advisory Committee on Evidence Rules* (Oct. 19, 2018, meeting) at 171) at 26.

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October 5, 2020

Rebecca A. Womeldorf, Secretary
Committee on Rules of Practice and Procedure
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Re: Comment on Amending Federal Rule of Evidence 702

Dear Ms. Womeldorf:

As you know, the Advisory Committee on Evidence Rules is considering an amendment to Federal Rule 702 to clarify that the reliability and relevance requirements for admissibility of expert opinion evidence are threshold issues to be decided by the Court. The undersigned are trial lawyers whose practice regularly requires us to address expert evidence admissibility issues. Our practice is primarily on the defense side of toxic tort matters. Mr. Scott has defended and tried toxic tort cases in state and federal courts dating back to the late 1970's. Ms. Jordan and Mr. Scott have sought to limit and/or exclude unreliable expert opinion evidence in numerous cases. While most of those cases involved claims that exposure to chemicals caused a Plaintiff to develop cancer, we also have recent trial and Rule 702 experience in a maritime personal injury case involving the medical cause of the Plaintiff's amputated leg.

We would like to describe some of our experiences in addressing these issues in the hope that it may assist the Advisory Committee in understanding the need for clarity and consistency among federal courts evaluating the admissibility of scientific and technical evidence. Most of the federal court cases we have had involving Rule 702 issues have been heard by thoughtful and conscientious judges who took their evidentiary gatekeeping role seriously. Because that approach differs significantly from our experience in a number of state courts, we will compare our state and federal court experiences to demonstrate just how important it is that federal trial courts engage in a critical evaluation of the objective reliability of expert evidence. We are hopeful that our experiences, both favorable and unfavorable, will provide a helpful perspective to the Advisory Committee.

We begin with the observation that Rule 104 clearly requires the Court to decide preliminary questions under Rule 702, not only regarding witness qualifications, but also admissibility of evidence. The language of Rule 104 (a) is mandatory: "The court *must* decide any preliminary question about whether . . . evidence is admissible." If proffered evidence

doesn't meet the standards of Rule 702, it should be considered no evidence or at a minimum incompetent evidence, like hearsay. In the same way that we don't ask a jury to decide questions surrounding hearsay, relevance, or other admissibility questions, Rule 104 (a) makes those determinations for the Court and Rule 104(b) even presumes the Court, not the jury, will hear proof of whether a fact exists to determine relevance.

It can and has been reasonably argued that the current language of Rule 702 is not vague or ambiguous. Rule 702 establishes what expert evidence is admissible and would make little sense if the jury was to decide admissibility. The very basis for allowing expert testimony is that the expert evidence will assist the lay trier of fact in understanding a technical or specialized subject. Even then, Rule 702 (b), (c) and (d) require that the proffered expert evidence must be based on sufficient facts, reliable methods and the reliable application of the methods to the facts. Unfortunately, perhaps based on the same concerns that Justice Rehnquist raised in his concurrence and partial dissent in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993),[1] many trial Judges conclude that the reliability and relevance questions inherent in determining the admissibility of scientific and technical evidence are matters better left to the jury.

**Federal Court consideration of the reliability of expert evidence – Our experience**

We describe three cases below in which the admissibility of expert evidence was a key issue. Two of the cases we describe below involved complicated medical and scientific evidence regarding the question of admissibility of expert opinion evidence that certain chemical exposures were capable of causing a hematologic malignancy known as acute myeloid leukemia. *See, Castellow v. Chevron USA, et al,* 97 F. Supp. 2d 780 (S.D.Tx. 2000) and *Burst v. Shell Oil Co., 120 F. Supp. 3d 547* (E.D.La. 2015), *aff'd, 650 Fed. Appx. 170* (5th Cir. 2016), *cert. den.*, 2016 U.S. LEXIS 6219 (U.S., Oct. 11, 2016). In both instances, the trial court conducted a somewhat lengthy *Daubert* hearing at which experts retained by both the proponent of the evidence and by our clients who opposed the evidence as inadmissible testified before the Court. In both cases, the trial court's opinion excluding expert evidence and granting summary judgment, was published. In *Burst*, the trial court order excluding experts and granting summary judgment were appealed to the Fifth Circuit, but affirmed. The third case we describe, *Gowdy v. Marine Spill Response Corporation*, was brought by a seaman who claimed that an alleged injury incurred on a merchant vessel resulted in the amputation of his leg. While the Court did not conduct a formal *Daubert* hearing, the proffered expert evidence was addressed based on the expert report and deposition testimony and severely limited. That case, with the limitations on the scope of an expert's opinions was tried to a defense verdict.

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[1] Chief Justice Rehnquist concurred in part and dissented in part noting: "I do not doubt that Rule 702 confides to the judge some gatekeeping responsibility in deciding questions of the admissibility of proffered expert testimony. But I do not think it imposes on them either the obligation or the authority to become amateur scientists in order to perform that role."

*Castellow v. Chevron USA, et al,* 97 F. Supp. 2d 780; 2000 U.S. Dist. LEXIS 9090 (S.D.Tx 2000). The *Castellow* case was brought by the family of a 30 plus year gasoline station attendant, manager and owner who developed acute myeloid leukemia ("AML") from which he died. The Plaintiffs claimed that Mr. Castellow was exposed to benzene contained as a relatively minor constituent in gasoline which he pumped into cars and used as a cleaning solvent. There was no dispute that exposure to pure benzene at sufficiently high levels was capable of causing AML. However, the studies of workers exposed to gasoline, which by definition contained some small amount of benzene, did not show any increase in the incidence of AML.

Plaintiffs retained multiple medical causation expert witnesses who generally offered opinions that benzene exposure from the gasoline Mr. Castellow used resulted in a sufficient level of benzene exposure to cause AML. Plaintiffs offered an exposure assessment expert who claimed to calculate the level of benzene exposure from the tasks in which Mr. Castellow used gasoline. Plaintiff's medical causation experts relied on that exposure assessment in reaching opinions that the benzene exposure level was sufficient to cause AML. However, when Plaintiff's exposure assessment expert was asked to use the same assumptions to calculate the level of toxic gasoline exposure, he calculated a dose that would have been repeatedly acutely lethal, forcing him to acknowledge the unreliability and, in fact, the impossibility of his estimates.

On Defendants' motion, the Court agreed to conduct a hearing with live expert evidence on the Rule 702/*Daubert* issues regarding admissibility of both the exposure assessment evidence and the Plaintiffs' expert testimony that benzene exposure from gasoline was capable of causing AML. The two-day hearing involved not only a detailed critical evaluation of the exposure assessment but also of the scientific literature studying workers exposed to gasoline. The Court concluded that the exposure assessment of Plaintiffs' expert relied on modeling rather than published studies of workers who performed the same tasks as Mr. Castellow, repeatedly utilized assumptions which were inconsistent with the actual undisputed facts and had been repeatedly revised by the expert sponsoring it to correct admitted errors.[2] With regard to the question of whether gasoline exposure can cause leukemia, the Court concluded that the "pertinent studies show that persons exposed to gasoline, by occupation, do not reflect a statistically significant excess rate of AML, or even leukemias generally." Having found the Plaintiffs' expert evidence unreliable and inadmissible, the Court granted the Defendants' summary judgment motion.

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[2] Interestingly, some trial courts have suggested that the Rule 702/*Daubert* gatekeeping function is meant to "screen the jury from unreliable nonsense opinions, but not to exclude opinions merely because they are impeachable." *Alaska Rent-A-Car, Inc. v. Avis Budget Group, Inc.*, 738 F.3d 960, 969 (9th Cir. 2013). That analysis forgoes the threshold established by Rule 702 that the proffered expert evidence must meet reliability and relevance standards to be admissible. The trial court in *Castellow* noted the Defendants' asserted the proffered evidence did not meet the "laugh test," yet nevertheless, performed the required detailed analysis of that evidence.

The level of detail in the *Castellow* Court's analysis reflects exactly the approach that should be dictated by Rule 702 and *Daubert*. The Court did not supplant the jury because a jury should only hear relevant and admissible evidence. In the same way that courts regularly evaluate questions of relevance, hearsay or similar evidentiary considerations to determine admissibility, the court determined that there was no admissible factual or scientific foundation for the opinions of the Plaintiffs' experts.

*Burst v. Shell Oil Co., 120 F. Supp. 3d 547* (E.D.La. 2015), *aff'd, 650 Fed. Appx. 170* (5th Cir. 2016), *cert. den.,* 2016 U.S. LEXIS 6219 (U.S., Oct. 11, 2016). The *Burst* case involved claims by Plaintiff Burst that her husband developed AML as a result of exposure to benzene from the use of gasoline over 40 years after his work as a service station mechanic and attendant. There is no question that all gasoline contains some benzene (roughly, less than 1% to as much as 4%). Plaintiff filed an early motion for partial summary judgment asking the Court to find as a matter of law that "benzene can cause AML" trying to frame the general causation issue. The Defendants acknowledged that under some circumstances (not present in or relevant to the *Burst* case), benzene exposure can cause AML. However, the Defendants responded that the "proper general causation question is whether exposure to *gasoline*, not benzene, can cause leukemia [arguing] that there is no established causal connection between exposure to gasoline, which contains a small amount of benzene, and development of leukemia." *See*, U.S. District Judge Sarah Vance August 8, 2014 Order and Reasons in Civil Action No. 14-109 (E.D.La.) Judge Vance agreed "that the proper general causation question in this case is whether exposure to gasoline containing benzene can cause leukemia, not whether exposure simply to benzene can cause leukemia." *Id.*

Plaintiffs proffered experts on exposure assessment and on the question of whether gasoline (or benzene in gasoline) exposure can cause AML. Defendants filed Rule 702/*Daubert* motions, supported by expert affidavits, seeking to exclude all of the experts designated by Plaintiff, including both exposure assessment and medical causation experts. The Court reviewed the Plaintiffs' expert reports as well as the controverting reports of defense experts and scheduled a *Daubert* hearing at which she requested testimony from one Plaintiff expert and two defense experts. At the hearing, each side questioned the experts as did the Court. Following the *Daubert* hearing, the Court in extraordinarily detailed opinions excluded the Plaintiffs' experts as unreliable and granted summary judgment because the Plaintiff proffered no admissible evidence on general causation. *See*, U.S. District Judge Sarah Vance June 29, 2015 Order and Reasons in Civil Action No. 14-109 (E.D.La.)

*Gowdy v. Marine Spill Response Corporation*, 925 F.3d 200, 208 (5th Cir. 2019). Plaintiff James Gowdy alleged that he injured his left foot when he stepped off the last rung of a ladder that was dangerously raised four feet off the floor, while employed as a seaman aboard a Marine Spill Response Corporation ("MSRC") vessel. Mr. Gowdy further alleged that this injury caused a neuropathic condition which ultimately resulted in the amputation of his foot. It was undisputed that Mr. Gowdy suffered from several pre-existing conditions, including a documented history of uncontrolled diabetes, which is well-established within the medical

community as being the most common cause of the neuropathic condition which resulted in his foot amputation.

Mr. Gowdy initially failed to designate any expert testimony on the issue of medical causation and MSRC moved for summary judgment, which was granted by the trial court. On Appeal, the Fifth Circuit reversed the trial court's ruling on the narrow issue that expert testimony was not required because "[s]tepping down from a high ladder rung and fracturing one's foot is closer to breaking one's leg after being hit by a car than to developing cancer after years of toxic tort exposure or experiencing a back injury explicable only by general working conditions underneath a train. The causal link in this case can be understood by jurors based on everyday knowledge and experience."

However, during the trial of the case, Plaintiff attempted to present expert testimony evidence from his treating podiatrist and other lay witnesses that the alleged fracture sustained by Mr. Gowdy ultimately caused various complex medical complications, like the neuropathic condition which resulted in the ultimate amputation. MSRC argued that Plaintiff should not be permitted to present any such expert evidence based on Gowdy's failure to timely designate experts or alternatively, that a Daubert hearing was necessary to test the sufficiency of the evidence under Rule 702. The trial court agreed and granted MSRC's motion in *limine* on complex medical causation. The Court excluded testimony from the podiatrist on the clearly expert questions regarding whether the alleged foot injury stepping off the ladder caused the neuropathic condition and amputation, while allowing the podiatrist to discuss his treatment of the foot injury.

The federal Courts in the three cases described above, exercised their gatekeeping role in exactly the way anticipated by Rules 104 and 702. We have had a very different experience in *Daubert* state courts across the country in which the court was reluctant to or simply refused to engage in any meaningful evidentiary gatekeeping exercise. The reason for the different approach may be that state court judges typically do not have the resources and law clerks that federal trial courts have or that elected judges are not inclined to grant dispositive motions. Nevertheless, the typical approach to consideration of challenges to technical and scientific evidence in *Daubert*-following state courts, in our experience, is to declare a battle of the experts and leave it to the jury to resolve the dispute with no evaluation of whether the challenged evidence is based on a sufficient factual predicate, an appropriate and accepted methodology and application of that methodology to the facts. Evaluation of those factors is essential to the Court's determination that the evidence will assist the lay trier of fact in understanding a specialized subject.

While we have experienced many cases in which our client's legitimate challenge to expert evidence was given no more than a cursory evaluation and perhaps a short hearing with a

foregone conclusion, perhaps the most extreme example we have experienced of state court hostility to the gatekeeping role of the trial judge was an unusual toxic tort leukemia case in Louisiana. We were retained in the case following a trial court discovery order in which the Court struck our client's defenses as a discovery sanction. The Plaintiff suffered from a type of leukemia known as acute promyelocytic leukemia ("APL"). On the issue of causation, the plaintiff offered a medical expert who had little in-depth understanding or knowledge of APL or its etiology.

The Defendants had a well-qualified hematology expert who had collected the medical literature demonstrating that 95% of APL cases were *de novo* or of no known cause and that exposure to benzene, the chemical at issue in the case, had not been associated with the development of APL in the scientific literature. The Defendants argued that while their defenses had been struck, Plaintiff still had to put on a *prima facie* case, including on the issue of medical causation. Defendants filed a motion to exclude the Plaintiff's only medical causation expert based on the Louisiana *Daubert* rule. *State v. Foret,* 628 So.2d 1163 (La. 1993). The trial court not only refused to allow Defendants to offer their own expert on the issue of medical causation in support of the motion to exclude, the court also refused to allow Defendants to cross-examine the Plaintiff's expert on the clear science demonstrating that benzene exposure is not causally associated with the development of APL. *See Monte McWilliams v. ExxonMobil, et al*, No. 2009-2803, Div. D, Parish of Calcasieu. In short, there was no scientific evidence supporting any causal association between exposure to benzene and the development of APL.

The McWilliams case is but one in which state courts have declined to exercise the necessary gatekeeping role to ensure that juries hear reliable and relevant evidence. As we set out above, a number of federal courts have embraced the obligation that as judges, they must determine that scientific evidence is sufficiently reliable that it will assist the trier of fact. That obligation is no less important than the decisions trial judges make every day to exclude hearsay, irrelevant evidence or other incompetent evidence. We whole-heartedly endorse any amendment to Rule 702 or the Committee Notes regarding the rule which makes even more clear that the rule is mandatory and requires the trial court to make basic admissibility decisions, even if the technical subject matter seems daunting.

We would be pleased to submit our CVs or bios as well as the opinions, motions and orders from the cases referred to in this comment. Thank you for your consideration.

Very truly yours,

Robert Scott and Marquel Jordan
Blank Rome LLP

RPS/plj

| | |
|---|---|
| **From:** | Scott, Bob |
| **To:** | RulesCommittee Secretary |
| **Cc:** | Jordan, Marquel |
| **Subject:** | Robert Scott and Marquel Jordan Comments on Federal Rule Evidence 702 |
| **Date:** | Monday, October 05, 2020 11:47:52 PM |
| **Attachments:** | Robert Scott and Marquel Jordan Comments on Rule 702 amendment.pdf |



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

Dear Ms. Womeldorf,

I have attached a letter setting out comments my colleague Marquel Jordan and I have made regarding the proposed amendments to Rule 702. Marquel and I are trial lawyers and have tried personal injury cases across the country in state and federal courts. As our comments set out, we have been fortunate to have a number of federal courts favorably consider Rule 702/*Daubert* challenges to unreliable scientific and medical evidence and testimony. Our experience in state courts in states which have adopted the *Daubert* standard has been less favorable. However, the consistency, clarity and fairness of process and result in courts which take their Rule 702 gatekeeping role seriously and conscientiously is remarkable and worthwhile.

We will be delighted to provide our CVs as well as copies of the opinions and orders to which we refer in our comments.

Thanks you for considering these comments.

Robert Scott and Marquel Jordan

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# Morgan Lewis

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September 30, 2020

**VIA EMAIL ONLY**

Rebecca A. Womeldorf, Secretary
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Re: Amending Federal Rule of Evidence 702 to Clarify Courts' "Gatekeeping" Obligation

Dear Ms. Womeldorf:

We write in support of the proposed clarification of Federal Rule of Evidence 702 to emphasize a court's responsibility to act as the gatekeeper for expert testimony. Clarifying that courts must find the requirements of Rule 702 are met by a preponderance of the evidence would both (1) help restore the intent of *Daubert* to cases applying Rule 702; and (2) promote findings on the record that would help ensure fair process and meaningful appellate review. In our experience, the proposed change would benefit both parties and courts.

In *Daubert v. Merrell Dow Pharmacueticals, Inc.*, 509 U.S. 579 (1993), the Supreme Court expressed confidence that "federal judges possess the capacity" to serve as the "gatekeeper" for expert testimony, determining "whether the reasoning or methodology underlying the testimony is scientifically valid" and "whether that reasoning or methodology properly can be applied to the facts in issue." *Id.* at 592–93. Making this determination is the trial court's responsibility because the Rules of Evidence "assign to the trial judge the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand." *Id.* at 597. "Faced with a proffer of expert scientific testimony, then, the trial judge must determine at the outset, pursuant to Rule 104(a), whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue." *Id.* at 592.

Courts have struggled to apply *Daubert*. Rather than make findings on the Rule 702 standards—whether "(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and

(d) the expert has reliably applied the principles and methods to the facts of the case"—courts have begun to treat these criteria as affecting the weight, rather than the admissibility, of expert testimony. *See, e.g., Krommenhock v. Post Foods, LLC*, 334 F.R.D. 552, 580 (N.D. Cal. 2020) ("Post's challenges to Silverman's methodology and failure to consider specific issues go to weight, not admissibility."); *In re ResCap Liquidating Tr. Litig.*, 432 F. Supp. 3d 902, 926 (D. Minn. 2020) ("[T]he reliability of Plaintiff's appraisal experts' GAVM method goes to weight not admissibility[.]").

We have seen firsthand both the importance of judges acting as gatekeepers as well as the consequences when judges view the Rule 702 standards as mere benchmarks for evaluating the weight, rather than the admissibility, of expert testimony. These consequences include allowing cases to proceed past the summary judgment stage based on insufficient and unreliable expert testimony, determinations of liability or the awards of massive damages based on unreliable expert testimony, and the application of an erroneous standard of review on appeal if the Rule 702 criteria are improperly viewed as going to the weight and not the admissibility of evidence. Even if trial court error can be corrected on appeal, the entry of judgment based on unreliable expert testimony may require the defendant to establish a reserve pending appeal, potentially impacting shareholder value.

By clarifying that admissibility requires courts to make these specific findings—and based on the preponderance of the evidence—we anticipate two additional benefits. First, we anticipate that district judges' written explanations of decisions to admit or exclude expert testimony would be more detailed and better explained, facilitating appellate review of these important decisions. If a district court must affirmatively and expressly find that each of the requirements of Rule 702 has been satisfied, judges must engage in rigorous analysis.

Second, we anticipate that district judges would be more likely to hold hearings regarding the admission of expert testimony. A hearing, in which a judge can opt to hear from the experts, hear live argument from counsel, and when necessary, ask questions of the experts, focuses a court's attention on the relevant standards, in a way that a decision on the papers does not.

Hearings can particularly valuable for issues involving complex technology. In patent infringement cases, for example, courts determining the meaning of patent claims often first have the parties present a technology tutorial, followed by *Markman* hearing in which the parties discuss the claims. Peter S. Menell et al., *Patent Case Management Judicial Guide* 2-18–2-19 (3d ed. 2016); *see also id.* at 5 6 ("Depending on the complexity of the technology at issue, it is often useful to plan for technology tutorials in conjunction with the Markman proceeding."); *id.* at 5-16–5-18 (discussing technology tutorials).

We do not suggest that holding a hearing would always be necessary (or appropriate), but some expert testimony involves highly complex and technical subject matter, and it may benefit the trial court to have either of both of a "technology tutorial" or a live *Daubert* hearing before ruling on the admissibility of expert testimony. A formal amendment to Rule 702 will help to reinforce that judges must take their gatekeeping responsibilities—including the need to understand the science, methodology or technology underlying the expert opinion—as seriously as they do when interpreting patent claims.

Litigation during the COVID-19 pandemic has illustrated that the burden of additional hearings can be minimized by technology. Parties and witnesses can appear remotely by videoconference without any need for travel, limiting the expenses for the parties and making scheduling easier for courts.

For these reasons, we urge the Rules Committee to adopt the proposed amendment to Federal Rule of Evidence 702 and expressly require that before admitting expert testimony, a court find that each of the requirements of Rule 702 be satisfied by a preponderance of the evidence.

Sincerely,

*/s/ J. Gordon Cooney, Jr.*
J. Gordon Cooney, Jr.

*/s/ William R. Peterson*
William R. Peterson

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October 9, 2020

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

Re: Amending Federal Rule of Evidence 702 to Clarify Courts' "Gatekeeping" Obligation

Dear Ms. Womeldorf:

State Farm Mutual Automobile Insurance Company ("State Farm") and its millions of customers are highly dependent on a well-functioning civil justice system that is accessible, equitable, predictable and efficient. As State Farm's General Counsel, I appreciate the critical role the Advisory Committee on Evidence Rules ("Committee") plays in promoting a well-functioning civil justice system by ensuring the Federal Rules of Evidence (FRE) are fair, plainly understood, and uniformly applied. I applaud and thank the Committee for its diligent focus on Rule 702, and write to urge you to move forward in amending the rule to clarify the courts' "gatekeeping" responsibilities. I also take this opportunity to encourage the committee to act on the strongly worded suggestion by the United State Supreme Court in *Wal-Mart Stores v. Dukes*[1] and pronounce that Rule 702 applies at the class certification stage. In *Dukes* the Supreme Court stated, "The District Court concluded that Daubert did not apply to expert testimony at the certification stage of class-action proceedings. We doubt that is so…"[2]

In State Farm's experience, some of the courts do not fully and consistently execute the "gatekeeping" function, which requires a determination that the proponent qualifying an expert witness has met his/her burden by a preponderance of the evidence, consistent with Rule 104(a). The lack of consistency creates confusion about the court's role that results in admission of unreliable opinion testimony that misleads juries, undermines civil justice, and erodes confidence in the courts. With full appreciation for the Committee's caution about amendments that clarify rather than change standards, I respectfully urge you to amend Rule 702 to remedy the inconsistency in practice by clarifying the courts' gatekeeping responsibilities and encouraging them to apply Rule 702 as intended.

Additionally, given the mixed jurisprudence among the lower courts, I urge you to make clear in an amendment (or Comment) that Rule 702 applies at the class certification stage. As Rule 1101 makes clear, all proceedings before a district court must follow the Federal Rules of

[1] 564 U.S. 338 ( 2011)
[2] *Id.* at 354 (2011)

Evidence. With respect to class actions, the Committee should appreciate that expert testimony can be the deciding factor in whether or not to certify a class. Three well-known class action examples from the U.S. Supreme Court illustrate this point: *Comcast Corp. v. Behrend*[3] turned on the rejection of testimony from an economic expert supposedly offering a classwide damage model; *Wal-Mart Stores, Inc. v. Dukes*[4] centered in part around whether to admit testimony from a plaintiff's expert about the allegedly discriminatory culture at Wal-Mart (the Court rejected it); and *Tyson Foods, Inc. v. Bouaphakeo*[5] rested on the admission of testimony from a statistics expert. The certification decision often signals the end of class action litigation. A decision to certify can create bet-the-company litigation that usually results in a classwide settlement, while a decision to deny certification typically leads to settlement or trial of only the named plaintiff's claims. A decision of this magnitude should not be subject to the inconsistency and uncertainty presently seen in the execution of many courts' gatekeeping responsibilities.

Thank you for your consideration and the opportunity to weigh in on these critical topics.

Sincerely,

Steve McManus
Senior Vice President and General Counsel

SM/sk

[3] 569 U.S. 27 (2013)
[4] 564 U.S. 338 (2011)
[5] 136 S. Ct. 1036 (2016)

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

October 10, 2020

Re: Amending Federal Rule of Evidence 702

Dear Ms. Womeldorf:

The Advisory Committee on Evidence Rules is considering whether to amend Federal Rule of Evidence 702 to clarify that the proponent of expert testimony must establish the admissibility requirements set forth in the rule—*i.e.*, that the testimony be based on sufficient facts or data and be the product of reliable principles and methods that are reliably applied to the facts of the case—by a preponderance of the evidence under Rule 104(a). *See* Daniel Capra, *Memorandum to Rule 702 Subcommittee re: Rule 702(b) and (d) – Weight and Admissibility Questions*, at 1, 26–27 (Oct. 1, 2018) (Agenda Book, Advisory Committee on Evidence Rules (Oct. 19, 2018 meeting) at 171, 196–97). According to Professor Capra, this inquiry into Rule 702 "is necessitated by the fact that a fair number of courts appear to have not read the Rule as it is intended" and instead "appear to be treating sufficiency of basis and/or reliability of application as questions of weight and not admissibility." *Id.* at 1, 5 (Agenda Book at 171, 175). As an attorney who frequently deals with Rule 702-related issues in the context of pharmaceutical, medical device, and toxic tort litigation, I believe that such an amendment is necessary.

I conducted a targeted review of federal cases to assess the extent to which courts treat sufficiency of basis and/or reliability of application as questions of weight rather than admissibility when considering expert testimony on general causation (*i.e.*, whether a product is capable of causing a medical problem) or specific causation (*i.e.*, whether the product caused the problem in a particular plaintiff)—two core issues in pharmaceutical, medical device, and toxic tort litigation.[1] In a significant number of

[1] I conducted a search in the "All Federal" database on Westlaw using the following terms: <<"Rule 702" and (general specific /5 causation) and ((sufficiency sufficient) or (application applied) /s (weight /s admissible admissibility)) and DA(aft 8/1/2010)>>. That search yielded forty-one cases. This letter addresses fourteen of those cases, including *Johnson v. Mead Johnson & Co.*, 754 F.3d 557 (8th Cir. 2014); *Bettisworth v. BNSF Ry. Co.*, 2020 WL 3498139 (D. Neb. June 29, 2020); *Langrell v. Union Pac. R.R. Co.*, 2020 WL 3037271 (D. Neb. June 5, 2020); *King v. Union Pac. R.R. Co.*, 2020 WL 3036073 (D. Neb. June 5, 2020); *Lemberger v. Union Pac. R.R. Co.*, 2020 WL 2793565 (D. Neb. May 29, 2020); *Roohbakhsh v. Bd. of Trustees of Neb. State Colleges*, 2019 WL 5653448 (D. Neb. Oct. 31, 2019); *Murphy-Sims v. Owens Ins. Co.*, 2018 WL 8838811 (D. Colo. Feb. 27, 2018); *Fox v. Omron Healthcare, Inc.*, 2016 WL 7826661 (D. Mass. Aug. 9, 2016); *Rivera v. Volvo Cars of N. Am., LLC*, 2015 WL 11118065 (D.N.M. May 28, 2015); *Bee v. Novartis Pharms. Corp.*, 18 F. Supp. 3d 268 (E.D.N.Y. 2014); *Bowles v. Novartis Pharms. Corp.*, 2013 WL

the cases I reviewed, courts failed to acknowledge or misinterpreted the standards that govern their gatekeeping role under Rule 702 when they admitted expert testimony. This indicates that courts remain uncertain as to the meaning of Rule 702.

First, although the Committee Note relating to the 2000 amendments to Rule 702 indicates that the proponent of expert testimony has the burden under Rule 104(a) of "establishing that the pertinent admissibility requirements are met by a preponderance of the evidence," many courts did not acknowledge this burden. *See, e.g.*, *Bettisworth v. BNSF Ry. Co.*, 2020 WL 3498139, at *2–3 (D. Neb. June 29, 2020) (failing to note that the proponent of expert testimony has the burden of establishing its admissibility, let alone by a preponderance of the evidence); *Bowles v. Novartis Pharms. Corp.*, 2013 WL 5297257, at *2 (S.D. Ohio Sept. 19, 2013) (same); *Ast v. BNSF Ry. Co.*, 2012 WL 252140, at *3 (D. Kan. Jan. 26, 2012) (same); *see also Fox v. Omron Healthcare, Inc.*, 2016 WL 7826661, at *2–3 (D. Mass. Aug. 9, 2016) (acknowledging that the proponent of expert testimony has the burden of establishing its admissibility but failing to note that admissibility must be established by a preponderance of the evidence); *Rivera v. Volvo Cars of N. Am., LLC*, 2015 WL 11118065, at *2 (D.N.M. May 28, 2015) (same); *Deutsch v. Novartis Pharms. Corp.*, 768 F. Supp. 2d 420, 424–27, 478 (E.D.N.Y. 2011) (same).

Some of these courts also purported to apply a "liberal" standard of admissibility even though Rule 702 on its face contains no such standard. *See Bettisworth*, 2020 WL 3498139, at *10 (stating that "*Daubert* calls for the liberal admission of expert testimony"); *Rivera*, 2015 WL 11118065, at *2 (citing a Tenth Circuit decision that pre-dates the 2000 amendments to Rule 702 for the proposition that "[t]he Court should liberally admit expert testimony") (citing *United States v. Gomez*, 67 F.3d 1515, 1526 (10th Cir. 1995)); *Deutsch*, 768 F. Supp. 2d at 426, 478 (stating that "Rule 702 codifies a liberal admissibility standard" and quoting a Second Circuit decision that pre-dates the 2000 amendments to Rule 702 for the proposition that "'there should be a presumption of admissibility of evidence'") (quoting *Borawick v. Shay*, 68 F.3d 597, 610 (2d Cir. 1995)).

These problems were not limited to district court decisions. In *Johnson v. Mead Johnson & Co.*, 754 F.3d 557 (8th Cir. 2014), the Eighth Circuit referred to Rule 104(a) but stated only that the rule required courts to determine if "the proposed testimony is scientific knowledge, derived from the scientific method, that will assist the trier of fact, i.e., is relevant." *Id.* at 561–62. The court did not acknowledge that, under Rule 104(a), the proponent of expert testimony must establish its admissibility by a preponderance of the evidence. Further, the court took the position that the testimony of an expert who performs a differential etiology analysis—*i.e.*, the process of ruling in and then ruling out the possible causes of a plaintiff's condition until the most likely cause remains—is "presumptively admissible." *Id.* at 560 n.2. Neither Rule 702 nor Rule 104(a) provides for a presumption of admissibility, and such a

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5297257 (S.D. Ohio Sept. 19, 2013); *In re Chantix (Varenicline) Prods. Liab. Litig.*, 2012 WL 12920549 (N.D. Ala. Dec. 3, 2012); *Ast v. BNSF Ry. Co.*, 2012 WL 252140 (D. Kan. Jan. 26, 2012); and *Deutsch v. Novartis Pharms. Corp.*, 768 F. Supp. 2d 420 (E.D.N.Y. 2011).

presumption is inherently inconsistent with the requirement that the proponent of expert testimony establish its admissibility by a preponderance of the evidence.

Second, many courts dismissed problems with the factual basis of an expert's opinion as relating to the weight of the evidence rather than its admissibility. *See, e.g.*, *Fox*, 2016 WL 7826661, at *4 n.3 (admitting expert's general causation opinion, reasoning that defendant's argument that expert "did not rely upon the appropriate literature, studies, or methods in forming his opinion go to the weight, rather than the admissibility, of his testimony"); *Rivera*, 2015 WL 11118065, at *5 (summarily rejecting defendant's argument that plaintiff's expert failed to review scientific literature in forming his specific causation opinion, and quoting a Tenth Circuit decision that pre-dates the 2000 amendments to Rule 702 for the proposition that "'[t]he sufficiency of factual basis to support [the expert's] opinion goes to its weight, not its admissibility'") (quoting *Werth v. Makita Elec. Works, Ltd.*, 950 F.2d 643, 654 (10th Cir. 1991)); *Bee v. Novartis Pharms. Corp.*, 18 F. Supp. 3d 268, 304–05 (E.D.N.Y. 2014) (rejecting defendant's argument that anecdotal case reports provided an unreliable basis for plaintiff's expert's general causation opinion, reasoning that the argument "go[es] to the weight, and not to the admissibility, of [the expert's] opinion" and that "questions concerning the accuracy or credibility of any such case reports may serve as valuable ammunition in countering [the expert's] opinion, once given on the stand"); *In re Chantix (Varenicline) Prods. Liab. Litig.*, 2012 WL 12920549, at *2–3 (N.D. Ala. Dec. 3, 2012) (concluding that "the factual underpinnings" of expert's specific causation opinion "are a matter for the jury to weigh, and not this court"); *Deutsch*, 768 F. Supp. 2d at 432, 459, 477–78 (stating repeatedly that "mere weaknesses in the factual basis of an expert witness' opinion . . . bear on the weight of the evidence rather than on its admissibility," and holding that court "cannot conclude that Dr. Gelfman's opinion on specific causation is scientifically unreliable," reasoning that "[h]is lack of memory with regard to what he did and did not rule out when performing his differential diagnosis can be explored on cross-examination").

In *Ast*, the court implied that challenges to the factual basis of an expert's opinion went to the weight of the evidence rather than its admissibility even though the court did not explicitly so state. The plaintiff in *Ast* sued his former employer, alleging that he was injured while throwing a railroad switch due to the defendant's negligent maintenance of the switch. *See* 2012 WL 252140, at *1. Although the plaintiff's causation expert visited the work site more than three years after the plaintiff allegedly was injured, the expert opined that the conditions he witnessed during the site visit were substantially similar to the conditions that existed at the time of the plaintiff's alleged injury. *See id.* at *3. Even though the expert did not point to any evidence supporting his three-year extrapolation, the court held that "[t]he lapse in time between the accident and [the expert's] inspection affects the weight of [his] testimony rather than its admissibility, and should be addressed at trial during cross-examination and arguments." *Id.* at *4 & n.18.

Third, other courts dismissed problems with an expert's application of his or her methodology as relating to the weight of the evidence rather than its admissibility. In *Johnson*, for example, the plaintiff/guardian ad litem of a minor child alleged that the child developed severe permanent brain

damage from exposure to a bacterium in powdered infant formula manufactured by the defendant. *See* 754 F.3d at 559–60. The district court excluded the testimony of three of the plaintiff's experts on the ground that they performed unreliable differential etiology analyses by failing to rule out other potential causes of bacterial contamination, including the municipal water supply or the pipes and/or environment in the child's home. *See id.* at 560–61. The Eighth Circuit reversed. The court explained that a differential etiology analysis is the process by which an expert rules in the reasonably plausible causes of injury and then rules them out "from least to more plausible until a most plausible cause emerges." *Id.* at 560 n.2. After noting that expert testimony based on such an analysis is "presumptively admissible" in the Eighth Circuit, the court stated that "experts are not required to rule out all possible causes when performing the differential etiology analysis." *Id.* at 560 n.2 & 563. According to the court, "such considerations go to the weight to be given the testimony by the factfinder, not its admissibility." *Id.* at 563.

Like the court in *Johnson*, other courts took the position that an expert's application of his or her methodology is an issue that goes to weight, not admissibility. *See, e.g.*, *Bettisworth*, 2020 WL 3498139, at *3, 9 (stating that "[i]n general, deficiencies in the application of scientific methodology go to the weight of the expert's testimony, not to its admissibility," and holding that even though cigarette smoking is a "widely known, and well-established" cause of lung cancer, the expert's failure to rule out the plaintiff's smoking as a cause of her lung cancer "go[es] to the weight to be given to the testimony by the factfinder, not the admissibility of the expert's testimony"); *Murphy-Sims v. Owens Ins. Co.*, 2018 WL 8838811, at *7 (D. Colo. Feb. 27, 2018) (rejecting defendant's challenge to expert's differential diagnosis, reasoning that "[c]oncerns surrounding the proper application of the methodology typically go to the weight and not admissibility"); *Bowles*, 2013 WL 5297257, at *5–6 (rejecting argument that expert's differential etiology analysis was flawed because he admitted he could not rule out multiple possible causes of plaintiff's jaw problems, reasoning that "[a]ny disagreements over the sufficiency of that etiology go to the weight of his testimony, not to its admissibility").

Fourth, in a series of decisions out of the District of Nebraska, the court did not even cite to the text of Rule 702 and concluded that challenges to both the factual basis of an expert's opinion *and* the expert's application of his methodology go to the weight of the evidence rather than its admissibility. *See Lemberger v. Union Pac. R.R. Co.*, 2020 WL 2793565, at *5 (D. Neb. May 29, 2020) ("Generally, deficiencies in application go to the weight of the evidence, not its admissibility. As a general rule, the factual basis of an expert opinion goes to the credibility of the testimony, not the admissibility.") (internal citation and quotation marks omitted); *Langrell v. Union Pac. R.R. Co.*, 2020 WL 3037271, at *5 (D. Neb. June 5, 2020) (same); *King v. Union Pac. R.R. Co.*, 2020 WL 3036073, at *5 (D. Neb. June 5, 2020) (same); *Roohbakhsh v. Bd. of Trustees of Neb. State Colleges*, 2019 WL 5653448, at *2–3 (D. Neb. Oct. 31, 2019) (same).

The court's application of these erroneous standards in *King* is particularly troubling. The plaintiff there alleged that he developed multiple myeloma from exposure to diesel fuel, diesel exhaust, benzene, creosote, and herbicides while employed at the defendant railroad company. *See* 2020 WL 3036073, at *1. The plaintiff's expert conducted a differential etiology analysis to determine what caused the

plaintiff's multiple myeloma. *See id.* at *8. Even though the expert could not rule out age, gender, genetics, or smoking as a *sole* cause of the plaintiff's injury and could not opine that one potential cause was more likely than another to have caused the injury, the court admitted his opinion that the alleged chemical exposure contributed to the plaintiff's condition, reasoning that a differential etiology is "presumptively admissible" and that the expert's application of this methodology was "reliable enough." *Id.* at *3, 8–9.

In short, my review demonstrates a pervasive problem in how courts interpret and apply their gatekeeping role under Rule 702. This conclusion is consistent with my experience practicing in the pharmaceutical, medical device, and toxic tort fields over the last approximately twenty years. During that period, I have litigated numerous expert challenges in state and federal courts across the country. While I have found that courts generally take their gatekeeping role seriously, the fact is that assessing the admissibility of general and specific causation testimony can be difficult, and judges sometimes may prefer to admit testimony rather than grapple with complicated scientific issues. That urge is understandable, but it is not compatible with Rule 702.

In *General Electric Co. v. Joiner*, 522 U.S. 136 (1997), Justice Breyer observed that "neither the difficulty of the task nor any comparative lack of expertise can excuse the judge from exercising the 'gatekeeper' duties that the Federal Rules of Evidence impose." *Id.* at 148 (Breyer, J., concurring). "To the contrary," he wrote, "when law and science intersect, those duties often must be exercised with special care." *Id.* Amending Rule 702 to clarify that courts must establish the admissibility requirements set forth in the rule by a preponderance of the evidence would give courts the added guidance that they need to exercise their gatekeeping duties with the special care that Justice Breyer recommended.

Sincerely,

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12 October 2020

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Attention: Rebecca A. Womeldorf, Secretary

**Re: Comment on Potential Amendment to Federal Rule of Evidence 702**

GlaxoSmithKline LLC ("GSK") respectfully submits this Comment to the Advisory Committee on Evidence Rules ("Committee") in support of amendment to Federal Rule of Evidence 702. As a science-led global health leader, GSK's mission is to help people do more, feel better, and live longer. We achieve these goals through rigorous application of scientific principles and adherence to the integrity of the scientific method. With these guiding values in mind, we believe that amending Rule 702 is both necessary and important.

Rule 702 is intended to ensure that unreliable evidence is barred from consideration by juries. Yet decades of experience make it apparent that there is confusion among courts regarding the application and parameters of Rule 702, sometimes with consequences felt well outside the courtroom. Indeed, federal courts are divided on some of the bedrock principles of Rule 702, such as whether their gatekeeping function requires analysis of the factual basis of a proposed expert's testimony, and whether the application of a proposed expert's methodology is within the scope of review. Because Rule 702 as currently drafted is failing to provide clear guidance to properly inform and guide courts on these important issues, the Advisory Committee should amend the Rule to provide greater clarity, ensure consistent decision-making, and protect juries and the public from unreliable pseudo-science.

## *I. Rule 702 requires an amendment to clarify the courts' gatekeeping role*

Scholars and other commentators have recognized for some time that many federal courts do not apply Rule 702 as intended, even after the adoption of amendments in 2000 to "implement[] the standards of *Daubert* and its progeny and provid[e] a uniform structure for assessing expert testimony in light of all the case law."[1] A seminal 2015 law review article noted several fundamental issues that have arisen since the 2000 amendments.[2] Clear examples of confusion regarding Rule 702 include: (1) continued application of pre-amendment standards, (2) holding that the application of an expert's methodology is not subject to the gatekeeping function, and (3) statements that the factual basis of an expert's opinion is an issue of weight rather than admissibility.[3] More recent reviews of the case law confirm that courts continue to misapply Rule 702. For example, many decisions hold that Rule 702 establishes a presumption of admissibility, which when applied in practice serves to exclude only the most egregious and patently nonsensical expert opinions.[4] No presumption of admissibility exists within Rule 702, and applying a presumption undermines the intent of the rule and judges' responsibility to independently assess the reliability of proffered expert opinions.

Such decisions are not "one-off" aberrations, but rather constitute a troubling pattern of confusion regarding Rule 702 and courts' mandated gatekeeping function. Misapplication of Rule 702 is especially prevalent in mass tort actions in the pharmaceutical industry, an area of particular importance to GSK. Given the size and importance of these cases,

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[1] Daniel Capra, Memorandum to the Advisory Committee on Evidence Rules, n.6 (April 1, 2018), Agenda Book for Advisory Committee on Rules of Evidence April 26-27, 2018, https://www.uscourts.gov/sites/default/files/agenda_book_advisory_committee_on_rules_of_evidence_-_final.pdf), at 92 [hereafter Capra, *Memorandum I*].
[2] David E. Bernstein & Eric G. Lasker, *Defending* Daubert: *It's Time to Amend Federal Rule of Evidence 702*, 57 Wm. & Mary L. Rev. 1 (2015).
[3] *Id.* at 19-25, 27-30, 33 (discussed at length in Capra, *Memorandum I, supra* n.1); *see* David E. Bernstein, *The Misbegotten Judicial Resistance to the Daubert Revolution*, 89 Notre Dame L. Rev. 27 (2013) (arguing that further amendment to Rule 702 is necessary to address misapplication of the standard for admitting expert testimony); 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) (identifying "five general areas of inconsistency in the application of expert testimony standards").
[4] Lee Mickus, *Gatekeeping Reorientation: Amend Rule 702 to Correct Judicial Misunderstanding About Expert Evidence*, Washington Legal Foundation, Critical Legal Issues Working Paper Series, Number 217 (May 2020) https://www.wlf.org/wp-content/uploads/2020/05/0520MickusWPfinal-for-web-002.pdf.



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mass tort opinions influence Rule 702 decisions in other contexts, thereby fostering continued misunderstanding and misapplication of the Rule, continued reliance on pre-2000 decisions, and application of incorrect standards.[5]

Misunderstanding and misapplication of Rule 702 can have important consequences outside the courtroom. In some instances, safe and effective drugs have been pulled from the market due to the threat of lawsuits based on unsound science. For example, litigation alleging that the drug Bendectin caused birth defects resulted in large jury awards based on unreliable science, after which the manufacturer withdrew the medication from the United States market.[6] The market withdrawal left an absence of any approved treatment for serious nausea and vomiting impacting pregnant women in the United States.[7] Years later, the same drug was re-approved as safe and efficacious for use in pregnancy, but the decade-long damage based on unfounded and unscientific litigation claims had been done.[8]

Junk science in the courtroom also can have a pernicious influence on doctor-patient relationships, and even influence individual patients to discontinue recommended therapies. An analogy to the harm of unfettered expert testimony at trial can be seen in research on attorney advertising for mass tort cases. Research demonstrates that patients exposed to unscientific information with an imprimatur of authority may perceive greater risks than exist and stop taking necessary medications.[9] In some cases, the consequences are tragic.[10] Perhaps less obvious, but nonetheless unfortunate, is the stifling effect unfounded science can have on innovation, ultimately denying new and better treatment options to patients.[11] Treatment decisions, like all decisions concerning public health, should be driven by sound science. That goal is undermined when individuals cloaked with the authority of experts offer unscientific testimony in a manner completely at odds with *Daubert* and the gatekeeping mandate of Rule 702.

### *II. Courts apply inconsistent standards to Rule 702 decisions*

Notably, and contrary to the purposes of the Federal Rules of Evidence, Rule 702 is not applied in a consistent manner across jurisdictions. Instead, federal courts have diverged sharply over the scope of their gatekeeping responsibilities on two important issues. Some have concluded that problems in the application of an expert's methodology or shortcoming in an expert's factual basis are matters to be considered by a jury. Although other courts have hewn closely to the intent of Rule 702, Committee action is needed to clarify the Rule and provide uniformity in federal courts' consideration of proffered expert evidence.

Under Rule 702(b), courts must ensure that expert "testimony is based on sufficient facts or data." But several circuits have misunderstood this directive and held that factual basis is not an issue of admissibility. In *Milward v. Acuity Specialty Prods. Grp., Inc.*, the district court identified several key defects in the factual basis of a proffered expert and excluded his testimony, but the First Circuit reversed.[12] It criticized the district court for "repeatedly challeng[ing] the factual underpinnings of [the expert's] opinion," holding that "[t]he soundness of the factual underpinnings of the expert's analysis and the correctness of the expert's conclusions based on that analysis are factual matters to be determined by the trier of fact."[13]

In *Manpower, Inc. v. Ins. Co. of Pennsylvania*,[14] the Seventh Circuit similarly reversed the exclusion of expert testimony, holding that a "district court usurps the role of the jury, and therefore abuses its discretion, if it unduly scrutinizes the quality of the expert's data and conclusions rather than the reliability of the methodology the expert employed."[15] It ruled that a district court may not "assess the quality of the data inputs [an expert] selected" because "the selection of

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[5] Thomas Sheehan et al., Letter to the Advisory Committee (June 9, 2020), https://www.uscourts.gov/sites/default/files/20-ev-e_suggestion_from_thomas_sheenan_-_rule_702_0.pdf

[6] *See* Brent R. *Bendectin: Review of the medical literature of a comprehensively studied human non-teratogen and the most prevalent tortogen–litigen*, Reprod Toxicol. 1995;9:337–349; Brent R. *Bendectin and birth defects: hopefully, the final chapter*, Birth Defects Res A Clin Mol Teratol. 2003;67:79-87. Recognizing the importance of sound science in the courtroom, the Supreme Court established the *Daubert* standard to guide judges' gatekeeping function in a Bendectin case.

[7] *See* Kutcher JS, Engle A, Firth J, Lamm SH. *Bendectin and Birth Defects. II: Ecological Analyses*, Birth Defects Res A Clin Mol Teratol. 2003;67(2):88-97, at 96 (noting that that hospitalizations for nausea and vomiting in pregnancy doubled after Bendectin became unavailable in the United States).

[8] *See* Lars Noah, *Triage in the Nation's Medicine Cabinet: The Puzzling Scarcity of Vaccines and Other Drugs*, 54 S.C. L. Rev. 741, 760 (2002); W. Kip Viscusi, *Corporate Risk Analysis: A Reckless Act?*, 52 Stan. L. Rev. 547, 583-84 (2000).

[9] Jesse King & Elizabeth Tippett, *Drug Injury Advertising*, 18 Yale J. Health Pol'y L. & Ethics, 148 (2019).

[10] Maren McBride, Legislative Director for Appropriations, U.S. Food & Drug Admin., to Hon. Andy Harris, M.D., U.S. House of Rep. (Feb. 6, 2019), *available at* https://www.agingresearch.org/app/uploads/2019/05/2019-0206-Harris-Letter.pdf (stating the FDA received reports indicating that 58 patients who were prescribed antidiabetic, antidepressant, or anticoagulant medications discontinued taking their medication after viewing a negative lawsuit or other advertisement, and subsequently experienced an adverse event or death).

[11] David J. Damiani, *Expert Testimony Reform* Proposals, 13 Alb. L. J. Sci. 518, 523 (2003) ("Mass tort litigation that damages nontortious companies often leads to unintended consequences such as the disappearance of needed drugs and devices from the market and a disincentive to innovate.").

[12] 639 F.3d 11, 13 (1st Cir. 2011).

[13] *Id.* at 22 (quoting *Smith v. Ford Motor Co.*, 215 F.3d 713, 718 (7th Cir. 2000).

[14] 732 F.3d 796, 801 (7th Cir. 2013).

[15] *Id.* at 806.

data inputs to employ in a model is a question separate from the reliability of the methodology reflected in the model itself."[16]

The Fourth Circuit has also taken the view that assessing the factual basis of an expert's proposed testimony is not part of the court's gatekeeping function. In *Bresler v. Wilmington Tr. Co.*, defendants pointed to errors that an expert made in assigning "certain variables, including the cost of insurance and future interest rates."[17] The court ruled that such arguments were not cognizable under Rule 702 because "challenges to the accuracy of [an expert's] calculations affect the weight and credibility of [the expert's] assessment, not its admissibility."[18] The Fifth and Eighth Circuits have also stated that, in general, the factual basis of an expert's proffered testimony is an issue for a jury to consider rather than a part of the courts' gatekeeping role.

Other circuits have taken an entirely different view and properly concluded that an expert's factual basis must be assessed by a judge prior to admission of expert testimony. The Third Circuit rejected the "suggestion that the reasonableness of an expert's reliance on facts or data to form his opinion is somehow an inappropriate inquiry under Rule 702," stating that such an argument reflects "an unduly myopic interpretation of Rule 702 and ignores the mandate of *Daubert* that the district court must act as a gatekeeper."[19] The Second Circuit recognizes that "[i]n deciding whether a step in an expert's analysis is unreliable, the district court should undertake a rigorous examination of the facts on which the expert relies, the method by which the expert draws an opinion from those facts, and how the expert applies the facts and methods to the case at hand."[20] The Eleventh Circuit has also held that it is "entirely proper—indeed necessary—for the district court to focus on the reliability of [an expert's] sources and methods," although it acknowledged "that courts in other circuits have taken a more expansive approach and permitted expert testimony" despite problems with an expert's factual basis.[21] Such acknowledgment underscores that there is substantial disagreement among circuits regarding the scope and application of Rule 702(b), meaning opinions may rest more on where a complaint is filed than the text of the Rule itself.

The same split in authority exists as to Rule 702(d), which provides that a court must find an "expert has reliably applied the principles and methods to the facts of the case." As with factual basis, not all courts apprehend the scope of review under this provision. In *City of Pomona v. SQM N. Am. Corp.*, a district court excluded an expert's opinion because he failed to adhere to published protocols for the test he administered.[22] The Ninth Circuit reversed, explaining that "[i]n the Ninth Circuit" expert opinion testimony should be excluded only if it "is the result of a faulty methodology or theory as opposed to imperfect execution of laboratory techniques whose theoretical foundation is sufficiently accepted in the scientific community."[23] Notably, the court specifically rejected the "any step" approach described in *In re Paoli R.R. Yard PCB Litigation*,[24] a case cited in the Advisory Committee's note to the 2000 amendment of Rule 702 as exemplifying the proper analysis.[25]

Similarly, while finding it a "close question," the Ninth Circuit reversed exclusion of expert testimony in *Wendell v. GlaxoSmithKline LLC*, and faulted the trial court for looking "too narrowly at each individual consideration [under *Daubert*], without taking into account the broader picture of the experts' overall methodology."[26] In particular, the court criticized the trial judge's "overemphas[is]" on the experts' failure to conduct independent research or to cite to epidemiological studies, as well as the trial judge's finding that the experts did not rely on studies supporting causation.[27] Instead, the appellate court effectively endorsed the experts' differential diagnosis as sufficient to overcome the hurdles of *Daubert* without sufficiently evaluating whether differential diagnosis was a sound methodological basis for the experts' opinions.[28] *Wendell* is illustrative of a reading of Rule 702 that swallows the instruction of the Rule and the purpose of its amendments by eschewing *Daubert* factors in favor of a broad brush approach to admissibility.

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[16] *Id.* at 807.
[17] 855 F.3d 178, 195 (4th Cir. 2017).
[18] *Id.* at 196 (internal quotation marks omitted).
[19] *ZF Meritor, LLC v. Eaton Corp.*, 696 F.3d 254, 294 (3d Cir. 2012)
[20] *Amorgianos v. Nat'l R.R. Passenger Corp.*, 303 F.3d 256, 267 (2d Cir. 2002)
[21] *Kilpatrick v. Breg, Inc.*, 613 F.3d 1329, 1336, 1343 (11th Cir. 2010).
[22] 750 F.3d 1036, 1047 (9th Cir. 2014).
[23] *Id.* at 1047-48 (quoting *United States v. Chischilly*, 30 F.3d 1144, 1154 & n.11 (9th Cir.1994).
[24] 35 F.3d 717, 745 (3d Cir. 1994).
[25] *City of Pomona*, 750 F.3d at 1047; *see* Fed. R. Evid. 702 advisory committee's note to 2000 amendment.
[26] 858 F.3d 1227, 1233 (9th Cir. 2017).
[27] *Id.*
[28] *Id.*; *see also* Schwartz & Silverman, 35 Hofstra L. Rev. at 250 (noting the sometimes "fine line between differential diagnosis and pure guesswork").

The Eleventh Circuit applied a similar rule in *Quiet Tech. DC-8, Inc. v. Hurel-Dubois UK Ltd.*, distinguishing "between the reliability of computational fluid dynamics generally and of [an expert's] application of [that method] in this case."[29] Although the court appeared to recognize that an expert had used an incorrect variable in an important formula, it held that "[t]he identification of such flaws in generally reliable scientific evidence is precisely the role of cross-examination."[30] Because defendants' "argument is that [the expert] misused a method that, in the abstract, is reliable," the court concluded that the issue went "to the weight, not the admissibility, of the evidence he offered."[31] Determining that opinions are admissible because the methodology employed is "in the abstract" reliable, even where the methodology was not reliably applied, strikes at the very purpose of the Rule 702 amendments: to preclude unreliable expert opinions.

Courts in other circuits have adopted a view of Rule 702(d) consistent with the intent of the Rule. In the Third Circuit, courts have adhered to the "any step" approach described in *Paoli*. There, the court explained that "after *Daubert*, we no longer think that the distinction between a methodology and its application is viable."[32] Accordingly, "any step that renders the analysis unreliable under the *Daubert* factors renders the expert's testimony inadmissible" and "despite the fact that [a] methodology is generally reliable, each application is distinct and should be analyzed for reliability."[33] The Tenth Circuit has also explicitly rejected the argument "that *Daubert* should not [be] used to assess the *application* of the experts' methodologies, but rather should have been used to assess *only the methodologies* upon which [an expert] relied."[34] It explained that "[i]t is an elusive process to divine the difference between a methodology and what constitutes a change from that methodology" and thus any faulty step renders expert evidence inadmissible regardless of "whether the step completely changes a reliable methodology or merely misapplies that methodology."[35] These different approaches among the circuits, however, remain unresolved and evidence the need for an amendment to help judges consistently and uniformly apply Rule 702.

Differences among the circuits also create substantial uncertainty and drive courts to reach different outcomes when considering the same issues or even the same experts. For example, district courts in the Seventh Circuit have denied Rule 702 challenges to experts suggesting a causal relationship between the GSK drug Paxil and suicide, citing that circuit's rule that "the court should avoid passing judgment on the 'factual underpinnings of the expert's analysis and the correctness of the expert's conclusions,' a role better left to the fact-finder."[36] But a court that considered the sufficiency of an expert's factual basis on that same issue excluded testimony in part because the expert "failed to account for a substantial body of evidence which has found no causal link between Paxil and suicide or suicidal behavior in adults."[37] Similarly, courts with different interpretations of Rule 702(b) have reached different conclusions about the admissibility of the same proposed expert's testimony, with one court ruling that Rule 702 "applies to all aspects of an expert's testimony" including "the facts underlying the expert's opinion,"[38] but another stating that that "the factual basis for an expert's findings goes to the weight of his testimony not the admissibility."[39] These outcomes should not be driven by the location in which suit is filed, but by the text of the Rule.

### *III. The lack of a uniform approach to Rule 702 requires Advisory Committee action*

Courts' differing approaches to Rule 702 have not gone unnoticed. In addition to the Advisory Committee's own work noted above, many scholars have described splits among the courts on the application of the Rule.[40] Perhaps more importantly, courts themselves are increasingly identifying differences in the way different circuits apply Rule 702.

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[29] 326 F.3d 1333, 1343 (11th Cir. 2003).
[30] *Id.* at 1345.
[31] *Id.*
[32] *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d at 745.
[33] *In re Zoloft (Sertraline Hydrochloride) Prods. Liab. Litig.*, 858 F.3d 787, 795 (3d Cir. 2017)
[34] *Attorney Gen. of Oklahoma v. Tyson Foods, Inc.*, 565 F.3d 769, 779 (10th Cir. 2009) (emphases in original).
[35] *Id.* at 780.
[36] *Tucker v. SmithKline Beecham Corp.*, 701 F. Supp. 2d 1040, 1055 (S.D. Ind. 2010) (quoting *Smith v. Ford Motor Co.*, 215 F.3d 713, 718 (7th Cir. 2000)); *see also Dolin v. Smithkline Beecham Corp.*, No. 12 C 6403, 2015 WL 7351678, at *3 (N.D. Ill. Nov. 20, 2015) (adopting the reasoning of *Tucker*).
[37] *Vanderwerf v. SmithKlineBeecham Corp.*, 529 F. Supp. 2d 1294, 1307 (D. Kan. 2008).
[38] *In re Zoloft (Sertraline Hydrocloride) Prods. Liab. Litig.*, No. 12-MD-2342, 2015 WL 7776911, at *16 (E.D. Pa. Dec. 2, 2015).
[39] *In re DePuy Orthopaedics, Inc. Pinnacle Hip Implant Prods. Liab. Litig.*, No. 3:11-MD-2244-K, 2014 WL 3557345, at *13 (N.D. Tex. July 18, 2014).
[40] Bernstein & Lasker, 57 Wm. & Mary L. Rev. at 27, 30 (noting differences on whether "review of an expert's application of his methodology is beyond the scope of a court's gatekeeping power" and whether courts may "assess the reliability of the factual foundations of such testimony"); David L. Faigman, Christopher Slobogin, John Monahan, *Gatekeeping Science: Using the Structure of Scientific Research to Distinguish Between Admissibility and Weight in Expert Testimony*, 110 Nw. U. L. Rev. 859, 874 (2016) ("While some courts have taken to heart the change in focus signaled by *Joiner* and Rule 702, many other courts, perhaps most, continue to insist on the methodology-conclusions distinction when determining whether an expert evidentiary proposition goes to admissibility or weight.") (footnote omitted); 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, 795 (2019) (citing "judges' lack of consistency in applying *Daubert*"); Alexandra Kennedy-Breit, *Admissibility of Expert Evidence to Prove Causation in Toxic Torts*, 53 Tort Trial & Ins. Prac. L.J. 139, 146 (2017) stating that "more than twenty years after the Supreme Court's decision in *Daubert*," Rule 702 is "still being applied inconsistently").

As a district judge recently noted with candor, decisions applying Rule 702 "are impossible to read without concluding that district courts in the Ninth Circuit must be more tolerant of borderline expert opinions than in other circuits."[41] The same court noted that this lack of uniformity "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."[42] Another district court judge explained that "the approach of the Eighth and Third Circuits [to Rule 702] is somewhat more restrictive than the approach of the First and other Circuits" and expressed difficulty in attempting "to choose between these two approaches."[43]

Confusion regarding Rule 702 among federal courts has also been cited by other tribunals considering the admissibility of expert testimony. In deciding whether to adopt federal standards as a matter of state law, the Supreme Court of New Jersey acknowledged that "there is no monolithic body of case law uniformly or even consistently applying *Daubert*," and thus the court "hesitate[d] to sweep in adherence to the various approaches taken among the circuits and state jurisdictions when applying the *Daubert* factors."[44] The court accordingly did "not adopt a 'standard' that [it] cannot fully discern in its application" and noted it "cannot ignore that there are discordant views about the gatekeeping role among *Daubert* jurisdictions."[45] The District of Columbia Court of Appeals, likewise considering whether to apply the federal rule, noted that although "there are substantial benefits to be gained from adopting a test that is widely used," the court was "not proceeding with any illusions that the cases are uniform or even consistent."[46]

This discordance demands correction. "One of the shaping purposes of the Federal Rules is to bring about uniformity in the federal courts . . . ."[47] Yet Rule 702 as written is not providing sufficient guidance. As noted above, judges themselves have decried the inability to discern a uniform standard and acknowledged that the case law is inconsistent. The absence of a national standard applied consistently across jurisdictions permits forum shopping and makes it difficult for interstate companies to plan their affairs based on legitimate science rather than threats of litigation. Those threats are exacerbated when parties can seek out lowest-common-denominator jurisdictions that permit unreliable expert evidence in contravention of the intent of Rule 702. In short, whether proffered expert opinions are deemed reliable and admissible has become a question more of where the opinion is being offered, rather than the impartial and consistent application of Rule 702.

The Advisory Committee has received numerous comments from legal organizations and industry leaders urging Rule 702 reform.[48] GSK joins those voices in exhorting the Advisory Committee to avoid further delay and draft an amendment to Rule 702 to clarify that courts can and indeed are obligated by the Rule to engage in rigorous gatekeeping of proposed expert testimony. Committee action is needed to ensure that litigation is based on reliable evidence and that public health decisions are guided by scientific principles.

Yours sincerely,

James Ford

**James Ford**
**Senior Vice President & General Counsel**

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[41] *In re Roundup Prods. Liab. Litig.*, 358 F. Supp. 3d 956, 959 (N.D. Cal. 2019).
[42] *In re Roundup Prods. Liab. Litig.*, 390 F. Supp. 3d 1102, 1113 (N.D. Cal. 2018) (citations omitted).
[43] *United States v. McCluskey*, 954 F. Supp. 2d 1224, 1255 (D.N.M. 2013).
[44] *In re Accutane Litig.*, 191 A.3d 560, 595 (N.J. 2018)
[45] *Id.*
[46] *Motorola Inc. v. Murray*, 147 A.3d 751, 757 (D.C. 2016).
[47] *Hanna v. Plumer*, 380 U.S. 460, 472 (1965).
[48] Chief Legal Officers of 50 Companies, Letter to Advisory Committee (March 2, 2020), https://www.uscourts.gov/sites/default/files/20-ev-b_suggestion_from_50_companies_-_rule_702_0.pdf; Federation of Defense & Corporate Counsel, Letter to Advisory Committee (June 30, 2020), https://www.uscourts.gov/sites/default/files/20-ev-f_suggestion_from_federation_of_defense_and_corporate_counsel_-_rule_702.pdf; International Association of Defense Counsel, Letter to Advisory Committee (July 31, 2020), https://www.uscourts.gov/sites/default/files/20-ev-h_suggestion_from_international_association_of_defense_counsel_-_rule_702_0.pdf

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October 15, 2020

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

***Re: Amending Federal Rule of Evidence 702 – A Louisiana Perspective.***

Dear Ms. Womeldorf:

As a Louisiana attorney and mass tort litigator in Louisiana state and federal courts, I am writing in support of a clarifying amendment to Federal Rule of Evidence 702.[1] In lieu of repeating the well-reasoned and thoroughly researched positions of my peers,[2] I thought it may be helpful to provide the Committee with a recent example of the "trickle-down" effect of the ambiguity of Rule 702 on Louisiana litigation.

**Louisiana Code of Evidence Rule 702 Mirrors the Federal Rule of Evidence 702**

The Louisiana Supreme Court has long recognized that the applicable federal law interpreting Rule 702, including *Daubert* and its progeny, is relevant and persuasive when analyzing Louisiana Code of Evidence Rule 702. *See e.g., State v. Foret*, 628 So. 2d 1116 (La. 1993) ("As [La. C.E. art. 702] is virtually identical to its source provision in the Federal Rules of Evidence, F.R.E. 702 and in several states' evidentiary rules, we will examine and consider federal jurisprudence and other states' jurisprudence interpreting the proper application of this rule.").

La. C. E. art. 702 was revised in 2014 to track Fed. R. Evid. 702, which was amended as part of a restyling of the Federal Rules of Evidence. *See* La. C.E. art. 702, cmt. (b); *see also* FED. R. EVID. 702, cmt. The revision creates a five-element test as to the admissibility of expert testimony, requiring that the witness be "qualified as an expert by knowledge, skill, experience, training, or education" and setting forth four enumerated requirements of the qualified expert's testimony that relate to its reliability and relevance.

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

[2] *See, e.g.* June 9, 2020, Memorandum from Thomas J. Sheehan, Eva Canaan, and Joshua Glasgow, to Committee on Rules of Practice and Procedure, *re: Amending Federal Rule of Evidence 702 – a Review of Gatekeeping Practices in Multidistrict Litigation.*

Failure of the witness to qualify as an expert pursuant to the introductory paragraph of La. C.E. art. 702(A) *or* failure of the testimony to meet any of the indicia of reliability or relevancy set forth in La. C.E. art. 702(A)(1) through (A)(4) will render the testimony inadmissible. *See Blair v. Coney*, 2019-00795 (La. 4/3/20), *reh'g denied,* 2019-00795 (La. 7/9/20), 298 So. 3d 168.

Prior to the foregoing revision to La. C.E. art. 702, the Louisiana Supreme Court recognized that the admission of expert testimony is proper only if all three of the following are established: "(1) the expert is qualified to testify competently regarding the matters he intends to address; (2) the methodology by which the expert reaches his conclusions is sufficiently reliable as determined by the sort of inquiry mandated in [*Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993)]; and (3) the testimony assists the trier of fact, through the application of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact in issue." *Cheairs v. State ex rel. Dep't of Transp. & Dev.*, 2003-680, pp. 9-10 (La. 12/3/03), 861 So. 2d 536, 542–43 (quoting *City of Tuscaloosa v. Harcros Chems., Inc.*, 158 F.3d 548 (11th Cir. 1998). These requirements are reproduced in the introductory paragraph of La. C.E. art. 702(A), in La. C.E. art. 702(A)(3), and in La. C.E. art. 702(A)(1), respectively.[3]

The foregoing amendment to La. C.E. art. 702 ostensibly adds two requirements to the three-prong inquiry adopted in *Cheairs*: first, that the testimony must be based on sufficient facts or data, La. C.E. art. 702(A)(2), and; second, that the expert must reliably apply the principles and methods to the facts of the case, La. C.E. art. 702(A)(4). Although not previously enumerated in La. C.E. art. 702 or *Cheairs*, these additions do not change the law. Instead, La. C.E. art. 702(A)(2) and C.E. art. 702(A)(4) are grounded in the longstanding principle recognized in *Daubert* that the determination of whether an expert's testimony is admissible requires an assessment of "whether that reasoning or methodology properly can be applied to the facts in issue." *Daubert*, 509 U.S. at 592–593, 113 S.Ct. 2786; *see also* La. Acts 2014, No. 630, § 2 ("No change in law or result in a ruling on evidence admissibility shall be presumed or is intended by the Legislature of Louisiana by the passage of this Act.").

In Louisiana, like in federal courts, the district court performs the important gatekeeping role of ensuring "that any and all scientific testimony or evidence admitted is not only relevant, but reliable." *Cheairs*, 861 So. 2d at 541 (citing *Daubert*, 509 U.S. at 589, 113 S.Ct. 2786). Accordingly, a district court is afforded broad discretion in determining whether expert testimony is admissible, and its decision with respect thereto shall not be overturned absent an abuse of that discretion. *Cheairs*, 861 So. 2d at 541 (citing *State v. Castleberry*, 98-1388 (La. 4/13/99), 758 So. 2d 749, 776); *see also* La. C.E. art. 702, cmt (d) ("[b]road discretion should be accorded the trial judge in his determination as to whether

[3] The four non-exclusive factors set forth in *Daubert* for determining reliability of an expert's methodology – namely, (1) whether it can be (and has been) tested, (2) if the theory or technique has been subjected to peer review and publication, (3) the known or potential rate of error, and (4) whether it is generally accepted within the scientific community – are appropriately reviewed under C.E. art. 702(A)(3*). See Indep. Fire Ins. Co. v. Sunbeam Corp.*, 99-2181, p. 13 (La. 2/29/00), 755 So. 2d 226, 234 (citing *Daubert*, 509 U.S. at 594–95, 113 S.Ct. 2786).

expert testimony should be held admissible and who should or should not be permitted to testify as an expert."); *State v. Foret*, 628 So. 2d 1116, 1123 (La. 1993) ("The admission of the evidence [is] subject to the discretion of the trial judge.") (internal quotations omitted).

Importantly, the factual basis for an expert's opinion determines the reliability of the testimony, and the trial court's inquiry must be tied to the specific facts of the particular case. *Giavotella v. Mitchell*, 2019-0100 (La. App. 1 Cir. 10/24/19), 289 So. 3d 1058, 1071–72, *writ denied,* 2019-01855 (La. 1/22/20), 291 So. 3d 1044 (citing *Robertson v. Doug Ashy Bldg. Materials, Inc.*, 2010-1552 (La. App. 1st Cir. 10/4/11), 77 So. 3d 339, 355, *writs denied,* 2011-2468, 2011-2430 (La. 1/13/12), 77 So.3d 973). The relaxation of the usual requirement that a witness have firsthand knowledge and the permission granted to an expert to express opinions not based on firsthand knowledge or observation "is premised on an assumption that the expert's opinion will have a reliable basis in the knowledge and experience of the discipline." *Indep. Fire Ins. Co. v. Sunbeam Corp.*, 99-2181 (La. 2/29/00), 755 So. 2d 226 (citing *Daubert*, 509 U.S. at 591–92, 113 S.Ct. 2786). "On the other hand, we recognize 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.'" *Blair v. Coney*, 2019-00795 (La. 4/3/20), *reh'g denied,* 2019-00795 (La. 7/9/20), 298 So. 3d 168 (*quoting Daubert*, 509 U.S. at 596, 113 S.Ct. 2786).

**Recent (Mis)Application of Rule 702 by the Louisiana Supreme Court:**
***Everett v. Air Prod. & Chemicals Inc.*, 2019-01975 (La. 5/26/20), 296 So. 3d 1011**

Recently, in *Everett v. Air Prod. & Chemicals Inc.*, the Louisiana Supreme Court overturned a district court's ruling excluding an expert's specific causation opinions for failing to satisfy the requirements of La. C. E. 702, stating in a footnote, "To the extent there are disputes over the accuracy of the facts relied upon by [the expert], the court may find such a challenge goes to the weight of the testimony rather than its admissibility. Additionally, any challenge over the accuracy or sufficiency of the facts underlying the expert opinion may be resolved by an appropriate pre-trial motion, such as a motion for summary judgment, or at trial by the trier of fact." 2019-01975 (La. 5/26/20), 296 So. 3d 1011. Without context, this statement appears mostly innocuous. However, when placed in the context of the facts of that case, the extent to which the gatekeeping function of the courts is being undermined, and the urgency with which a clarifying amendment is required, becomes disturbingly clear.

In *Everett,* Plaintiffs, William Everett, Jr. and Paula Everett, individually and on behalf of their deceased mother, Emily Everett ("Ms. Everett"), alleged that Ms. Everett was exposed to asbestos from laundering the work clothes of her former husband, William Everett, Sr. during his career, and that this exposure substantially contributed to her development of peritoneal mesothelioma, a rare form of mesothelioma affecting the abdominal lining. To prove this allegation, Plaintiffs retained Dr. Edwin Holstein, a medical doctor who offered various opinions relating to the alleged exposure. While he did not submit a report detailing his opinions, in violation of the trial court's scheduling order, Dr. Holstein was deposed in that matter.

During his deposition, Dr. Holstein testified that, while peritoneal mesothelioma is extremely rare and idiopathic in 25-50% of cases involving women such as Ms. Everett, he nonetheless believed that her peritoneal mesothelioma was caused by her ex-husband's exposure to asbestos by specific defendants. Dr. Holstein also testified that he based his specific causation opinions on the deposition testimony of Mr. Everett, and that this testimony was the *only* source of information he had been provided by Plaintiffs' counsel to advise his specific causation opinions. While Dr. Holstein claimed his opinions as to specific defendants were also informed by his historical knowledge, Dr. Holstein did not maintain any files or information on the individual defendants, nor did he attempt to review any other sources of information relevant to the individual defendants, or Ms. Everett's potential exposures, prior to formulating his specific causation opinions in that matter. Instead, Dr. Holstein determined that Ms. Everett's peritoneal mesothelioma was caused by her exposure to asbestos by particular defendants based on Mr. Everett's vague testimony – often stating little more than that he *may* have worked in some capacity at a defendants' premises, where there *may* have been a contractor doing something, and where there *could have been* what he *assumed* to be an asbestos containing product, *at some point* over the course of a decade.

Notwithstanding his various opinions, without any information regarding the conditions of Mr. Everett's workplace, or the proximity, duration, or frequency of any possible exposure he may have encountered, Dr. Holstein was unable to quantify, in any manner, the former husband's exposure from any particular defendant, *as Louisiana law requires*. In turn, Dr. Holstein was also unable to quantify the exposure allegedly encountered by Ms. Everett as a result of laundering her then-husband's clothes. Accordingly, several defendants filed motions to exclude Dr. Holstein's opinion as to specific causation, *i.e.* that the exposure from a particular defendant was a substantial contributing factor to the development of Ms. Everett's peritoneal mesothelioma.

Plaintiffs filed an omnibus opposition in response to the defendants' motions. Despite bearing the burden of proof, Plaintiffs provided little support for the reliability and admissibility of Dr. Holstein's specific causation opinions. Rather, the evidence presented to the trial court clearly showed that Dr. Holstein's reliance on Mr. Everett's testimony was misplaced: Mr. Everett's testimony was vague and generalized; he could not recall many important details (if any at all); there was a lack of information related to the duration, frequency, and proximity of his possible exposures; and, Mr. Everett actually admitted that he only ***assumed*** that the products he was working with or around contained asbestos and, in fact, could not honestly testify that those products were asbestos-containing. Based on the record, and with no other source of facts or data on which to base a quantitative or qualitative assessment of asbestos exposure, Plaintiffs' expert's causation opinions simply could not pass muster under La. C. E. art. 702.

The defendants' motions were heard by the trial court on September 13, 2019. At the hearing, the defendants successfully argued that Dr. Holstein's opinions were not based on, nor supported by facts and, as such, were unreliable and unhelpful to the trier of fact and should be precluded from trial. After

considering the motions, exhibits, applicable law, and the arguments of counsel, district court judge agreed with the defendants and excluded Dr. Holstein's specific causation opinions from trial.[4]

In excluding Dr. Holstein's specific causation opinions, the trial court concluded that any of Dr. Holstein's opinions regarding exposure at a particular premise, or as a result of a particular defendant's conduct, would not be based on reliable facts or data. In its Reasons for Judgment, the trial court explained that, because the *only* source of information regarding Mr. Everett's exposure was the vague and speculative testimony of Mr. Everett himself, Dr. Holstein's opinions were not based on sufficient relevant facts or data, and so do not meet the requirements for admissibility under La. C. E. art. 702. Furthermore, Dr. Holstein did not even attempt any kind of quantitative ***or*** qualitative assessment of the possible exposure levels of either Mr. or Ms. Everett, nor could he have done so based solely on Mr. Everett's deposition and with no records pertaining to the individual defendants. Without an understanding of the nature of Mr. Everett's exposures, it was simply not possible to scientifically determine that *any particular defendant* caused Ms. Everett's peritoneal mesothelioma.

In response to the trial court's decision to exclude their expert's causation opinion, Plaintiffs filed an application for supervisory writ to the Louisiana Fourth Circuit Court of Appeal on November 12, 2019. On November 13, 2019, the Fourth Circuit denied Plaintiffs' application for supervisory writ, correctly finding no abuse of discretion by the trial court. Plaintiffs then filed a writ of certiorari with the Louisiana Supreme Court.

The Louisiana Supreme Court granted Plaintiffs' writ, vacated and set aside the district courts ruling, and remanded the case to the district court to "make specific findings, after an appropriate hearing, as to whether Dr. Holstein's testimony on causation satisfies the requirements of La. Code Evid. art. 702 as well as the considerations set forth in *Daubert v Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), and *State v. Foret*, 628 So. 2d 1116 (La. 1993)." *Everett v. Air Prod. & Chemicals Inc.*, 2019-01975 (La. 5/26/20), 296 So. 3d 1011. While the Court's decision was primarily based on the lack of information provided in the appellate record, in the brief *per curiam* opinion, the Court included the following footnote, citing a California U.S. district court opinion:

> To the extent there are disputes over **the accuracy of the facts** relied upon by Dr. Holstein, **the court may find such a challenge goes to the weight of the testimony rather than its admissibility.** Additionally, any challenge over the **accuracy or sufficiency of the facts underlying the expert opinion** may be resolved by an appropriate pre-trial motion, such as a motion for summary judgment, **or at trial by the trier of fact.** *See, e.g., Walashek v. Air Liquid Systems Corporation*, 2016 WL 614030 (S.D.Cal. Feb. 16, 2016) (Not Reported in Fed. Supp.).

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[4] After granting the motions *in limine*, the trial court mooted a Motion to Exclude Dr. Holstein for Non-Compliance with the Court's Scheduling Order, which had been filed as a result of Dr. Holstein's failure to submit an expert report in direct violation of the trial court's scheduling order.

*Id.* (emphasis added).

Because the issue in that case was the ***absence of facts*** upon which the expert relied in forming his opinion, this footnote demonstrates why a clarifying amendment is required for Rule 702. Even though the statute plainly requires that an expert's opinion must be based on sufficient facts or data, and despite the trial court's proper application of La. C. E. 702 and exercise of its gatekeeping function, the confusion resulting from the lack of guidance on Rule 702 has reached the highest court in this State. Moreover, Louisiana law generally does not require a quantitative exposure analysis as long as there are some basic facts from which a qualitative analysis may be made by the expert, a liberal standard to be sure. The egregious thing about *Everett* is that there were no facts -- only assumptions and vague non-specific recollections – upon which even a qualitative analysis could be based. The La. Supreme Court will now allow the absence of facts to be obscured and, moreover, negated by an expert's opinion -- who has no firsthand knowledge of any facts and whose opinion has significant persuasive power on a jury.

Simply put, the confusion surrounding the application of Rule 702 is causing uncertainty and unnecessary expense on both sides of the aisle, in both state and federal court, and will continue to undermine the purpose and spirit of Rule 702 unless corrected by the Advisory Committee.[5]

**An Amendment Regarding Weight/Admissibility under Rule 702 is Necessary to Prevent Further Misapplications of Rule 702.**

In "a disturbing number of cases," courts make the broad misstatement that "challenges to the sufficiency of an expert's basis raise questions of weight and not admissibility."[6] That misstatement is equivalent to throwing in the towel and conceding a result when confronted with difficult circumstances. Yet, the difficult task of determining expert validity is unquestionably the role of the trial court and not the jury, and experienced judges are in a far better position to accomplish that task than lay jurors.

In refusing to exercise their gatekeeping duties, courts effectively shift *Daubert*'s gatekeeping requirement to counsel opposing the expert testimony. Any failure by the court to conduct a thorough Rule 702 analysis can supposedly be remedied by vigorous cross-examination. Yet, once the expert is allowed to testify, the cat is out of the bag. Indeed, there are at least two instances where cross-

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[5] *See also, Certain Underwriters at Lloyd's London v. United States Steel Corp.*, 2019-1730 (La. 1/28/20), 288 So. 3d 120, 122 ("We agree with [the dissent] that the majority below and the trial court erred in considering factors which may affect the credibility of the experts' opinions or the weight the jury affords their conclusions, but do not undermine the soundness of the methodology employed by the experts . . . "An expert may provide testimony based on information obtained from others, and **the character of the evidence upon which the expert bases an opinion affects only the weight to be afforded the expert's conclusion.**" (citations omitted);

[6] Daniel Capra, *Memorandum to Advisory Committee on Evidence Rules re: Possible Amendment to Rule 702*, (Oct. 1, 2019)(Agenda Book, Advisory Committee on Evidence Rules (Oct. 25, 2019 meeting) at 160).

examination of an expert will be insufficient to remedy a failure to conduct a comprehensive Rule 702 analysis.[7]

> • First, the significance of cross-examination might "go over the heads" of jurors where expert testimony deals with complex and difficult subject matter. This is the very reason for Daubert's gatekeeping requirement.[8]
>
> • Second, even successful cross-examination of an expert can be ineffective if the expert's opinion is unfairly prejudicial, touching upon sensitive or emotion-laden subjects.[9]

Such an opinion should be inadmissible in the first instance because it does not help the trier of fact under Rule 702(a). "The whole point of Rule 702 – and the *Daubert*-Rule 104(a) gatekeeping function – is that these issues cannot be left to cross-examination."[10]

In order to provide greater clarity and consistent interpretation of Rule 702 by the Courts, I am writing to express my full support of a clarifying amendment or comment so far as it addresses the weight/admissibility issue and urges its adoption. As succinctly noted in the Washington Legal Foundation's recent Working Paper, the intent of Rule702 was – and remains – to establish rather than evade a uniform standard courts will use to scrutinize an expert's basis, methodology and application.[11] The Committee must now issue necessary clarification so that the Rule can function as intended and safeguard the trial process against misleading and unqualified opinion testimony.

## Conclusion

Thank you very much for your time and valuable consideration on these important issues. Please do not hesitate to contact me if you have any questions, and I look forward to the opportunity to further engage with the committees regarding the importance of Rule 702.

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[7] *See* 29 WRIGHT & GOLD, Federal Practice & Procedure § 6294. Wright & Gold discuss Rule 705 and the general weaknesses in cross-examining experts. Rule 702 is woven throughout that discussion.

[8] *Id.*

[9] *Id.*

[10] Capra, *supra* note 9 at 141.

[11] Mickus, *Gatekeeping Reorientation: Amend Rule 702 to Correct Judicial Misunderstanding About Expert Evidence*, Washington Legal Foundation, Critical Legal Issues Working Paper Series, Number 217 (May 2020).

Respectfully submitted,

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20-EV-X

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

October 15, 2020

Re: In Support of Amending Federal Rule of Evidence ("FRE" or "Rule") 702

Dear Ms. Womeldorf:

We, the undersigned, include advocates who represent indigent clients charged with criminal offenses in federal and state court, at trial, on appeal and in post-conviction, and who study and conduct research geared towards assuring that sound scientific evidence is used in the justice system. We also include a diverse array of advocacy and technical assistance organizations that support the use of only valid and reliable scientific evidence in criminal courts to ensure that justice is administered fairly and Constitutionally. Collectively, we agree it is in every stakeholder's interest—including prosecutors, defense attorneys, policy advocates, and citizens—to ensure that only sound scientific evidence is used in the justice system. Our respective experiences underscore the importance of amending Federal Rule of Evidence 702 to bring a measure of scientific integrity in proceedings in which life and liberty are at stake. Moreover, because indigent people and people of color are disproportionately prosecuted in criminal courts, we also consider the proposed amendment to Rule 702 to be a critical economic and racial justice issue. We offer this letter to encourage the Committee to consider amending Rule 702.

Courts have frequently failed to exclude unreliable or insufficiently tested forensic techniques or to rein in exaggerated and misleading claims by experts.[1] This has resulted in a divergence from the Committee's intentions in writing the rule to align with the Supreme Court's ruling in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[2] Empirical research demonstrates that, particularly in criminal cases, judges often do not faithfully apply the reliability factors set forth in *Daubert* (and subsequently codified in FRE 702), but rather rely on prior (pre-*Daubert* and pre-Rule 702) legal precedent previously allowing admission of similar types of evidence, or they rely simply on the credentials of the expert seeking to testify.[3] For those reasons, the reliability standard from *Daubert* that is reflected in the text of Rule 702 "is widely perceived to have been neglected by federal judges."[4]

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[1] Brandon L. Garrett & M. Chris Fabricant, *The Myth of the Reliability Test*, 86 Fordham L. Rev. 1559 (2018) (describing rulings in state courts adopting Rule 702 as well as federal rulings regarding fingerprint evidence).
[2] 509 U.S. 579 (1993). *See also* 1 DAVID L. FAIGMAN, EDWARD K. CHENG, JENNIFER L. MNOOKIN, ERIN E. MURPHY, JOSEPH SANDERS & CHRISTOPHER SLOBOGIN, MODERN SCIENTIFIC EVIDENCE: THE LAW AND SCIENCE OF EXPERT TESTIMONY § 1:30 (2019).
[3] *See, e.g.*, Nat'l Research Council of the Nat'l Acad. of Sciences, *Strengthening Forensic Science in the United States: A Path Forward* 98 n. 53 (2009); M. Chris Fabricant & Tucker Carrington, *The Shifted Paradigm: Forensic Science's Overdue Evolution from Magic to Law*, 4 Va. J. Crim. L. 1, 110 (2016) ; Paul C. Giannelli, *Forensic Science: Daubert's Failure*, 68 CASE W. RES. L. REV. 869, 937 (2018).
[4] Garrett, *supra* note 1 at 1563–64.

Moreover, at least 38 states and the District of Columbia have adopted Rule 702 or functional equivalents. This is significant because virtually all violent crime is prosecuted in state courts, which, similar to federal courts, have failed to apply Rule 702 to exclude unvalidated, untested, or exaggerated "scientific" evidence.[5] The breakdown in the judicial gatekeeping function has resulted in widespread acceptance, in those state courts, of forensic techniques that the scientific community has rejected, largely based on similar reliance on pre-Rule 702 precedent and credentials of experts, rather than the reliability analysis that Rule 702 demands.[6]

That this Committee must amend FRE 702 to enable and encourage courts to faithfully execute their gatekeeping responsibility is made manifest by wrongful convictions attributable to the introduction of techniques both the NAS Report and the PCAST Report found fundamentally unreliable or lacking sufficient empirical testing. Indeed, nearly half of all wrongful convictions proven by post-conviction DNA evidence involve the misapplication of forensic sciences. In a wide range of these cases, experts misstated and overstated science during their trial testimony, as well as used inadequately tested or unvalidated and unreliable methods that should not have survived gatekeeping analysis.[7]

**Forensic Evidence Has Significant Persuasive Power Over Juries.**

Forensic evidence plays a prominent role in the United States criminal justice system. Not only is its use widespread, the outsized role forensics have played in convicting the innocent demonstrates that even baseless "scientific" evidence has a uniquely persuasive impact on juries. Accordingly, where misleading, mistaken, untested, or unreliable forensic evidence is admitted at a criminal trial, there is a serious risk that juries will overvalue this evidence and convict innocent people of crimes they did not commit.

There are several reasons why jurors are highly persuaded by expert forensic testimony, even when it is flawed. *First*, jurors grant special deference to experts because they have difficulty interpreting and evaluating forensic evidence and instead rely on the expert's background and experience to validate their testimony. *Second*, jurors believe that the court has reviewed the scientific evidence before admission and determined it to be trustworthy. *Finally*, jurors have false perceptions of rates of error of scientific methodologies, such as hair microscopy.[8]

The more than seventy wrongful convictions attributable, at least in part, to the introduction of hair microscopy evidence amply demonstrate the profound effect scientifically questionable forensic evidence can have on juries.[9] For example, numerous cases overturning wrongful

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[5] *Id*. (finding that courts in criminal cases almost never apply the reliability prongs of their states' equivalents of Fed. R. Evid. 702); Jennifer L. Groscup et al., *The Effects of* Daubert *on the Admissibility of Expert Testimony in State and Federal Criminal Cases*, 8 PSYCHOL. PUB. POL'Y & L. 339, 344–46, 352, 358 (2002).

[6] *See, e.g*., Nat'l Research Council of the Nat'l Acad. of Sciences, *Strengthening Forensic Science in the United States: A Path Forward* (2009)("NAS Report"); President's Council of Advisors on Science & Tech*., Report to the President: Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods* (Sept. 2016)("PCAST Report").

[7] Innocence Project, *Overturning Wrongful Convictions Involving Misapplied Forensics* (2020), https://www.innocenceproject.org/overturning-wrongful-convictions-involving-flawed-forensics/.

[8] *See, e.g.*, *U.S. v. Frazier*, 387 F.3d 1244, 1263 (11th Cir. 2005); *State v. Krause*, No. 2 CA-CR 2015-0326-PR, 2015 WL 7301820, at *5 (Ariz. Ct. App. Nov. 19, 2015) ("[C]ourts have recognized that jurors may give significant weight to scientific evidence."); *R. v. Mohan,* [1994] 2 S.C.R. 9, 21 (Can.) ("[d]ressed up in scientific language which the jury does not easily understand and submitted through a witness of impressive antecedents, this evidence is apt to be accepted by the jury as being virtually infallible and as having more weight than it deserves.").

[9] *See* Fabricant, *supra* note 3 at 80.

convictions were premised in part on hair microscopy evidence, demonstrating that jurors are prone to afford weight to such evidence even when inaccurate. In many of those cases, the hair microscopy evidence was later demonstrably proven to be wrong or generally discredited.[10] But this phenomenon is not limited to hair microscopy—numerous other types of invalid scientific evidence and related "expert" testimony have caused similar injustices, including in the areas of "bite mark" evidence, comparative bullet lead analysis, and fire artifact analysis.[11]

**Jurors Expect that Forensic Evidence has Passed Through a Judicial Filter.**

An unintended consequence of the courts' gatekeeping role is that when judges admit expert testimony, it acquires additional persuasive impact because it has passed through a judicial filter.[12] This phenomenon has been termed the "gatekeeper effect."[13] As discussed, lay fact finders are typically ill-equipped to critically evaluate scientific evidence and instead rely on institutional cues of validity, including the simple fact that such testimony was admitted by a judge.[14] Indeed, research shows that the primary predictor of jurors' views on the persuasiveness and quality of evidence is whether or not it was admitted into evidence; neither the absence of any rigorous scientific foundation for the evidence nor the credibility of the source affected the persuasiveness of the evidence.[15] "[J]urors assume too much about the quality of scientific evidence presented at trials. Specifically, jurors assume that judges review scientific evidence before it is presented to them, and that any evidence used in a trial must be above some threshold of quality."[16] Even within jurisdictions that follow *Daubert*, there is reason to believe that judges may not appropriately screen expert evidence, particularly in criminal cases.[17]

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[10] NACDL, *Microscopic Hair Comparison Review Project* (2018), https://www.nacdl.org/haircomparison/.

[11] Multiple examples display the serious consequences of convictions based on junk science. *See e.g.* Curt Anderson, Robert DuBoise exonerated: DNA evidence clears Tampa man of rape, murder after 37 years, The Ledger (September 14, 2020), https://www.theledger.com/story/news/crime/2020/09/14/tampa-robert-duboise-exonerated-murder-rape-dna-evidence-florida-prison-innocence-project/5793244002/; *Ex parte Gandy*, No. WR-22,074-10 (Tex. Crim. App. May 8, 2019); David Owens & Dave Altimari, *Murder Charge Dismissed Against Alfred Swinton, Man Who Served 18 Years After Wrongful Conviction*, Hartford Courant (March 1, 2019), https://www.courant.com/news/connecticut/hc-alfred-swinton-freed-20180301-story.html; *see also* Paul C. Giannelli, *Comparative Bullet Lead Analysis: A Retrospective*, 47 Crim. Law Bull. 306 (2010); National Fire Protection Association, *Guide for Fire and Explosion Investigations* (2021), https://www.nfpa.org/codes-and-standards/all-codes-and-standards/list-of-codes-and-standards/detail?code=921; Paul Bieber, *Anatomy of a Wrongful Arson Conviction*, National association of Fire Investigators (2017), https://www.nafi.org/blog/anatomy-of-a-wrongful-arson-conviction/; 60 Minutes, *Evidence of Injustice* (2007), https://www.cbsnews.com/news/evidence-of-injustice/.

[12] *See* N.J. Schweitzer & Michael J. Saks, *The Gatekeeper Effect: The Impact of Judges' Admissibility Decisions on the Persuasiveness of Expert Testimony*, 15 Psychol., Pub. Pol'y, & L. 1, 2 (2009).

[13] *Id.* at 4.

[14] *Id.*

[15] *Id.* at 8.

[16] *Id.* at 12.

[17] *Id.*

**Jurors Place Undue Weight on Experts' Background and Experience to Evaluate Their Testimony.**

Lay jurors are unlikely to fully understand the scientific principles behind forensic evidence, leading them to grant special deference to the expert's testimony.[18] Scholars have observed that at trial many juries tend to uncritically accept the testimony of forensic experts even when they should not.[19] Indeed, interviews of jurors have revealed that, in cases where the physical evidence seemed contradictory and inconsistent, some jurors have based guilty verdicts on their beliefs that "CSI-types know what they're doing—they can solve anything . . . "[20]

Because of the difficulty in evaluating scientific evidence, jurors use certain cues, beyond the substance of the testimony, to determine validity. For example, jurors rely on experts' background and experience, as presented at trial, to determine the meaning and value of the scientific evidence, rather than the evidence itself.[21] However, "these cues are problematic because it is not clear that a more impressive sounding background or more case experience provide a valid indicator of greater expertise or accuracy."[22] In fact, in several forensic science fields, literature indicates that there is little or no relationship between an expert's experience and his or her accuracy in identification.[23] And what is in fact an essential factor for scientists in determining a method's trustworthiness—whether it has been scientifically tested—does not seem to affect jurors' evaluation of the probative value of the evidence.[24]

**Conclusion**

Scientific evidence is a powerful tool. When such evidence is appropriately screened by courts, the truth-seeking function of the justice system is well served. However, as documented above, when courts fail in their gatekeeping responsibilities and admit unreliable, inadequately tested, or misleading evidence, the opposite happens; truth is obscured. Innocent lives—disproportionally the lives of Black and brown people—are put at risk, and the legitimacy of our legal system is diminished. We believe more guidance is required for federal courts—and ultimately state courts—to ensure the fair administration of justice.

An amended Rule and additional Advisory Committee Notes will send a strong message to the courts: FRE 702 is not working as intended. Courts have continued to admit evidence that is unreliable or inadequately tested and allow exaggerated claims of the probative value of such evidence, leading directly to wrongful convictions and otherwise corrupting the truth-seeking

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[18] *See* Geoffrey M. Pipoly, *Daubert Rises: The (Re)applicability of the Daubert Factors to the Scope of Forensics Testimony*, 96 Minn. L. Rev. 1581, 1601–02 (2012) ("The scope of an expert witness's testimony is significant, principally because jurors tend to defer to experts . . . ").

[19] *See, e.g.*, Kit R. Roane & Dan Morrison, *The CSI Effect*, 138 U.S. News & World Report 15, 2005 WLNR 25563240, at *3 (Apr. 25, 2005); Kimberlianne Podlas, *"The CSI Effect": Exposing the Media Myth*, 16 Fordham Intell. Prop. Media & Ent. L.J. 429, 437–38 (2005); Mark A. Godsey & Marie Alou, *She Blinded Me With Science: Wrongful Convictions and the "Reverse CSI-Effect,"* 17 Tex. Wesleyan L. Rev. 481, 483–84 (2011).

[20] *See* Godsey, *supra* note 19 at 496–97 (internal quotation marks omitted).

[21] Jonathan J. Koehler et al., *Science, Technology, or the Expert Witness: What Influences Jurors' Judgments About Forensic Science Testimony?*, 22 Psychol., Pub. Pol'y, & L. 401, 410 (2016); see also David L. Faigman et al., *Modern Scientific Evidence: The Law & Science of Expert Testimony* (1997) (when an expert "bases [an] opinion on 'years of experience' the practical result is that the witness is immunized against effective cross examination").

[22] Koehler, *supra* note 21 at 410.

[23] *Id*.

[24] *Id.* at 411.

function of criminal trials. Accordingly, the undersigned organizations urge the Committee to amend Rule 702, along with the proposed notes.

Should the Committee have any questions or like additional resources on this issue, please contact Chris Fabricant (cfabricant@innocenceproject.org), Shana-Tara O'Toole (shana@idueprocess.org), or Professor Brandon Garrett (bgarrett@law.duke.edu).

Sincerely,

Academy for Justice at the Arizona State University Sandra Day O'Connor College of Law
American Civil Liberties Union
Black Public Defender Association
The Bronx Defenders
Center for Justice Research at Texas Southern University
Center for Integrity in Forensic Sciences
Computational Justice Lab at Claremont Graduate University
Due Process Institute
Fair and Just Prosecution
Federal Public and Community Defenders
Forensic Justice Project
Innocence Project
The Legal Aid Society
NAACP Legal Defense and Educational Fund, Inc.
Public Defender Service for the District of Columbia
Quattrone Center for the Fair Administration of Justice at the University of Pennsylvania Carey Law School
Reason Foundation
Southern Center for Human Rights
Wilson Center for Science and Justice at Duke University School of Law

**COMMENT**
**to the**

**ADVISORY COMMITTEE ON EVIDENCE RULES**
**and its**
**RULE 702 SUBCOMMITTEE**

# 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

October 20, 2020

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

> "As a general rule, the factual basis of an expert opinion goes to the credibility of the testimony, not the admissibility…"
>
> *U.S. v. Finch*, 630 F.3d 1057 (8th Cir. 2011)

## INTRODUCTION

If Rule 702 requires courts to find that "the testimony is based on sufficient facts or data"[2] prior to admitting opinion testimony, why does the Eighth Circuit say just the opposite?[3] The answer,

[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] Fed. R. Evid. 702

[3] *United States v. Finch*, 630 F.3d 1057 (8th Cir. 2011) ("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").

which has important implications as the Committee nears a decision on whether to amend the rule, is that the Eighth Circuit's Rule 702 jurisprudence doesn't actually interpret the rule, but rather recites pre-2000 caselaw holdings. Our research—tracing the "DNA" of the *Finch* holding—demonstrates that the Eighth Circuit's rulings are direct descendants of a pre-*Daubert* opinion, *Loudermill v. Dow Chemical*, which declared in 1988 that "the factual basis of an expert opinion goes to the credibility of the testimony, not the admissibility[.]"[4] In the many courts that presently follow this statement and not Rule 702's requirement, today *Loudermill* speaks louder than the rule.

The Eighth Circuit is certainly not alone in misunderstanding *what* Rule 702 requires and *that* the rule requires it. The numerous comments submitted to the Committee and the Subcommittee's own thorough research have established that case law ostensibly interpreting Rule 702's requirements not only varies from court to court, but also is frequently inconsistent with the rule. This does not reflect the normal function of courts' arriving at different interpretations of the text. Although Rule 702 provides courts wide discretion to determine whether particular testimony satisfies its test, it does not give courts leeway to choose a *different* test. Having been promulgated pursuant to the Rules Enabling Act, Rule 702 is the law. Because many courts across federal jurisdictions are applying tests that contradict the rule, an amendment is needed to clarify both the rule's standards and that the rule *changed* the law.

## I. THE REASON BEHIND TODAY'S WIDESPREAD MISUNDERSTANDING OF RULE 702'S REQUIREMENTS IS A RELIANCE ON PRE-2000 CASELAW

There is a reason that Rule 702's requirements are disconnected from much of the caselaw on expert admissibility: many widely cited descriptions of the courts' role are not interpretations of Rule 702 at all, but rather are recycled statements of law that the 2000 amendment rejected.

A ruling from just weeks ago, *Trice v. Napoli Shkolnik PLLC*,[5] is a case in point, showing how supplanted but persistent caselaw pronouncements cause courts to misunderstand their gatekeeping responsibility. Although the court in *Trice* recites that Rule 702 governs the admission of expert testimony and that the "proponent of the expert testimony bears the burden of showing by a preponderance of the evidence that the testimony is admissible,"[6] the court nevertheless employs a caselaw-based standard that is flatly irreconcilable with Rule 702:

> "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." *United States v. Finch*, 630 F.3d 1057, 1062 (8th Cir. 2011) (internal quotations and alterations omitted). "Only if the expert's opinion is so fundamentally unsupported that it can

[4] *Loudermill v. Dow Chem. Co.*, 863 F.2d 566, 570 (8th Cir. 1988).

[5] Case No. CV 18-3367 ADM/KMM, 2020 WL 4816377 (D. Minn. Aug. 19, 2020).

[6] *Id*. at *10.

> offer no assistance to the jury must such testimony be excluded." *Bonner v. ISP Techs., Inc.*, 259 F.3d 924, 929–30 (8th Cir. 2001).[7]

Perhaps this district court could reasonably expect that the Eighth Circuit's precedents on the expert admissibility standard reflect, as required, an interpretation of Rule 702, but that is not the case. Why not? Because the *Finch* holding's "DNA" is a direct descendant of pre-2000 standards:

- *Finch* quoted the statement from *United States v. Rodriguez*, 581 F.3d 775, 795 (8th Cir. 2009);
- *Rodriguez* took the quotation from *Arkwright Mut. Ins. Co. v. Gwinner Oil, Inc.*, 125 F.3d 1176, 1183 (8th Cir. 1997);
- *Arkwright Mut.* drew the sentence from *Hose v. Chicago Nw. Transp. Co.*, 70 F.3d 968, 974 (8th Cir. 1995); and
- *Hose* pulled those very same words from the 1988 pre-*Daubert* ruling in *Loudermill*, 863 F.2d at 570.

This "DNA" analysis shows that the *Trice* court's ruling, ostensibly based on the Rule 702 admissibility standard, in fact upholds a principle that Rule 702 rejected and replaced.

The *Trice* court's holding that opinion testimony is admissible unless it is "fundamentally unsupported," also descends directly from pre-Rule 702 thinking. The source it cites for that principle, the Eighth Circuit's *Bonner v. ISP Techs*.[8] opinion, derived its analysis from a 1995 decision, *Hose v. Chicago Nw. Transp. Co*.[9] Thus, neither of the legal propositions upon which the *Trice* court based its decision to dismiss challenges to proffered expert testimony as going "to the credibility of the opinion rather than its admissibility"[10] were interpretations of Rule 702.

The *Trice* court's reliance on statements that should have faded into history after adoption of the 2000 Rule 702 amendment typifies a widespread problem: courts across the country actively utilize anachronistic caselaw-derived approaches that contradict Rule 702. Courts continue using

[7] *Id.*

[8] 259 F.3d 924, 929–30 (8th Cir. 2001).

[9] 70 F.3d 968, 974 (8th Cir. 1995). The *Hose* opinion took most of this language from *Loudermill*, 826 F.2d at 570, but overembellished it by adding the word "only." Doing so dramatically changed the meaning, reconfiguring what had been a description of a situation warranting exclusion of an expert's testimony into a characterization of the admissibility test that does not depend on a showing of reliability and heavily favors allowing opinion testimony.

[10] 2020 WL 4816377 at *12.

the *Loudermill* rationale,[11] or similar pronouncements from other pre-*Daubert* decisions,[12] to dismiss challenges that should prevail under Rule 702(b). Courts are substituting pre-Rule 702 notions of the threshold showing, such as the *Hose* "not fundamentally unsupported" test, for the Rule 104(a)-derived burden of production Rule 702 requires.[13]

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[11] More than 200 rulings issued since January 2015 include the quoted *Loudermill* statement, *see* Bayer Corp., *Amending Federal Rule of Evidence 702* at 1 & n.1, 20-EV-O Suggestion from Bayer – Rule 702 (Sept. 30, 2020). Reliance on the *Loudermill* assertion that "the factual basis of an expert opinion goes to the credibility of the testimony, not the admissibility" has occurred in several circuits. *See*, *e.g.*, *A.B. v. Count of San Diego*, Case No.: 18cv1541-MMA-LL, 2020 WL 4431982, at *9 (S.D. Cal. July 31, 2020); *Bluetooth SIG, Inc. v. FCA US LLC*, Case No. 2:18-cv-01493-RAJ, 2020 WL 3446342, at *4 (W.D. Wash. June 24, 2020); *Watkins v. Lawrence County, Arkansas*, Case No. 3:17-cv-00272-KGB, 2020 WL 2544469, at *2, *7 -*9 (E.D. Ark. May 19, 2020); *Clark v. Travelers Companies, Inc.*, No. 216CV02503ADSSIL, 2020 WL 473616, at *5 (E.D.N.Y. Jan. 29, 2020); *Patenaude v. Dick's Sporting Goods, Inc.*, Case No. 9:18-CV-3151-RMG, 2019 WL 5288077, at *2 (D.S.C. Oct. 18, 2019); *Wischermann Partners, Inc. v. Nashville Hosp. Capital LLC*, No. 3:17-CV-00849, 2019 WL 3802121, at *1, *3 (M.D. Tenn. Aug. 13, 2019); *Irish v. Fowler*, No. 1:15-CV-00503-JAW, 2019 WL 1179392, at *8 (D. Me. Mar. 13, 2019); *Thompson v. APS of Oklahoma, LLC*, No. CIV-16-1257-R, 2018 WL 4608505, at *5 n.15 (W.D. Okla. Sept. 25, 2018).

[12] Courts actively reiterate the assertion originally stated in *Viterbo v. Dow Chem. Co*., 826 F.2d 420, 422 (5th Cir. 1987) 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." *See*, *e.g.*, *U.S. v. City of Houston, Texas*, Case No. H-18-0644, 2020 WL 2516603, at *12 (S.D. Tex. May 15, 2020); *Compton v. Moncla Co*., Case No. 17-2258, 2020 WL 1638287, at *3 (E.D. La. Apr. 2, 2020); *Ward v. Autozoners*, LLC, Case No. 7:15-CV-164-FL, 2018 WL 10322906, at *3 (E.D. N.C. Apr. 16, 2018); *United States v. McCarthy Improvement Co*., Case No. 3:14-CV-919-J-PDB, 2017 WL 10434414, at *5 (M.D. Fla. Feb. 3, 2017). Bayer's comment indicates that more than 150 cases announced in the period between January 2015 to the present incorporate this language from *Viterbo*. Bayer Corp., *Amending Federal Rule of Evidence 702* at 1 & n.2, 20-EV-O Suggestion from Bayer – Rule 702 (Sept. 30, 2020). Courts also continue to invoke the Tenth Circuit's statement from *Werth v. Makita Elec. Works, Ltd.*, 950 F.2d 643, 654 (10th Cir. 1991) that doubts "concerning the sufficiency of the factual basis to support [the expert's] opinion go to its weight, and not to its admissibility" and the Sixth Circuit's declaration in *United States v. L.E. Cooke Co*., 991 F.2d 336, 342 (6th Cir. 1993) that "weaknesses in the factual basis of an expert witness' opinion . . . bear on the weight of the evidence rather than its on admissibility." *See*, *e.g*., *Schlueter v. Ingram Barge Co.*, No. 3:16-CV-02079, 2019 WL 5683371, at *9 (M.D. Tenn. Nov. 1, 2019); *Mighty v. Miami-Dade Cty.*, Case No. 14-23285-CIV-MORENO-MCALILEY, 2019 WL 4306939, at *3 (S.D. Fla. Apr. 30, 2019); *United States v. Pac. Health Corp.*, Case. No. CV-12-00960-RSWL-AJW, 2018 WL 1026361, at *4 (C.D. Cal. Feb. 20, 2018); *Jorgensen v. Ritz-Carlton Hotel Co. LLC*, No. 16-CV-00795-MEH, 2017 WL 3390582, at *6 (D. Colo. Aug. 8, 2017); *Finn v. BNSF Ry. Co.*, Case No.11-CV-349-J, 2013 WL 462057, at *3 (D. Wyo. Feb. 6, 2013). *See also* Ford Motor Co., *Amending Federal Rule of Evidence 702* at 3 & n.11, 20-EV-L Suggestion from Ford – Rule 702 (Sept. 26, 2020)(discussing problematic rulings rooted in pre-*Daubert* caselaw within the Fourth Circuit).

[13] *See*, *e.g.*, *Watkins v. Lawrence Cty., Ark*., Case No. 3:17-CV-00272-KGB, 2020 WL 2544469, at *9 (E.D. Ark. May 19, 2020); *K.W.P. v. Kansas City Pub. Sch.*, 296 F. Supp. 3d 1121, 1128 (W.D. Mo. 2017); *U.S. Bank Nat. Ass'n v. PHL Variable Life Ins. Co.*, 112 F. Supp. 3d 122, 135 (S.D.N.Y. 2015); *In re Trasylol Prod. Liab. Litig.*, No. 08-MD-01928, 2010 WL 1489793, at *7 (S.D. Fla. Feb. 24, 2010). *See also* Lee Mickus, Gatekeeping Reorientation: Amend Rule 702 to Correct Judicial Misunderstanding About Expert Evidence, Wash. Legal Found. Critical Legal Issues Working Paper Series, No. 217 at 14 (May 2020)(describing additional cases that apply a presumption of admissibility inconsistent with the burden of production applicable to Rule 702, based on *dicta* from *Borawick v. Shay*, 68 F.3d 597, 610 (2d Cir. 1995), *cert. denied*, 517 U.S. 1229 (1996)).

## II. BECAUSE RULE 702 WAS PROMULGATED ACCORDING TO THE RULES ENABLING ACT, COURTS DO NOT HAVE THE DISCRETION TO IMPOSE PRE-2000 CASELAW STANDARDS THAT CONFLICT WITH RULE 702

Courts addressing expert admissibility must apply Rule 702, not the conflicting case law.[14] As the Sixth Circuit recently explained, rules enacted pursuant to the Rules Enabling Act have the force of law:

> we are to be "mindful that the Rule [Fed. R. Civ. P. 26] as now composed sets the requirements [courts] are bound to enforce," and we "are not free to amend a rule outside the process Congress ordered." *Amchem* [*Prods., Inc. v. Windsor*, 521 U.S. 591,] 620 [(1997)]. That process involves careful review of a proposed amendment by the Rules Advisory Committee, the Judicial Conference, the Supreme Court, and Congress. *See* 28 U.S.C. §§ 2072–74. After the Rules Advisory Committee has recommended a change to the Judicial Conference, that body may propose that the Supreme Court promulgate the amendment. Even if the Court does so, Congress may prevent the change through statutory enactment before the new rule goes into effect. *See id.* This multi-layered review process ensures that alterations to the Rules can only be made after thorough deliberations by multiple expert bodies, which can assess the virtues and drawbacks of a proposed change as well as evaluate the possible implications of the proposed rule across the entire judicial system, rather than by individual judges facing the pressures of litigation.[15]

Rule 702 is a product of that process,[16] and courts are not free to ignore Rule 702.[17] Courts that rely on caselaw that contradicts Rule 702's requirements—including the court's duty to determine the sufficiency of the expert's factual foundation,[18] the court's obligation to assess the

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[14] *See Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 620 (1997)("The text of a rule thus proposed and reviewed limits judicial inventiveness.").

[15] *In re National Prescription Opiate Litig*., Case Nos. 19-4097/4099, 2020 WL 5701916, at *8 (6th Cir. Sept. 24, 2020).

[16] In fact, the attention paid to the Rule 702 amendments was particularly intense, given that Congress raised several alternative proposals for direct enactments of expert admissibility standards. *See* May 1, 1998 Report of the Advisory Committee on Evidence Rules, 181 F.R.D. at 132 ("The proposal is also a response to bills pending in Congress that purport to "codify" *Daubert*, but that, in the Committee's view, raise more problems than they solve.").

[17] *Cf. Hentif v. Obama*, 733 F.3d 1243, 1246 (D.C. Cir. 2013)("Where rules fall within the scope of the [Rules Enabling] Act, subject to its limitations, they have the force of law and the court is not free to ignore their interpretation of a jurisdictional requirement."); *Morel v. DaimlerChrysler AG*, 565 F.3d 20, 24 (1st Cir. 2009)(" as long as a Rule is consonant with both the Constitution and the Rules Enabling Act, 28 U.S.C. § 2072, that Rule must be given effect").

[18] *See* n.11 & n.12, *supra*.

expert's methodological application to the facts of the case,[19] or the burden of production[20]—not only misunderstand the meaning of Rule 702, but also the role of Rule 702 in our courts.

## III. AMENDING RULE 702 IS NECESSARY AND APPROPRIATE TO CLARIFY THAT THE RULE REJECTS PRE-2000 CASE LAW

Courts that continue to apply discarded caselaw need clarity about what the 2000 amendment accomplished. Some courts understand "the revisions to Rule 702 were intended to simply codify the principles of *Daubert* and *Kumho*[.]"[21] From that perspective, pre-2000 caselaw is not just suggestive, but continues to apply in force because adoption of amended Rule 702 did not change the expert admissibility standard and so did not displace existing authorities.[22] That view fails to recognize that the amendment established a new standard that courts must use to assess admissibility of expert testimony.[23] In the face of inconsistent court treatment prior to 2000,[24] the inclusion of Rule 702(b) and (d) in the text of the amended rule resolved that disagreement: admitting an expert's opinions requires a showing that they must have sufficient factual foundation and arise from an adequate methodological application to the facts of the case. [25] Adoption of amended Rule 702 therefore *did* reject existing interpretations of the admissibility

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19 *See AmGuard Ins. Co. v. Lone Star Legal Aid*, No. CV H-18-2139, 2020 WL 60247, at *8 (S.D. Tex. Jan. 6, 2020)(relying on *Viterbo* language discussed in n. 15, *supra*, to conclude that "objections [that the expert could not link her experienced-based methodology to her conclusions] are better left for cross examination, not a basis for exclusion."); *Murphy-Sims v. Owners Ins. Co.*, No. 16-CV-0759-CMA-MLC, 2018 WL 8838811, at *7 (D. Colo. Feb. 27, 2018)(relying on understanding established in *Watson v. City of Kansas City, Kan*., 857 F.2d 690, 695 (10th Cir. 1988) to rule that "Concerns surrounding the proper application of the methodology typically go to the weight and not admissibility").

20 *See* n.13, *supra*.

21 *Iwanaga v. Daihatsu America, Inc*., No. SA 99-CA-711 WWJ, 2001 WL 1910564, at *7 n.41 (W.D. Tex. Oct. 19, 2001).

22 *See*, *e.g*., *Granger v. Marine*, Case No. 15-477, 2016 WL 4621501, at *2, *5 (E.D. La. Sept. 6, 2016)(indicating "Rule 702 is in effect a codification of the United States Supreme Court's opinion in *Daubert*" and relying on pre-amendment Fifth Circuit rulings, such as *Moore v. Ashland Chem*., 151 F.3d 269 (5th Cir. 1998) and *Viterbo*, 826 F.2d 420, that describe the analysis and court role in assessing proffered opinion testimony).

23 *See* Advisory Committee Notes to the 2000 Amendments ("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.")(emphasis added).

24 *See*, *e.g*., *L.E. Cooke*, 991 F.2d at 342; *Werth*, 950 F.2d at 654; *Loudermill*, 863 F.2d at 570 (8th Cir. 1988); *Viterbo*, 826 F.2d at 422.

25 *See* May 1, 1998 Report of the Advisory Committee on Evidence Rules, *in* Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure and Evidence: Request for Comment, 181 F.R.D. 18, 132 (1998)(indicating that the amendment to Rule 702 "attempts to address the conflict in the courts about the meaning of *Daubert*" and now "requires a showing of reliable methodology and sufficient basis; and provides that the expert's methodology must be applied properly to the facts of the case."). *See also* Hon. Fern M. Smith, Report of the Advisory Committee on Evidence Rules (May 1, 1999) at 7, *in* ADVISORY COMMITTEE ON EVIDENCE RULES OCTOBER 1999 AGENDA BOOK 52 (1999)(indicating the expert admissibility standard set forth in amended Rule 702 "clearly envision[s] a more rigorous and structured approach than some courts are currently employing.").

standard that were not consistent with the requirements set forth in the rule's text. A new amendment to Rule 702 is needed to clarify the rule's requirements and that the rule rejects conflicting caselaw. Although the Committee is understandably "wary about changing a rule in a way that essentially says, 'apply the rule the way it was written,'"[26] an amendment to Rule 702 similar to the suggestions set forth in the November 2020 Agenda Book would accomplish considerably more. Such an amendment would achieve two goals: clarify what the text of the rule requires, and announce that, because Rule 702 *changed the standards* for admissibility of expert evidence, inconsistent doctrines derived from earlier cases do not define Rule 702's standards.[27]

## CONCLUSION

Although Rule 702 provides courts wide discretion to decide whether proffered testimony meets the rule's standards, it does not—and cannot—permit courts to *change* those standards. Much of the current confusion about what Rule 702 requires derives from caselaw that, upon careful "DNA" analysis, does not interpret the rule but rather perpetuates discarded doctrine that the rule displaced. An amendment is needed to ensure courts understand not only what Rule 702 requires, but also that Rule 702 changed the law.

[26] Hon. Debra A. Livingston, Report of the Advisory Committee on Evidence Rules (June 1, 2020) at 4, *in* COMMITTEE ON RULES OF PRACTICE AND PROCEDURE JUNE 2020 AGENDA BOOK 641 (2020).

[27] Of the several alternate draft amendments presented in the November 2020 Agenda Book, the version titled "Draft One – Making the Preponderance Standard Applicable to All Rule 702 Admissibility Requirements and Adding an Overstatement Limitation" most directly addresses the problems identified and provides the clearest guidance to the courts. The accompanying Draft Committee Note includes the following language that would go far to clarify the invalidity of caselaw that contradicts Rule 702(b) and (d): "unfortunately 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 generally questions of weight and not admissibility. These rulings are an incorrect application of Rules 702 and 104(a), and are rejected by this amendment." Memorandum from Daniel J. Capra and Liesa A. Richter, Reporter, Advisory Comm. on Evidence Rules, to Advisory Comm. on Evidence Rules, *Possible Amendment to Rule 702* (Oct. 1, 2020) at 54 *in* ADVISORY COMMITTEE ON EVIDENCE RULES OCTOBER 2020 AGENDA BOOK 101 (2020). The approach employed in the 2015 Advisory Committee Note to Fed.R.Civ.P. 37(e)(2), in which the Note identifies particular rulings as incompatible with the rule, would add more helpful clarity to this statement. Advisory Committee Note to 2015 Amendments to Federal Rule of Civil Procedure 37(e)(2)("[The amendment] rejects cases such as *Residential Funding Corp. v. DeGeorge Financial Corp*., 306 F.3d 99 (2d Cir. 2002, that authorize the giving of adverse-inference instructions on a finding of negligence or gross negligence.").

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**By Email**

October 23, 2020

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

**Re: Comment on Amending Federal Rule of Evidence 702**

Dear Ms. Womeldorf:

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

Covington represents many of the nation's leading corporations in complex litigation, including product liability litigation, intellectual property litigation, antitrust litigation, class actions, and other fields in which expert witness testimony often plays a central role. Whether experts faithfully apply a reliable methodology, supported by an adequate factual basis, is critical to the fair adjudication of disputes, especially for our many clients whose businesses involve sophisticated science and technology.

As a practical matter, questions of expert admissibility commonly rise to a case-dispositive level, including in multidistrict litigations where a Rule 702 determination may lead to the rapid disposition of thousands of individual cases—or to many years of costly litigation. Our clients depend on federal courts to uphold the gatekeeping requirements of Rule 702 and keep unreliable or speculative science out of the courtroom.

Unfortunately, rigorous scrutiny of expert opinions under Rule 702 is less common than it should be. The collective experience of Covington's litigators mirrors what the Committee has already observed: all too often, courts make the mistake of proclaiming that the Rule 702's core requirements—sufficient facts or data, and reliable application of a reliable methodology—go to the weight of the proffered testimony rather than its admissibility.[1] The Committee's Reporter

[1] Committee Report, June 2020, at 4; *see also* Agenda Book, Spring 2019, at 118.

has stated the problem with this approach: "The key to *Daubert* is that cross-examination alone is ineffective in revealing nuanced defects in expert opinion testimony and that the trial judge must act as a gatekeeper to ensure that unreliable opinions don't get to the jury in the first place."[2] Truth and fairness suffer when courts abdicate their gatekeeping responsibility, treating expert testimony as presumptively admissible while leaving the jury to sort out the weight of the evidence later.

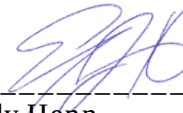
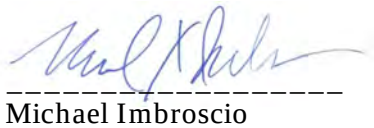
Clarification is needed. We understand that the Committee has expressed some reluctance to alter the text of Rule 702 because the Rule 104(a) standard already applies to Rule 702. The Committee has suggested specifying the preponderance of evidence standard explicitly in one rule could lead to negative inferences elsewhere in the Rules.[3] In our view, the Committee could alleviate this concern by adding a Note explaining that the amended text of Rule 702 was necessitated by courts' frequent misinterpretation of that Rule in particular, and that the amendment should not be read to create any negative inference with respect to other Rules.

If the Committee is unwilling to revise the text of Rule 702 itself, the Committee should at minimum add language in the Notes to make clear that that the proponent of the testimony bears the burden of satisfying the Rule 702 requirements, and that the court must decide admissibility under Rule 702 by the preponderance standard.

Covington endorses the Comments submitted on these issues by the Lawyers for Civil Justice, the Federation of Defense and Corporate Counsel, and the Washington Legal Foundation, which ably illustrate, through scores of case examples, the seriousness of the problem and the pressing need for clarification by the Committee.

Thank you for your consideration of these important issues.

Respectfully submitted,


Emily Henn  Michael Imbroscio  Henry Liu

[2] Committee Minutes, May 2019, at 23.

[3] Committee Report, June 2020, at 4.

*950 Pennsylvania Ave, N.W.*
*Washington, D.C. 20530*

November 6, 2020

Hon. Patrick Schiltz
United States District Judge
United States Courthouse
300 South Fourth Street, Room 14E
Minneapolis, MN 55415

Re: Possible Amendment to Federal Rule of Evidence 702

Dear Judge Schiltz:

We write respectfully, in advance of our upcoming November 13 meeting, to supplement the agenda materials with some additional reference materials and thoughts. Since the virtual nature of our meeting may make free-flowing discussion more difficult, we hope that having our views in advance will help further the conversation.

Uniform Language for Testimony and Reports

As the Committee will recall, the Department has proposed that the Committee table any amendment to Rule 702 in order to gauge the effectiveness of Department's initiatives with respect to Uniform Language for Testimony and Reports ("ULTRs"). The Department's Forensic Science webpage currently contains 16 ULTRs, many updated this past summer to further address important qualifications and limitations of expert testimony in various forensic disciplines.

In the forensic geology discipline, for example, an examiner may testify to a (1) Fracture fit; (2) Inclusion (i.e., included); (3) Exclusion (i.e., excluded); or (4) Inconclusive. When explaining his or her conclusion, "[a]n examiner shall not assert that two or more geologically-derived materials were once part of the same object unless the materials physically fit together." In addition, when offering a conclusion, an examiner shall not assert that a fracture fit is based on the "uniqueness" of an item of evidence; use the term "individualize" or "individualization;" or claim that the geologically-derived materials originated from the same object "to the exclusion of all other objects." Nor may an examiner assert absolute or 100% certainty or claim that forensic geology examinations are infallible or have a zero-error rate. Moreover, the ULTRs make clear that an examiner's source identification opinion is not based on a statistically derived or verified measurement or comparison to all other potential sources of a questioned sample. *See* https://www.justice.gov/olp/page/file/1284776/download.

Beginning in 2018, and continuing to the present, there are ample examples of federal, state, and D.C. courts that have limited or excluded testimony regarding the source of a spent bullet or shell casing. These cases, some of which are included in the case law digest, include:

*United States v. Jovon Medley*, No. PWG 17-242 (S.D. Md. April 24, 2018)
*Williams v. United States*, 210 A.3d 734 (D.C. Ct. App. June 27, 2019)
*United States v. Tibbs,* 2019 D.C. Super. LEXIS 9 (D.C. Sup. Ct. September 5, 2019)
*United States v. Davis*, 2019 U.S. Dist. LEXIS 155037 (W.D. Va. September 11, 2019)
*United States v. Shipp*, 2019 U.S. Dist. LEXIS 205397 (E.D.N.Y. November 26, 2019)
*United States v. Adams*, 2020 U.S. Dist. LEXIS 45125 (D. Oregon March 16, 2020)
*People v. A.M.*, 2020 N.Y. Misc. LEXIS 2961 (Sup Ct. Bronx June 30, 2020)

In each of these cases—whether or not one agrees with the analysis and ultimate decision—the court used the existing rules of evidence to preclude the examiner from offering identification testimony. In contrast, the meeting memo ("Memo") discusses *U.S. v. Simmons*, 2018 U.S. Dist. LEXIS 18606 (E.D. Va), decided January 12, 2018, as an example of a case that failed to heed the Department's directives. *Simmons*, however, predated the publication of the ULTR documents. In addition, *Simmons* was a case in which the government—not the witness—offered alternative formulations of the expert's conclusion for the court's consideration during pretrial proceedings.

Although the Memo correctly notes that the ULTRs are not binding on state laboratories or state courts, neither are the Federal Rules of Evidence. Nevertheless, the ULTRs may well have an important impact on the states. The Organization of Scientific Area Committees[1] ("OSAC"), whose primary mission is to develop uniform national standards across forensic disciplines, and whose membership includes experts from federal, state, county, and local government, academia, and the private sector, has drawn from language provided in the ULTRs to draft national forensic standards. By allowing this industry-wide standards-building process to continue and develop, the guidance articulated in ULTRs may take hold faster and more effectively than any federal rule change. Indeed, in two recently published opinions, one from the D.C. District Court and another from the Western District of Oklahoma, the court utilized the Department's ULTRs to properly limit the scope of firearms-toolmarks testimony.[2]

The Conceptual and Practical Differences Between "Match" and "Source Identification"

The conceptual formulation of a "match" and a "source identification" opinion is not the same. The traditional "match" paradigm in the forensic pattern comparison disciplines employed an essentially deductive reasoning process in which a sufficient combination of corresponding features was considered to be "unique" in the natural world. It followed that if a questioned sample exhibited a sufficient combination of features that corresponded to those observed in the known item, then the questioned sample (pattern) was considered "unique." As such, an examiner "individualized" the questioned sample "to the exclusion of all other" such items (e.g. fingerprints, shell casings).

[1] https://www.nist.gov/topics/organization-scientific-area-committees-forensic-science

[2] *U.S. v. Harris*, 2020 U.S. Dist. LEXIS 205810 (D.D.C.) (Nov. 4, 2020); *see also U.S. v. Hunt*, 2020 U.S. Dist. LEXIS 95471 (W.D. Okla.) (June 1, 2020).

In contrast to the "match" paradigm, a "source identification"[3] conclusion is the result of an inductive reasoning process that makes no universal claims of deductive certainty. During an examination, a known item and a questioned sample are examined for a sufficient combination of corresponding features.[4] If an examiner determines that there is sufficient correspondence such that she (based on her knowledge, training, experience, and skill) would not expect to find the same combination of features repeated in another source, and there is insufficient disagreement to conclude that the combination of features came from a different source, then the correspondence provides extremely strong support for the proposition that the questioned sample came from the known item. Similarly, it provides extremely weak or no support for the proposition that the questioned sample came from a different source. The examiner then inductively infers (from the observed data) that the questioned sample originated from the known item.[5] The resulting classification as a "source identification," "source exclusion," "inconclusive," is ultimately an examiner's skill and experience-based opinion.

Importantly, at the conclusion of this process, an examiner makes no claim that the observed combination of corresponding features in the questioned sample (class and individual

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[3] "Identification is the decision process of establishing with sufficient confidence (not absolute certainty), that some identity-related information describes a specific entity in a given context, at a certain time." Casey Eoghan & David-Oliver, *Do Identities Matter?* 13 Policing: A Journal of Policy & Practice 21, 21 (March 2019).

[4] "The question for the scientist is not 'are this mark and print identical' but, 'given the detail that has been revealed and the comparison that has been made, what inference might be drawn in relation to the propositions that I have set out to consider.'" Christophe Champod & Ian Evett, *A Probabilistic Approach to Fingerprint Evidence*, Journal of Forensic Identification, 101-22, 103 (2001).

[5] *See* David Kaye, *Probability, Individualization, and Uniqueness in Forensic Science Evidence: Listening to the Academies*, 75 Brooklyn L. Rev. 1163, 1176 (2010) ("In appropriate cases . . . it is ethical and scientifically sound for an expert witness to offer an opinion as to the source of the trace evidence. Of course, it would be more precise to present the random-match probability instead of the qualitative statement, but scientists speak of many propositions that are merely highly likely as if they have been proved. They are practicing rather than evading science when they round off in this fashion.").

> Most inferential reasoning in forensic contexts is inductive. It relies on evidential propositions in the form of empirical generalisations . . . and it gives rise to inferential conclusions that are ampliative, probabilistic and inherently defeasible. This is, roughly, what legal tests referring to "logic and common sense" presuppose to be the lay fact-finder's characteristic mode of reasoning. Defeasible, ampliative induction typifies the eternal human epistemic predicament, of reasoning under uncertainty to conclusions that are never entirely free from rational doubt.

Paul Roberts & Colin Aitken, *Communicating and Interpreting Statistical Evidence in the Administration of Criminal Justice, 3. The Logic of Forensic Proof—Inferential Reasoning in Criminal Evidence and Forensic Science, Guidance for Judges, Lawyers, Forensic Scientists, and Expert Witnesses*, Royal Statistical Society 43 (2014) https://www.maths.ed.ac.uk/~cgga/Guide-3-WEB.pdf.

> Events or parameters of interest, in a wide range of academic fields (such as history, theology, law, forensic science), are usually not the result of repetitive or replicable processes. These events are singular, unique, or one of a kind. It is not possible to repeat the events under identical conditions and tabulate the number of occasions on which some past event actually occurred. The use of subjective probabilities allows us to consider probability for events in situations such as these.

Colin Aitken & Franco Taroni, *Statistics and the Evaluation of Evidence for Forensic Scientists* (Wiley 2nd Ed. 2004).

characteristics) is "unique"[6] in the natural world, or that the examiner can universally "individualize"[7] the item or person from which the questioned sample originated. Moreover, given the limitations of inductive reasoning, an examiner cannot logically "exclude all other" potential sources of the questioned sample with certainty.[8] Accordingly, ULTR documents that authorize a "source identification"[9] conclusion also prohibit an examiner from asserting that a questioned sample originated from a known source "to the exclusion of all other sources." They also disallow claims of absolute or 100% certainty, infallibility, or a zero-error rate.[10]

From a legal perspective, a "source identification" conclusion is properly characterized as technical or specialized knowledge under Rule 702,[11] as it is based on an examiner's training, skill, and experience—not statistical methods or measurements. As such, the PCAST Report erred when it claimed that all forensic pattern comparison disciplines are "metrology" (measurement science).[12] Although many of these disciplines are grounded in scientific principles, source identification conclusions provided by forensic examiners are "skill and experience-based"

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[6] "Every entity is unique; no two entities can be 'Identical' to each other because an entity may only be identical to itself. Thus, to say 'this mark and this print are identical to each other' invokes a profound misconception: they might be indistinguishable but they cannot be identical." Champod, *supra* note 4, at 103.

[7] "[I]ndividualization—the conclusion that 'this trace came from this individual or this object'—is not the same as, and need not depend on, the belief in universal uniqueness. Consequently, there are circumstances in which an analyst reasonably can testify to having determined the source of an object, whether or not uniqueness is demonstrable." Kaye, *supra* note 5, at 1166. The Department uses the term "identification" rather than "individualization."

[8] "We cannot consider the entire population of suspects - the best we can do is to take a *sample*… We use our observations on the sample, whether formal or in formal, to draw inferences about the *population.* No matter how large our sample, it is not possible for us to say that we have eliminated every person in the population with certainty. . . . This is the classic scientific problem of *induction* that has been considered in the greatest depth by philosophers." Champod, *supra* note 4, at 104-105.

[9] *See also* Kaye, *supra* note 5, at 1185 ("Radical skepticism of all possible assertions of uniqueness is not justified. Absolute certainty (in the sense of zero probability of a future contradicting observation) is unattainable in any science. But this fact does not make otherwise well-founded opinions unscientific or inadmissible. Furthermore, whether or not global uniqueness is demonstrable, there are circumstances in which an analyst can testify to scientific knowledge of the likely source of an object or impression.").

[10] https://www.justice.gov/olp/uniform-language-testimony-and-reports.

[11] *See, e.g. U.S. v. Herrera*, 704 F.3d 480 (7th Cir. 2013) ("[E]xpert evidence is not limited to 'scientific' evidence, however such evidence might be defined. . . . It includes any evidence created or validated by expert methods and presented by an expert witness that is shown to be reliable." (Latent print decision); *Restivo v. Hessemann*, 846 F.3d 547, 576 (2d Cir. 2017) ("Rule 702 'makes no relevant distinction between 'scientific' knowledge and 'technical' or 'other specialized' knowledge,' and 'makes clear that any such knowledge might become the subject of expert testimony.' *Kumho Tire Co.,* 526 U.S. at 147"); *see also U.S. v. Harris*, 2020 U.S. Dist. LEXIS 205810 (D.C. November 4, 2020) (characterizing firearms-toolmarks testimony as technical/specialized knowledge); *Accord U.S. v. Hunt*, 2020 U.S. Dist. LEXIS 95471 (W.D. Okla.); *U.S. v. Johnson*, 2019 U.S. Dist. LEXIS 39590 (S.D.N.Y. 2019); *U.S. v. Otero*, 849 F. Supp. 2d 425 (D.N.J. 2012); *U.S. v. Mouzone*, 696 F. Supp. 2d 536 (D. Md. 2009); *U.S. v. Monteiro,* 407 F. Supp. 2d 351 (D. Mass. 2006).

[12] *President's Council of Advisors on Sci. & Tech., Executive Office of the President, Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature Comparison Methods* 23, 44, 143 (2016) (original emphasis) at 23, 44 n.93, 143.

opinions, similar to those offered by an electrical engineer, and discussed in the meeting Memo (pp. 132-33). It is also important to note that the PCAST Report chose to use the term "proposed identification" as the appropriate way for a forensic pattern examiner to articulate his or her conclusion. By adding the word "proposed," PCAST meant to convey the possibility that the opinion might be incorrect[13] As such, a "proposed identification" is essentially equivalent to a "source identification" conclusion. Both formulations recognize that an examiner's opinion is potentially fallible.

Cross-Examination as a Solution to Perceived "Overstatement"

The meeting Memo suggests that empirical studies have shown that cross-examination is an ineffective means by which to challenge the credibility of expert witnesses—citing a 2008 study by McQuiston-Surrett & Saks. That study, however, is inconsistent with more recent research, including a 2013 paper authored by Professor Brandon Garrett. That study found that

> [p]articipants exposed to the examiner who testified on direct that his method was reliable and then acknowledged on cross a possible misidentification rated the general reliability of fingerprint identifications the lowest. Thus, our results suggest that an examiner who claims infallibility on direct will be viewed skeptically after a cross that elicits error-risk concessions, but an examiner who on direct describes her method in reasonable terms, including acknowledging some risk of error, may be able to limit the negative impact of an effective cross-examination or contrary fingerprint evidence presented by the defense.[14]

In another study published in 2015, Joseph Eastwood and Jiana Caldwell found that educating jurors about the limitations of forensic procedures by presenting opposing expert witnesses can be effective in raising legitimate doubts about the forensic conclusions.[15]

A 2019 study—authored by PCAST contributor William Thompson—reported that participants found an expert less credible and were less likely to convict when the expert admitted that his interpretation rested on subjective judgment and when he admitted to having been exposed to potentially biasing task-irrelevant contextual information.[16] Thompson found that,

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[13] *Id.* at 46. ("We suggest the term "*proposed* identification" to appropriately convey the examiner's conclusion, along with the possibility that it might be wrong. We will use this term throughout this report.") (original emphasis).

[14] Brandon Garrett & Gregory Mitchell, *How Jurors Evaluate Fingerprint Evidence: The Relative Importance of Match Language, Method Information, and Error Acknowledgment*, J. of Empirical Legal Stud., 484, 505-06 (2013); *see also* Brandon Garrett & Gregory Mitchell, *How Jurors Evaluate Fingerprint Evidence: The Relative Importance of Match Language, Method Information, and Error Acknowledgment*, Journal of Empirical Legal Studies, 484, 507 ("[W]hen the fingerprint examiner admitted that his method is not foolproof and that his conclusion in this case could be in error, that disclosure had a significant negative impact on the evidence.").

[15] Joseph Eastwood & Jiana Caldwell, *Educating Jurors About Forensic Evidence: Using an Expert Witness and Judicial Instructions to Mitigate the Impact of Invalid Forensic Science Testimony*, 60 J. Forensic Sci. 1523, 1528.

[16] William Thompson & Nicholas Scurich, *How Cross-Examination on Subjectivity and Bias Affect Jurors' Evaluations of Forensic Evidence*, 64 J. Forensic Sci. 1379-88 (2019).

> [o]verall, the results indicate that jurors were skeptical of the expert's claim that he had ignored the task-irrelevant information, and this skepticism increased when the expert also admitted that his interpretation of the findings required subjective judgment in the absence of objective standards for interpretation.[17]
>
> * * *
>
> From a legal perspective, the finding suggests that lawyers can successfully challenge the credibility of a non-blind forensic expert in two ways: either by revealing the subjectivity of the expert's methods or by revealing the expert's exposure to task irrelevant information.[18]

Accordingly, recent research supports the position that conceding the fallibility of forensic findings on direct examination, during cross-examination, or through contrary evidence by an opposing expert, *does* affect the persuasiveness of a forensic examiner's opinion. Moreover, cross-examination is enhanced by the timely production of information underlying the expert's opinion. This was the reason that the Criminal Rules Committee—with the Department's support—has worked on a proposed amendment to Rule 16. The proposed timeliness requirement in Rule 16 is also being supplemented with additional DOJ training to ensure that prosecutors understand and adhere to their disclosure obligations.

The Department recognizes that a forensic examiner's past performance on relevant, skill-based testing is an important measure for evaluating her performance in a given case. As such, FBI proficiency test results are routinely provided to defense counsel upon request. The FBI Laboratory will soon begin disclosing proficiency test results without a specific defense request as part of their general discovery and disclosure procedures. In addition, Department laboratory quality assurance manuals, standard operating procedures, testing methodologies, and other laboratory policies are currently available online to defense attorneys and the general public.[19] Moreover, the Department's ULTRs, which set forth the qualifications and limitations for sixteen forensic disciplines, are available to defense counsel in each case and are available on-line.[20]

In a recent study, Professor Garrett examined the impact of proficiency test results and laboratory error rates on jury-eligible adults. His study found that,

> [w]hen jurors receive information about flaws or weaknesses in a forensic method or receive general information about a field's error rates, the juror cannot be sure how that information applies to the particular analyst in the case at hand. But when jurors receive information about the testifying expert's own performance on a proficiency test that simulates the task involved in the case at hand, the relevance of this information is easy to comprehend and hard to ignore.[21]

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[17] *Id.* at 1386.
[18] *Id.*
[19] https://www.justice.gov/olp/forensic-science#posting.
[20] *See* https://www.justice.gov/olp/uniform-language-testimony-and-reports. "This document is intended to describe and explain terminology that may be provided by Department examiners. *It shall be attached to, or incorporated by reference in, laboratory reports or included in the case file*." (Emphasis added).
[21] Gregory Mitchell & Brandon Garrett, *The Impact of Proficiency Testing Information and Error Aversions on the Weight Given to Fingerprint Evidence*, 37 Behav. Sci. Law, 1, 14 (2019).

Regarding the impact of proficiency test information in particular, the Garrett study found that,

> [t]he fingerprint examiner's level of performance on a proficiency test (high, medium, low, or very low), but not the type of error committed on the test (false positive identifications, false negative identifications, or a mix of both types of error), affected the weight that jury-eligible adults gave to an examiner's opinion that latent fingerprints recovered from a crime scene matched the defendant's fingerprints, which in turn affected judgments about the defendant's guilt.[22]

Collectively, these recent studies undermine the position that cross-examination is an ineffective means of challenging the credibility of a forensic examiner. Instead, the findings clearly support the position that conceding the potential fallibility of forensic results on direct examination or during cross-examination, or challenging forensic evidence by use of an opposing expert, impacts the credibility of a forensic examiner's opinion.

Strength of Evidentiary Support versus Opinion Testimony

The meeting Memo appears to favor "strength of evidence" testimony over an expert's opinion about the source of a questioned item. Memo at 110. Recent research, however, has shown that jurors do not correctly discern differences between subtle gradations of evidentiary strength, such as those endorsed by the American Statistical Association and described in the Memo.

Specifically, Eleanor Arscott found that study participants performed poorly when attempting to distinguish between strength of evidence expressions at the strong end of the scale ("strong," "very strong," and "extremely strong").[23] As a result, she concluded that it was possible "to question the effectiveness of the scale of verbal expressions in communicating the intended evidential strength at the higher end of the scale."[24] Arscott also noted the same can be argued for distinctions between "weak" and "moderate" strength, and between "moderate" and "moderately strong" evidence.[25] She concluded that "[t]hese results suggest we may not be able to assume that decision makers will be able to discern between these expressions."[26]

Separate research by Kristy Martire[27] on verbally described gradations in evidentiary strength revealed what she described as "the weak evidence effect." That is, study participants presented with evidence that weakly supported guilt tended to invert that finding and wrongly think that "weak" evidence in support of the prosecution's case actually meant that the evidence favored the accused.[28] Participants presented with weakly exculpatory evidence, however, were

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[22] *Id.* at 1.
[23] Eleanor Arscott et al., *Understanding Forensic Expert Evaluative Evidence: A Study of the Perception of Verbal Expressions of the Strength of Evidence*, 57 *Sci. and Just.* 222, 224, n.13 (2017).
[24] *Id.* at 224.
[25] *Id.*
[26] *Id.* at 227.
[27] Kristy Martire et al., *The Expression and Interpretation of Uncertain Forensic Science Evidence: Verbal Equivalence, Evidence Strength, and the Weak Evidence Effect*, 37 Law and Hum. 197, 205-06 (2013).
[28] *Id.* at 205-06.

not affected in the same way.[29] These studies demonstrate that testimony based on gradations of evidentiary support may actually confuse rather than clarify the intended meaning of an examiner's conclusion. This is surely not the intended result of a proposed rule change to FRE 702.

Assumptions Underlying the Proposed Rule Change and Note

1. Studies on the Baseline Valuation of Forensic Evidence by Potential Jurors: The So-Called "CSI Effect"

The draft Committee Note that accompanies the proposed amendments to FRE 702 suggests that jurors may overvalue scientific evidence and either unquestionably accept it or fail to understand expert testimony. *See, e.g.*, Memo at p. 143. ("Just as jurors are unable to evaluate meaningfully the reliability of scientific and other methods underlying expert opinion, jurors lack a basis for assessing critically the conclusions of an expert that go beyond what the expert's methodology may reliably support.").

Recent research, however, contradicts the notion that jurors overvalue forensic evidence. To the contrary, the findings show that jurors approach forensic evidence with a critical eye and tend to underweight its probative value. For example, a 2020 study by Jacob Kaplan and colleagues[30] reached the following conclusion:

> We find that individuals in the United States hold a pessimistic view of the forensic science investigation process, believing that an error can occur about half of the time at each stage of the process. We find that respondents believe that forensics are far from perfect, with accuracy rates ranging from a low of 55% for voice analysis to a high of 83% for DNA analysis, with most techniques being considered between 65% and 75% accurate.[31]

The results differed from the researchers' expectations:

> While we expected respondents to have a high level of confidence in the forensic science investigation process and for the accuracy of each forensic science technique (Hypothesis 1), our results suggest that members of the US public hold significant doubts about the accuracy of forensic techniques and believe that each technique contains high levels of human judgement. The technique perceived to be most accurate was DNA evidence at 83% accuracy, while voice analysis at 55% and footwear analysis at 57% were perceived to be least reliable. Most forensic techniques were considered to be in the range of 65–75% accurate. Our results align with prior work indicating that DNA is often perceived to be among the most accurate forensic techniques, though our study yields lower perceptions of accuracy for DNA than reported elsewhere. Additionally, respondents indicated that they

[29] *Id.* at 205.
[30] Jacob Kaplan et al., *Public Beliefs About the Accuracy and Importance of Forensic Evidence in the United States*, 60 Sci. & Just. 263-72 (2020).
[31] *Id.* at 263.

> believed there was a substantial risk of error at each stage of the forensic science process, and that each stage involves a large amount of human judgement.[32]

In short, the authors found that,

> US respondents believe that there is a high degree of human judgement involved and high risk of an error occurring at each stage of the forensic science process. When considering forensic science techniques specifically, those in the US hold a skeptical view of the vast majority of techniques, viewing some of them as little more accurate than a coin flip, and no technique more than 84% accurate.[33]

Kaplan's results corroborate the findings of a similar study from Australia. In that work, Gianni Ribeiro and colleagues[34] found, contrary to their expectations, that study participants believed that the forensic process involved considerable human judgment and was relatively prone to error. Specifically, the researchers found:

> [P]articipants had wide-ranging beliefs about the accuracy of various forensic techniques, ranging from 65.18% (document analysis) up to 89.95% (DNA). For some forensic techniques, estimates were lower than that found in experimental proficiency studies, suggesting that our participants are more skeptical of certain forensic evidence than they need to be.[35]

> Ribeiro concluded that, "[i]n this study, we have demonstrated that participants do not just blindly believe that all forensic techniques are highly accurate, which has previously been assumed in the CSI effect literature. Instead, our participants believe that the forensic science process is error prone and involves a considerable amount of human judgment at each and every stage."[36]

As surprising as these findings may be, they are not anomalous. Indeed, they are consistent with other research finding that study participants consistently undervalue the significance of forensic evidence. For example, Dale Nance, in a study that involved people called for jury service in Illinois, concluded that, "[l]ooking at the forest rather than the trees, the dominant problem the empirical research reveals is that jurors as a group tend to undervalue the scientific evidence."[37]

In a separate large-scale empirical study—again using members of an Illinois jury pool—Nance confirmed the findings of his earlier research that jurors tend to minimize forensic

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[32] *Id.* at 270.
[33] *Id.* at 271.
[34] Gianni Ribeiro et al., *Beliefs About Error Rates and Human Judgment in Forensic Science*, 297 Forensic Sci. Int'l. 138-47 (2019).
[35] *Id.* at 138.
[36] *Id.* at 146.
[37] Dale Nance & Scott Morris, *An Empirical Assessment of Presentation Formats for Trace Evidence with a Relatively Large and Quantifiable Random Match Probability*, 42 Jurimetrics J. 403 (2002).

evidence.[38] Specifically, he found that "for the most part jurors' innate skepticism and need to be convinced create a dominating undervaluation of the evidence."[39]

In a later study, Jason Schklar[40] found that "[a]lthough no published study has reported jurors' naive expectancies of how likely it was that a DNA match report could have resulted from either random chance or a laboratory error, some evidence indicates that people think human errors in the DNA lab are *more likely* than proficiency test results have revealed."[41] In addition, Schklar concluded, "[t]he results of this study also suggest that jurors may not infer that DNA test results are error-free when they do not receive an LE [error rate] estimate."[42]

Most recently, William Thompson and Edward Newman[43] found that study participants undervalued forensic footwear evidence.[44] Their findings "indicate that perceptions of forensic science evidence are shaped by prior beliefs and expectations as well as expert testimony and consequently that the best way to characterize and explain forensic evidence may vary across forensic disciplines."[45] The authors concluded, "The complexity of our findings suggests that the problem of how "best" to present forensic evidence to lay audiences may not have a single, simple solution."[46]

2. Error Rates

Professor Brandon Garrett, in a letter to the Committee, claimed that "[n]o conclusion can be reached about a method without qualification or discussion of error rates, because there is no type of expertise that does not have some error rate." Memo, p. 121. The draft Committee Note reflects this view. *See* Memo, p. 143 ("Accurate testimony will ordinarily include a fair assessment of the rate of error of the methodology employed, based where appropriate on empirical studies of how often the method produces correct results, as well as other relevant limitations inherent in the methodology."). But it is scientifically incorrect to assume that a single error rate can be attributed to a particular method or generally applied to all forensic examiners who practice that method.[47]

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[38] Dale Nance & Scott Morris, *Juror Understanding of DNA Evidence: An Empirical Assessment of Presentation Formats for Trace Evidence with a Relatively Small Random-Match Probability*, 34 J. Legal Stud. 395 (2005).
[39] *Id.* at 436.
[40] Jason Schklar & Shari Diamond, *Juror Reactions to DNA Evidence: Errors and Expectancies*, 23 Law & Hum. Behav. 159 (1999).
[41] *Id.* at 165 (emphasis added).
[42] *Id.* at 178.
[43] *See* William Thompson & Eryn Newman, *Lay Understanding of Forensic Statistics: Evaluation of Random Match Probabilities, Likelihood Ratios, and Verbal Equivalents*, 39 Law & Hum. Behav. 332 (2015).
[44] Consistent with these results, other research has also found that study participants underutilize forensic evidence. *See* William Thompson & Edward Schumann, *Interpretation of Statistical Evidence in Criminal Trials: The Prosecutor's Fallacy and the Defense Attorney's Fallacy*, 11 *Law & Hum. Behav*. 167 (1987); David Faigman & A.J. Baglioni, *Bayes' Theorem in the Trial Process: Instructing Jurors on the Value of Statistical Evidence*, 12 Law & Hum. Behav. 1 (1988); Jane Goodman, *Jurors' Comprehension and Assessment of Probabilistic Evidence*, 16 Am. J. Trial Advoc. 361 (1992).
[45] *Id.* at 332.
[46] *Id.* at 348.
[47] *See, e.g.,* William Thompson et al., American Academy for the Advancement of Science *Forensic Science Assessments: A Quality and Gap Analysis* (2017) ("[I]t is unreasonable to think that the "error rate" of latent fingerprint examination can meaningfully be reduced to a single number or even a single set of numbers. At best, it might be

First, many experts, including skill and experience-based experts, will be unable to testify to a specific error rate. Consider the brain surgeon testifying in a medical malpractice suit. Based on the surgeon's experience performing and observing a procedure thousands of times, she opines that the failure to correctly clamp a particular artery led to the plaintiff's excess bleeding and subsequent paralyzing stroke. The surgeon's opinion, and her confidence in that opinion, may be tested on cross-examination and through rebuttal experts. But there is no error rate that accompanies the methodology used to reach that opinion. Similarly, the structural engineer who studies the collapse of a bridge and testifies that, in his opinion, the bridge had a specific design flaw need not provide an error rate in order to offer his skill and experience-based opinion.

Second, even error rate advocates concede that it is exceedingly difficult to accurately establish scientifically valid and generally applicable figures. PCAST contributor and Boston College Symposium participant Itiel Dror addressed this point in a recent paper in which he discussed the complexities and practical difficulties of establishing a valid error rate.[48] These include knowing ground truth facts, establishing appropriate databases, determining what counts as an error, deciding on an acceptable metric, and problems with the external or ecological validity[49] of generalizing a given rate to different situations and circumstances.[50] Dror observed that, "[p]roviding 'an error rate' for a forensic domain may be misleading because it is a function of numerous parameters and depends on a variety of factors."[51] He then posed the following rhetorical question:

> The need to properly establish error rates in forensic science is clear. But, given the time and effort it requires, as well as the inherent limitations of the very notion of error rates, is it worth it? And, how does it compare (or complement) other measures of performance (e.g., effective proficiency testing, quality assurance checks such as dip sampling and blind verification, accreditation, and ongoing training and development).[52]

Given these limitations, perhaps the best one can do is to examine the compendium of relevant studies and view them as a composite measure of the potential range of error rates across a discipline[53]—but one that is not necessarily applicable to any particular case or examiner (due

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possible to describe, in broad terms, the rates of false identifications and false exclusions likely to arise for comparisons of a given level of difficulty.").

[48] Itiel Dror, *The Error in Error Rate: Why Error Rates Are So Needed, Yet So Elusive* 65 *J. Forensic Sci.*, 1034 (2020).

[49] Ecological validity refers to "a kind of external validity referring to the generalizability of findings from one group to another group." W. Paul Vogt, *Dictionary of Statistics and Methodology* 78 (Sage Publications 1993).

[50] Dror, *supra* note 48, at 1034.

[51] *Id.* at 1037.

[52] *Id.* at 1038.

[53] *Daubert* discussed the known or *potential* rate of error. *See also* The American Association for the Advancement of Science (AAAS) recently published a study on latent fingerprints (William Thompson et al., *Forensic Science Assessments: A Quality and Gap Analysis* (2017)) that discussed the concept of "convergent validity," an approach that draws conclusions about method validity from the body of relevant literature *as a whole*, recognizing that various study designs have different strengths and weaknesses. It also recognized that some studies can reinforce others and collectively support conclusions not otherwise warranted. Thompson, at 44. *See also* NAT'L RESEARCH COUNCIL, NAT'L ACADS., THE EVALUATION OF FORENSIC DNA EVIDENCE 85, 87 (1996) ("The question to be

to the scientific limitations imposed by external/ecological validity). For example, the composite false positive error rate derived from extant firearms-toolmarks studies is at or below 1%—a rate consistent with that detected by the largest latent fingerprint study to date.[54]

The Department provided the Committee with the results of an ongoing firearms-toolmarks experiment by Mark Keisler and Stacey Hartman, *Isolated Pairs Research Study*, 50 AFTE Journal 56 (Winter 2018). The false positive error rate for that study is currently zero. This finding is consistent with the low false positive error rates recorded by numerous research studies in the firearms-toolmarks discipline of various experimental design.

A new firearms-toolmarks open-set black box study conducted by Jamie A. Smith was recently accepted for publication in the peer-reviewed *Journal of Forensic Sciences*.[55] The study was undertaken in response to the PCAST Report's criticism of closed set experimental designs used in some past firearms-toolmarks studies. Smith's study involved 72 qualified firearms examiners who compared bullets fired from 30 consecutively manufactured barrels (which makes comparisons much more difficult than those typically encountered during casework). The study's false positive error rate was calculated to be 0.08% with only 1 false association recorded in 1,250 comparisons.[56]

Finally, consider that the PCAST Report said the following about forensic error rates: "To be considered reliable, the FPR [false positive rate] should certainly be less than 5 percent and it may be appropriate that it be considerably lower, depending on the intended application."[57] The extant studies (including black box and other designs) for firearms-toolmarks and latent fingerprints consistently record false positive error rates at or less than 1%—well below PCAST's recommended 5% upper threshold.

A table of firearms-toolmarks studies that have measured false positive error rates for examiner-participants who conducted forensic comparisons of spent bullets and/or shell casings is appended to this letter as Attachment A.

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decided is not the general error rate for a laboratory or laboratories over time but rather whether the laboratory doing DNA testing in this particular case made a critical error.") and ("The risk of error is properly considered case by case, taking into account the record of the laboratory performing the tests, the extent of redundancy, and the overall quality of the results").

[54] For latent prints, in the largest-scale study to date, involving 169 examiners and 17,121 total decisions, the false positive error rate was 0.1%. Bradford Ulery et al., *Accuracy of Forensic Latent Fingerprint Decisions*, 108 Proceedings of the National Academy of Sciences 7733-38 (2011).

[55] Jamie A. Smith, Beretta Barrel Fired Bullet Validation Study, *Journal of Forensic Sciences* (accepted for publication October 2, 2020).

[56] It is important to note that experimental study error rates do not translate to laboratory error rates, as comparisons performed during studies do not have the benefit of verification performed by a second examiner or a laboratory's quality assurance measures. In this regard, see BALDWIN ET AL., A STUDY OF FALSE POSITIVE AND FALSE NEGATIVE ERROR RATES IN CARTRIDGE CASE COMPARISON 18 (2014), https://www.ncjrs.gov/pdffiles1/nij/249874.pdf: ("This finding [a 1.0% false positive error rate] does not mean that 1% of the time each examiner will make a false-positive error. Nor does it mean that 1% of the time laboratories or agencies would report false positives, since this study did not include standard or existing quality assurance procedures, such as peer review or blind reanalysis.").

[57] PCAST Report, *supra* note 12, at 152.

The Transactional Cost of a Rule Change to FRE 702

During the October 2017 roundtable that the Committee hosted in Boston, there seemed to be a consensus among participants that Rules 702 and 104(a) already provide the correct standard by which courts should assess the admissibility of expert testimony. The discussion was more focused on whether there was value in tweaking the rules to emphasize that courts should follow the existing rules, and in so doing, use the rule change to more broadly discuss the topic in a committee note. On the issue of admissibility versus weight, Judge James O. Browning—a participant in the Boston roundtable—subsequently wrote the following in a published opinion:

> Rule 702's most prominent hurdle is the sufficiency of basis. Yet the judiciary's uncomfortableness with analyzing an opinion's basis can be seen in the conflict in the cases. The current conflict is whether the questions of sufficiency of basis, and of application of principles and methods, are matters of weight or admissibility. *** There should not be a conflict. Rule 702 states that these are questions of admissibility. Yet many courts treat them as questions of weight. *** The Court is concerned that the federal courts will overact to the wayward opinions that have created a split whether sufficiency of basis and application of methods is for the court or goes to the evidence's weight. The Court is concerned that the federal courts are going in the direction of new rules. *** The development of new rules burdens the federal judiciary and the bar -- all of which are overworked -- with mandatory changes each year, often constituting little more than stylistic changes. Everyone has to get new rule books every year. The burden of new rules often does not justify the meager benefits of the changes.

*Walker v. Spina, et al*, Civil Action No. 17-0991 JB\SCY (D.N.M. Jan. 9, 2019) (Doc. 111), p. 32, n. 11 (internal citations omitted).

Judge Browning's observation is especially apt here, where proposed textual changes are not strictly necessary, but open the door to sweeping commentary in the note. Here, the proposed note is already obsolete, and would only become further outdated by the time an amendment takes effect. Forensic science is a quickly evolving discipline where new studies constantly add to a growing body of knowledge. *See, e.g., Harris*, *supra* at *2 ("recent advancements in the field in the four years since the PCAST Report address many of Mr. Harris's concerns). Studies conducted in the last few years already undermine the lead premise of the proposed note, *i.e.*, that jurors overvalue forensic testimony. Given the swift pace of forensic and social science research, the slow pace of rulemaking, and the permanence of Committee notes, we propose restraint. Other methods exist to educate courts on the correct application of Rule 702. The language of the Federal Rules already provide courts the tools necessary to regulate expert testimony, and many courts are actively doing so.

Respectfully,

*/s/ Elizabeth J. Shapiro*
Elizabeth J. Shapiro, Deputy Director
Ted R. Hunt, Senior Advisor on Forensic Science
U.S. Department of Justice

Appendix A

# Significant Firearms-Toolmarks False Positive Error Rate Studies

| Lead Author | Source | Year | Number of Participants | False Positive Rate (%) | Comparison Type Cases/Bullets |
|---|---|---|---|---|---|
| *Brundage | AFTE Journal | 1998 | 30 (Plus 37 Informal Participants) | 0 | Bullets |
| Bunch | AFTE Journal | 2003 | 8 | 0 | Cartridge Cases |
| DeFrance | AFTE Journal | 2003 | 9 | 0 | Bullets |
| Smith | AFTE Journal | 2004 | 8 | 0 | Both |
| *Hamby | AFTE Journal | 2009 | 507 (Includes *Brundage (1998) Participants) | 0 | Bullets |
| Lyons | AFTE Journal | 2009 | 22 | 1.2[a] | Cartridge Cases |
| Mayland | AFTE Journal | 2010 | 64 | 1.7[b] | Cartridge Cases |
| Cazes | AFTE Journal | 2013 | 68 (or 69) | 0 | Cartridge Cases |
| Fadul | AFTE Journal | 2013 | Phase 1: 217<br>Phase 2: 114 | Phase 1: .064[c]<br>Phase 2: 0.18[c] | Cartridge Cases |
| Fadul | NIJ (NCJRS) | 2013 | 183 | 0.40 [d] | Bullets |
| Stroman | AFTE Journal | 2014 | 25 | 0 | Cartridge Cases |
| Baldwin | NIJ (NCJRS) | 2014 | 218 | 1.0 | Cartridge Cases |
| Kerkhoff | Science & Justice | 2015 | 11 | 0 | Both |
| Smith | JFS | 2016 | 31 | 0.14 Cases<br><br>0 Bullets | Cartridge Cases<br><br>Bullets |
| Duez | JFS | 2018 | 46 Examiners<br>10 trainees | 0[e] | Cartridge Cases |
| Keisler | AFTE Journal | 2018 | 126 | 0 | Cartridge Cases |
| *Hamby | JFS | 2019 | 619 (Includes *Brundage (1998) and Hamby (2009) Participants) | 0.053%[f] | Bullets |
| Smith | Journal of Forensic Sciences (Accepted) | 2020 | 72 | 0.08% | Bullets |

*Brundage study was continued by Hamby who added additional participants and reported the combined data in fall 2009 and 2019.

[a] The error rate reported by the author appears to be (1-True Positive Rate). There were three false positive identifications made but the number of true negative comparisons is not reported. 259

correct positive identifications were made. The False Discovery Rate (FDR) for the study is 3/(3+259) = 1.1%.

[b] The false positive error rate in not reported by the authors. There were three false positive identifications and 178 correct positive identifications made. The False Discovery Rate (FDR) for the study is 3/(3+178) = 1.7% and is reported in the table above.

[c] The error rates reported by the authors are roughly equivalent to the False Discovery Rates (FDR) for each of the study phases (FDR = .062% and 0.18% respectively).

[d] Eleven false positives occurred. The false positive error rate in not reported by the authors. The error rate quoted is equivalent to the False Discovery Rate =11/(11+2734) = 0.40%.

[e] Two false positives were made by one trainee. None were made the qualified examiners. The false positive rate does not include the trainee errors. If trainee data is included with that submitted by examiners, the False Positive Rate is (2/112) = 1.8%.

[f] The empirically observed false positive rate is 0%. Using Bayesian estimation methods, the authors most conservative (worst case) estimate of the average examiner false positive error rate for the study is .053% with a 95% credible interval of ($1.1x10^{-5}$%, 0.16%).

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PAPER

Criminalistics

# Beretta barrel fired bullet validation study

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## Abstract

A report published in 2016 by the President's Council of Advisors on Science and Technology (PCAST) criticized studies that have been published regarding the discipline of firearm identification. This study was designed to answer some of these criticisms and involved 30 consecutively manufactured Beretta brand 9 mm Luger caliber barrels. This study had an "open set" design to help the discipline of firearm identification establish "Foundational Validity" which is outlined in the PCAST report. Seventy-two qualified firearm examiners completed and submitted answers for this study that included 15 knowns and 20 unknowns. There were an additional 5 firearms with similar characteristics as the Beretta barrels that were also included as unknowns which provided "known non-match" comparisons. Test sets were created using the random function in Microsoft Excel. Collaborative Testing Services (CTS) funded, facilitated, distributed the tests, and collected the answers from qualified firearm examiners throughout the United States and the world. Firearm examiners were able to complete the test of fired bullets with a low error rate. The error rate for the corrected data was 0.08% (1 in 1250) with the lower confidence interval as low as 0.01% (1 in 10,000) and the upper confidence interval being as high as 0.4% (1 in 250).

**KEYWORDS**
barrels, Beretta, comparison, consecutively manufactured, error rate, firearm identification, fired bullets, foundational validity, microscopic examination, PCAST, validation study

## 2 | INTRODUCTION

Firearm and toolmark identification is a discipline within forensic science whose primary objective is to determine if a fired bullet or fired cartridge case was fired in a specific firearm or the same firearm by comparison to each other if a suspected firearm is not submitted. A firearm examiner can determine if a fired bullet from a victim or from a crime scene was fired from a specific firearm that was recovered at a scene or from a suspect. If no firearm is recovered, a firearm examiner can determine how many firearms were discharged at the scene. A firearm examiner microscopically evaluates fired evidence using an optical comparison microscope and observes the stria on the bearing surface of a fired bullet. These striae are marked on the bullet as it travels down the barrel of the firearm. They are accidental in nature and occur because of random imperfections within the barrel of the firearm. The patterns of these striations are considered by firearm examiners to be unique. Many studies have been published supporting the idea that the striations on a bullet are unique (1–11). The striations are considered unique because the rifling tools during barrel manufacturing wear during their use and change microscopically. The greatest similarities between two barrels would be expected to occur in two barrels that were manufactured by the same rifling tool consecutively. There have also been many studies of a firearm examiners ability to differentiate evidence involving consecutively manufactured tools (2,3,5,11–38). Even though there is strong evidence supporting the discipline of firearm identification, there have been some expected criticisms considering the subjective nature of the analysis.

In 2009, the National Academy of Science Report (NAS) questioned the scientific validity of firearm and toolmark identification (39). Additional studies have been published after the NAS report that help support the scientific validity of firearm and toolmark comparisons (11,27–38,40–47). However, in September of 2016, the

  

Executive Office of the President President's Council of Advisors on Science and Technology (PCAST) published a Report to the President titled: Forensic Science in the Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods (48). It criticized several different forensic disciplines as well as the scientific validity of firearm and toolmark identification. In this report, PCAST outlines reasons they believed firearm/toolmark examinations did not meet the scientific criteria for "foundational validity". PCAST coined and defined the term "Foundational Validity". According to PCAST, since firearm identification is a feature-comparison method, its foundational validity can only be established through multiple independent black box studies ([48, p. 68). In order to meet the scientific criteria for foundational validity, PCAST states that the following criteria must be met:

1. Studies must involve sufficiently a large number of examiners and be based on sufficiently large collections of known and representative samples from relevant populations to reflect the range of features or combination of features that will occur in the application.
2. Empirical studies should be conducted so that neither the examiner nor those with whom the examiner interacts have any information about the correct answer.
3. Study design and analysis framework should be specified in advance.
4. The empirical studies should be conducted or overseen by individuals or an organization that do not have a stake in the outcome of the studies.
5. Data, software, and results of the validation studies should be available to allow other scientists to review the conclusions.
6. To ensure that conclusions are reproducible and robust, there should be multiple studies by separate groups reaching similar conclusions. ([48, pp.52–53)

PCAST reviewed several studies that have been conducted in the field of firearm/toolmark identification in the past 15 years. They stated that many of the studies were not appropriate for assessing scientific validity and estimating the reliability because they employed artificial designs that differ in important ways from the problems faced in casework ([48, p.106). These studies employed a "closed set" design where the source firearm is always present. They stated that the closed-set design is problematic in principle and underestimates the false positive rate in practice ([48, p.106). Therefore, PCAST concluded that this design is not appropriate for assessing scientific validity and measuring reliability ([48, p.109).

In order to address this criticism, more "open set" studies need to be conducted to have a black-box study that meets the scientific criteria for "foundational validity" set forth by PCAST as much as possible for firearm and toolmark identification.

With this goal in mind, the author's laboratory obtained 30 consecutively manufactured Beretta 9 mm Luger caliber barrels. These Beretta barrels were obtained by the laboratory in 1996 from Beretta U.S.A. Corp. of Accokeek, Maryland with the intent of performing a consecutively manufactured study. Given that the barrels were obtained in 1996, no one from the laboratory was present during the collection of the barrels and there is no formal documentation other than a packing list. The barrels are stamped numerically from 1 to 30 indicating the order of production. This experiment will provide participants in this study with a selection of known test standards from the 30 consecutively manufactured barrels and also provide them with 20 unknowns (a sample where the participant needs to determine if the bullet was fired from one of the barrels provided or some other barrel).

**Highlights**

- PCAST criticized firearm identification because of the few studies to support "Foundational Validity".
- A study of 30 consecutively manufactured Beretta barrels was created to address the concerns of PCAST.
- This test uses an "open set" design which was deemed appropriate by PCAST.
- CTS was used as a third party so that the participant did not communicate with the test designer.
- A low error rate was observed for firearm examiners when comparing fired bullets for this study.

This experiment will be set up similarly to the Ten Consecutive Manufactured Ruger Barrel Study by James Hamby (49); however, instead of a "closed set", it will be an "open set". In an "open set", the participant should have no expectation that all questioned bullets should match one or more of the unknowns. Only firearm examiners who were qualified to do work by their laboratory were selected to participate in this experiment. There was an administrative section with several questions that each participant filled out, such as, years of experience in the field, type of lighting, type of scope, laboratory accreditation, certification, etc.

Two hundred tests were created for this study. Within the 200 tests, there were 20 different answer keys of 10 sets each. The 30 consecutive Beretta manufactured barrels and 5 "known non-matching" (in this study, "known non-match" refers to a bullet fired from a barrel that is not present in the provided knowns) 9 mm Luger caliber firearms with similar rifling characteristics as the 30 consecutive barrels from the laboratory's reference collection were included in the test sets. Each set of 10 was determined using the random number function present in Microsoft Excel. The random number function was generated and then repeated for the next 19 unknowns for each test set. Using this process for the 20 unknowns, it was possible to have multiple bullets from the same barrel. It was also possible for the unknown bullets to have been fired in a barrel which did not correspond to any of the knowns.

## 3 | MATERIALS AND METHODS

Thirty consecutively manufactured barrels were obtained from Beretta U.S.A. Corp in January of 1996 by a local laboratory. These barrels have been test fired many times, so there was no concern a "break-in" period would significantly affect the test samples. A "break-in" period is a short period after the barrel has been manufactured where several bullets have to be fired in the barrel before the striations mark in a reproducible manner (16,18). There were five additional pistols used in the test structure to provide "known non-match" fired bullets. All of the pistols have similar general rifling characteristics (GRC) to the known Beretta barrels that were provided. The general rifling characteristics (GRC) were six lands and grooves with a right hand twist where the land impression widths ranged from 0.072 to 0.076 inches and the groove impression widths ranged from 0.100 to 0.106 inches. The following pistols were used: Beretta model 92F, Ruger model P85 MKII, FEG model PJK-9HP, Fabrique Nationale model Hi-Power, and CZ model 75.

For this study, over 14,000 9 mm Luger caliber Federal FMJ cartridges with Lot# AE9AP were obtained and test fired through the barrels.

Figure 1 is a simplified flow chart to help visualize the procedure of how the test sets were created in this study. Each barrel/pistol was lubricated and cleaned prior to test firing the test set (there were approximately 400 bullets fired through each known barrel). Ten percent of the fired bullets were verified, by an AFTE certified firearm examiner, to display sufficient microscopic individual characteristics for identification. Prior to the firing process, every 10th bullet (1, 11, 21, 31, 41, etc) was marked with a sharpie for microscopic comparison to other fired bullets in that set of 100. The ten bullets from each set of 100 were intracompared. A bullet from each set of 100 was then microscopically intercompared to a bullet from each of the 4 sets of 100. Therefore, all of the bullets from 1 to the total number of bullets fired for that barrel should be identifiable; however, not all fired bullets were microscopically compared. A dry patch was run down the barrel after each set of 100 test fires.

After all 30 Beretta barrels were fired, the "known non-matching" pistols received from the laboratory's Firearms Reference Collection were fired using the same process outlined above; however, only about 100 bullets were fired through these pistols because the known exemplars did not need to be fired and therefore, lessened the number of test fires needed.

The Beretta barrels used in this study were manufactured using a broaching tool (50). Since the potential for subclass characteristics may be present, the procedure Ronald Nichols outlined in his journal article (51) was utilized. A cast was made from the muzzle to the chamber of the 30 Beretta barrels using Forensic Sil casting material. The cast was then cut in half and the muzzle end of the cast was compared to the chamber end of the cast. This comparison was conducted by an AFTE certified firearm examiner and no subclass characteristics were observed. Due to the exorbitant cost of making the cast, it was not possible to ship casts of the barrel to each examiner. If any participant asked about the potential for subclass characteristics, they were told this method had been utilized to verify, there were no subclass characteristics.

Each test consisted of a set of three fired bullets each fired from 15 known standards (numbered 1 through 15) and 20 unknowns (labeled A through T). The random number generator feature on Microsoft Excel was used to determine the test sets. The function used to create the random number was RANDBETWEEN (*x*,*y*) where *x* is the lowest number and *y* is the highest number. Excel could select any number between *x* and *y*. This means that there could be multiple unknowns from the same barrel whether it is from a known barrel or an unknown non-matching barrel.

There were two sets of tests: the first set included barrels from 1 to 15, barrels 16 and 17 (not provided in this test as a known), the Beretta model 92F pistol, the Ruger model P85 MKII pistol, and the FEG model PJK-9HP pistol. The second set included barrels from 16 to 30, barrel 14 and 15 (not provided in this test as a known), the Beretta model 92F pistol, the FN model Hi-Power pistol, and the CZ model 75 pistol.

Once all of the test firing was completed, the bullets were scribed according to the Excel spreadsheet and packaged to be sent to Collaborative Testing Services (CTS). For each known of a particular test set, each bullet was scribed with the barrel number, and the set of standards were packaged into a coin envelope labeled with the barrel number. These knowns were placed in a large zip top plastic bag with the test set range (#1–#10, #11–#20, etc.) and the barrel number written on the bag. After all of the knowns were scribed for a particular barrel, the unknowns for that barrel were scribed with the appropriate letter, packaged in a coin envelope with that letter written on it, and put in a small zip top bag labeled with the test range and the appropriate letter. This procedure was performed for all 30 barrels.

For the fired bullets from barrels where a corresponding known was not present, the bullet was scribed with the appropriate letter and packaged in a coin envelope with the letter written on it and put in a small zip top bag with the test set range and the appropriate letter. For each test set, a large zip top plastic bag was labeled with the test set range and that it contained unknowns without a known present, incorporating "known non-match" in the test design.

Therefore, there were 15 large zip top plastic bags for each test set which contained the fifteen knowns (labeled 1–15 or 16–30) and unknowns (labeled A–T). In addition, there was one large zip top plastic bag labeled with the test set range and "unknowns without a known present" written on it.

These test sets were then sent to CTS for packaging and shipment. CTS assigned each test set a unique webcode. If more than one test set was ordered by a specific laboratory, different test sets were sent. This meant that no examiner in the same laboratory would have the same test. CTS managed communication with all of the participants in the study. At no time did the developer of the test know which particular tests were received by the participants.

The procedure outline below was the procedure that CTS used to package the test:

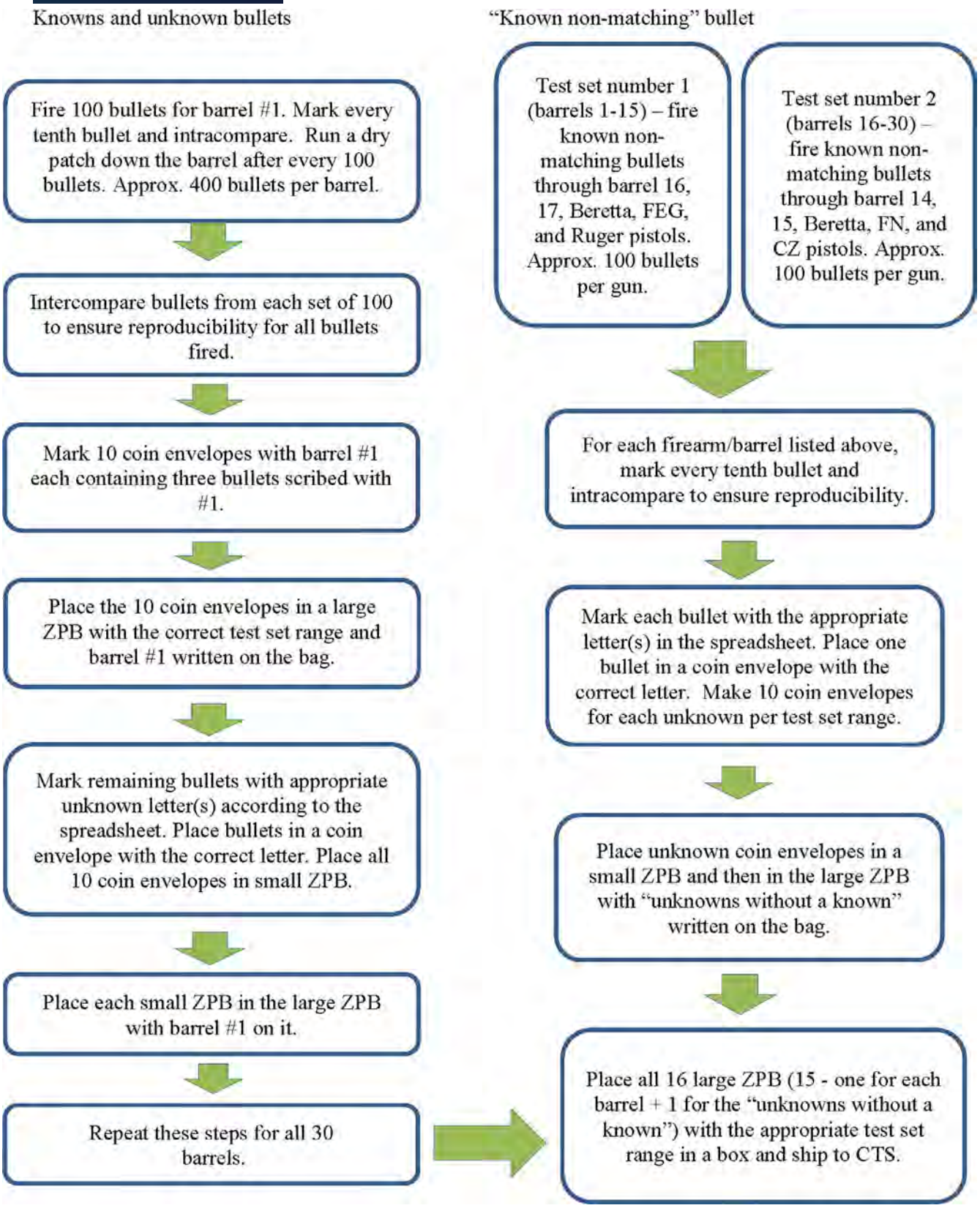


FIGURE 1 Simplified flow chart for procedure to create the test sets

1. With approximately 120 participants over a generated 200 Kits, the participants were spread out as evenly as possible, by utilizing up to 6 kits from each set of 10. Participants were assigned a random alpha-numeric 6 digit code (WebCode). This was sorted alphabetically and the kits were assigned numerically to this sorted list.

2. CTS received boxes of the materials for the Kits in 10 kit ranges.
3. CTS unpacked the bags of Known and Questioned envelopes and laid them out on tables for the required number of kits to be used per range. As stated above this was approximately 6 per range.
4. The attached picture illustrates one of the multiple stations that were set up to lay out the envelopes as they were unpackaged from the provided bags. The known bullets were numerical, so no assistance in laying them out was used. However, to assist with the Questioned Bullets, paper with the alphabetical range was laid down so that no letter was missed during unpacking.
5. Once all the envelopes were laid out from the provided bags, it was verified that all items were present on the table for all of the necessary kits.
6. Then the full range of envelopes were picked up and packaged into the appropriately labeled zip top bag.
7. The kit ranges and their assigned webcodes were checked prior to laying out the samples, after they were packaged into the zip top bags, and again when the zip top bags were placed inside of a sample pack box.

Each participant would receive a box from CTS with a label containing the participant number and the appropriate webcode. Within that box, there would be 15 coin envelopes containing three bullets from each of the test standards (either labeled #1 through #15 or labeled #16 through #30) and 20 coin envelopes containing one bullet from an unknown (questioned) sample labeled letter A through T.

For test set number 1 (barrels #1–#15) and test set number 2 (barrels #16–#30), an average of 22% of the unknowns provided did not have a corresponding known provided. The first test set ranged from having three unknowns (15%) not provided to having seven unknowns (35%) not provided. While the second test set ranged from having three unknowns (15%) not provided to having six unknowns (30%) not provided. The number of duplicates for test set number 1 and number 2 range from two to five. The number of triplicates for test set number 1 and number 2 range from zero to two. Because of the importance of the consecutive nature of this study, the number of unknowns provided from consecutively produced barrels within each 15 barrel grouping was reviewed. For test set number 1, the number of unknowns from consecutively produced barrels ranged from 7 to 10 barrels and for test set number 2, it ranged from 6 to 13 consecutive barrels; however, the set with six (6) unknowns from consecutive barrels also had another set of 5 unknowns from another subgroup of consecutively produced barrels.

## 4 | RESULTS

After soliciting qualified examiners from the firearm examination community, there were a total of 110 participants who volunteered to receive the test and participate. All of the data was collected by CTS via their website; there were 74 participants (67.3%) who submitted results.

From the tests distributed, there were 1149 possible identifications to a known barrel, 151 possible identifications to another bullet present in the unknowns that are not present in the knowns, and 180 true eliminations (bullet where a known or another unknown is not present in the test). Therefore, there was a total of 1300 possible identifications and 6120 true eliminations (180 * 34 [15 knowns +19 unknowns] = 6120).

Upon initial submission of the test results, there were 7 false identifications, 18 false eliminations, 23 missed identifications when the known was present and 22 missed identifications when only the unknown was present. See Table 1 for the data associated with results. In Table 1, the percentage of false identifications was calculated by dividing the number of false identifications by the number of correct identifications.

After looking at several of the false identification responses, it was realized that two examiners appeared to have incorrectly transferred the information into the wrong cell on the CTS website. One examiner made four false identifications because they had transposed the letters. On the answer sheet, the examiner had identified one of the unknowns to a specific barrel and then included other unknowns that had been identified to a different barrel. Another examiner made one false identification which was off by one letter; this would indicate that they read the wrong letter when filling in the answer sheet. A generic letter was sent by CTS to the participants who had incorrect responses stating that it was believed that they had made a typographical error and had ended up identifying one bullet to two different barrels. Below is the text of the email that was sent:

"It was noticed that there is an entry that appears to be a transcription error because there was an entry with more than one identification and your answers reference two different barrels. Any clarification that you could provide would be appreciated. "

A response to the email was received from both examiners and their email response identified where the error was and what the correct answer should have been.

Another false identification was a typographical error. In the answer sheet, an unknown was identified as having been fired from barrel #1; however, barrel #1 was not one of the barrels provided for

**TABLE 1** Error calculation based on original data submission

| Type of error | Number | Total[a] | Error rate (%) |
|---|---|---|---|
| False identification | 7 | 1251 | 0.56 |
| False elimination | 18 | 10935 | 0.16 |
| Total (false identification and false elimination) | 25 | 12186 | 0.21% |
| Missed identification (known present) | 23 | 1251 | 1.84 |
| Missed identification (unknown present) | 22 | 1251 | 1.76 |

[a]The information for identifications was always filled in; however, for the false elimination data, some examiners left the area blank.

that test set. The barrels provided for that test set were barrels #16 through #30. Therefore, this had to be a typographical error. Two emails were sent to try and clarify what the correct response should have been; however, no response was received.

From the text described above, it is reasonable to determine that the five transferring errors and the one typographical error are administrative in nature and therefore, should not be counted as false positives. Since these tests were not technically or administratively reviewed, which is part of the normal process in most forensic laboratories, these errors would likely have been discovered during the administrative review process. For the results submitted, there was one false identification. Therefore, corrected responses from this test are in Table 2. In Table 2, the percentage of false identifications was calculated by dividing the number of false identifications by the number of correct identifications.

There were 18 false eliminations present in the study. These false eliminations were made by six examiners. Four examiners were responsible for 16 of the false eliminations (8, 3, 3, and 2), and two examiners made one false elimination each. The false elimination response in Tables 1 and 2 were calculated based upon the total number of eliminations present because not all examiners filled in the area designated for eliminations. This area was left blank by many examiners because most firearm examiners do not feel it is necessary to eliminate all other firearms if they have made an identification to a specific firearm.

After calculating the overall error rates of the examiners, the sensitivity and specificity were also calculated. Sensitivity is the number of identifications reported divided by the number of identifications present in the test. The number of identifications submitted in this test was 1251 and the identifications present in this test was 1300. Therefore, the sensitivity of this test is 96.2%. The specificity is the number of eliminations reported divided by the number of eliminations present in the test. The number of eliminations reported in this test was 10,935 and the number of eliminations present in this test was 47,876. Therefore, the specificity of this test is 22.8%. While the specificity of this test is on the low side, possible reasons are explained in the discussion.

**TABLE 2** Error calculation based on corrected data from participants

| Type of error | Number | Total[a] | Error rate (%) |
|---|---|---|---|
| False identification | 1 | 1257 | 0.080 |
| False elimination | 18 | 10935 | 0.16 |
| Total (false identification and false elimination) | 19 | 12192 | 0.16 |
| Missed identification (known present) | 23 | 1257 | 1.83 |
| Missed identification (unknown present) | 22 | 1257 | 1.75 |

[a]The information for identifications was always filled in; however, for the false elimination data, some examiners left the area blank.

## 5 | DISCUSSION

The overall goal of a consecutive manufactured barrel study is to support the firearm identification community with scientific studies that show qualified firearm examiners can identify a fired bullet or fired cartridge case to a specific firearm within a small degree of error. The consecutively manufactured study is a "worst case scenario" where multiple barrels are manufactured consecutively (one after the other) with the same tool at the factory. In this and other consecutively manufactured studies, a firearm examiner can identify an unknown bullet to the correct barrel with a very low error rate. PCAST and other critics have found fault with many of the previous studies.

The first criterion that PCAST outlined: in order to establish foundational validity was the studies need to include a sufficiently large number of examiners and have large collections of representative samples that are typically found in casework. This is the largest consecutively manufactured barrel study known to date. Prior to this study, 10 consecutively manufactured barrels was the largest study that had been completed [3, 5, 6, 9, 11, 16, 20, 49]. Seventy-four examiners of the 110 that signed up completed the test (67.3%). This result is similar to other studies, such as the Ames Study where 218 out of 284 (76.8%) examiners participated (40) and the Smith study where 31 out of 47 (65.9%) examiners participated [41].

Since there are approximately 1200 firearm examiners (AFTE membership: Provisional [304], Regular [685] and Distinguished [174]) throughout the world, the number of participants in this study would have incorporated 6.3% of the firearm examiner in the world. This is obviously lower than desired; however, to be expected given the study had a large number of knowns and unknowns, it required a significant amount of time to complete the task. Since many firearm laboratories throughout the country and world have large backlogs and minimum manpower, it is reasonable to conclude participation could put an undue strain on their laboratories and participation would not be permitted by the employer in most cases. Also, examiners who would eagerly volunteer must manage time effectively and choose which studies to participate in because casework is still the priority.

In this study, Beretta barrels and pistols present in the Firearms Reference Collection were used. Many people purchase firearms chambered for the 9 mm Luger cartridge including the military, police departments, and civilian consumers for home defense. Since 1999, more than 44,000 firearms have been submitted to the firearm identification section of a local laboratory in a variety of different types of cases. Of those 44,000 firearms, more than 12% of those firearms have been chambered in 9 mm Luger caliber. Beretta is a popular manufacturer and they manufacture many different firearms chambered for the 9 mm Luger cartridge. For many years, the local police department used the 9 mm Luger Beretta model 92FS as their duty weapon. Beretta manufactured firearms are also commonly found in casework. Of the 5365 firearms chambered in 9 mm Luger submitted to the local police department since 1999, 515 of them were manufactured by Beretta. Therefore, Beretta accounted for approximately 9.6% of the 9 mm Luger submitted firearms. All of the pistols

selected for the unknowns were from the local laboratory's firearms reference collection. The local laboratory's firearms reference collection is a collection of firearms that have been seized during police investigations that occurred within the county. Therefore, all of the firearms used in this study are often seen in casework.

The second criterion for PCAST was: Empirical studies should be conducted so that neither the examiner nor those with whom the examiner interacts have any information about the correct answer. In this study, this criterion was met by a company called Collaborative Testing Services, Inc. (CTS). CTS is a company widely known throughout the forensic community as a proficiency test provider. All qualified firearm examiners filled out an application and submitted the application to CTS which served as the main point of contact for all of the participants in this study. CTS determined which tests were going to be shipped to the participant. In the event that a technical question needed to be answered, the test developer was contacted through CTS. In that event, the test developer did not know which specific test the participant was given because the webcode did not correlate to any information the test developer had.

The third criterion for PCAST was: Study design and analysis framework should be specified in advance. The study design and analysis framework were specified in advance. The local laboratory in collaboration with CTS specified in advance the design and analysis framework of the study. This was necessary so both parties knew and understood their responsibilities.

The fourth criterion for PCAST was: The empirical studies should be conducted or overseen by individuals or an organization that do not have a stake in the outcome of the studies. The study was conducted and overseen by CTS. In its capacity in this study, CTS served as the administrator of the test. CTS had no stake in the outcome of results of this study. CTS collected all of the answers submitted via their website and then forwarded the responses to the developer of the test.

The fifth criterion for PCAST was: Data, software, and results of the validation studies should be available to allow other scientists to review the conclusions. The test materials and results of this validation study are available upon request.

The sixth criterion for PCAST was: To ensure that conclusions are reproducible and robust, there should be multiple studies by separate groups reaching similar conclusions. This study, along with many other studies that are currently being distributed, will help ensure that the conclusions are robust and reproducible. This study reaches similar conclusions previous studies have demonstrated which is that within a low error rate, firearm examiners are able to identify an unknown bullet to a specific firearm.

Along with the criterion described above, PCAST also found fault with previous studies because they did not incorporate an "open set". As described in the study design, this study incorporated an "open-set" concept. Known non-matching samples were included.

It was suggested in the PCAST report, that a 95% confidence interval be calculated for these studies using the Clopper-Pearson/Exact Binomial method, the Wilson Score interval, the Agresti-Coull (adjusted Wald) interval, and the Jeffreys interval. These calculations were done using the following website https://epitools.ausvet.com.au/ciproportion. The data is included in Table 3.

The 95% confidence interval for this study at the upper limit for the corrected results was an error between 0.24% and 0.5%. The 95% confidence interval at the upper limit for the reported results was a range of 0.97%–1.17%. According to sources (52,53), for a study this size, the best confidence interval method calculations would be either the Wilson Score, Agresti-Coull (adjusted Wald), or Jeffreys Interval.

In the PCAST report, it was stated that closed-set studies have inconclusive and false-positive rates that are dramatically lower than those for an open designed study (p. 109). If one includes inconclusive results with false positive answers, the error rate will increase; however, it is inappropriate to include inconclusive results with false positive errors. An inconclusive result is reserved for an examiner when the class characteristics are the same and there are insufficient individual characteristics to reach a conclusion. If the firearm examiner believes that there is not enough

**TABLE 3** Calculation of binomial confidence intervals for false identifications for both the original submission and the corrected data

| Sample size | Positive number | Confidence | Proportion | Lower 95% | Upper 95% |
|---|---|---|---|---|---|
| 1258 | 7 | 0.95 | | | |
| Normal | | | 0.0056 | 0.0015 | 0.0097 |
| Clopper-Pearson | | | 0.0056 | 0.0022 | 0.0114 |
| Wilson | | | 0.0056 | 0.0027 | 0.0114 |
| Jeffreys | | | 0.0056 | 0.0025 | 0.0109 |
| Agresti-Coull | | | 0.0056 | 0.0024 | 0.0117 |
| 1258 | 1 | 0.95 | | | |
| Normal | | | 0.0008 | 0.0008 | 0.0024 |
| Clopper-Pearson | | | 0.0008 | 0.0000 | 0.0044 |
| Wilson | | | 0.0008 | 0.0001 | 0.0045 |
| Jeffreys | | | 0.0008 | 0.0001 | 0.0037 |
| Agresti-Coull | | | 0.0008 | 0.0001 | 0.0050 |

information on the sample to come to a conclusion, then an inconclusive result is appropriate. Firearm examiners approach these tests as if they are casework; therefore, it would be inappropriate for an examiner to be forced to come to an identification or elimination if sufficient information is not observed on the items in question. A laboratory would not want to have a policy that forces a scientist to render an opinion if there is not enough information to make a determination. The same approach should be used for firearm examiners in this study. Also, inconclusive is neither a correct answer nor an incorrect answer. From the perspective of the defense attorney, this conclusion could be a benefit because it would allow for "reasonable doubt".

As stated above, it is not accurate to include inconclusive answers in the error rate because an inconclusive result is neither positive nor negative. These confidence interval calculations are based upon the theory that the result is either positive or negative, and an inconclusive result is not possible. However, in order to compare information that was published in the PCAST report, below the inconclusive result has been included in the error rate. For the submitted results, if one included false positive and inconclusive results, the results would be 52 out of the 1303 (4.0%) for the submitted result and 46 out of 1303 (3.5%) for the corrected result. When comparing the error rates of the submitted results, the false positive error was 0.56% and when the inconclusive results are included, the false positive and inconclusive error is 4.0% (7-fold increase). When comparing the errors rates of the corrected results, the false positive error was 0.08% and when the inconclusive results are included the false positive and inconclusive error is 3.5% (44-fold increase). This is by far much lower than the 100-fold error reported in the PCAST report ([48, p.11).

Some of the inconclusive results can be explained due to laboratory policies. In the additional questions that were provided with the answer sheet, one of the questions was whether there was a laboratory policy that did not allow examiners to eliminate two items based on differences in individual characteristics. There were 3 examiners who reported that their laboratory prohibited eliminating based on differences in individual characteristics because of a laboratory policy. Two examiners reported that they could only eliminate based on individual characteristics if it was verified by another qualified examiner. Since all of the fired bullets in this study have similar rifling characteristics, an examiner would have to eliminate based upon individual characteristics. For those two examiners who needed verification from another examiner to eliminate an item based on individual characteristics, it is unknown as to whether that examiner requested this procedure for the purposes of this test.

The number of inconclusive results for this study may be higher than other studies. This was a large test with many known samples. There were 15 knowns which typically represents far more knowns than an examiner would evaluate in routine casework. For a comparison of one unknown to the fifteen knowns, the examiner is comparing potentially conducting ninety (90 = 15 knowns * 6 per bullet) land impression comparisons. Therefore, there would be 1800 (90 land impressions * 20 unknown bullets). In addition, with an average of more than 4 unknowns present per test, there would be potentially 24 comparisons (4 comparisons * 6 land impressions) per unknown for a total of about 1824 comparisons per test.

A sensitivity of 96.2% and specificity of 22.8% were calculated for this test. While the sensitivity is very good, the specificity was evaluated further. Of the 74 examiners who submitted results, many examiners either left the elimination area blank, put "N/A", or did not have a response. If an examiner left the elimination answer blank or put an "N/A", this meant that there were as many as 34 eliminations for one bullet that were missing (depending upon the test set). If the examiner left it blank for all of the bullets in a single test, this would mean that up to 680 (34*20) eliminations were potentially missing. There were several examiners who would eliminate the knowns, but did not eliminate the unknowns. Therefore, the number of eliminations went from 34 eliminations to 15 eliminations. This could be because the examiners did not realize that they were supposed to eliminate each unknown bullet from all of the unknowns. The normal process in most laboratories in casework is to compare all of the evidence to each other and to the tests, the directions for the study could have been more explicit. As discussed earlier, many firearms examiners did not fill in this area because they do not think it is necessary to eliminate all other firearms if they have made an identification to a specific firearm. Given this information, this perception has skewed the data for specificity for this study.

There were 16 examiners who had an inconclusive result for all of the eliminations in the test. The examiners in this study were asked to follow the AFTE Range of Conclusions and designate which inconclusive result that they were reporting. Below is the definition of inconclusive from the AFTE Range of Conclusions (54):

2. Inconclusive

a. Some agreement of individual characteristics and all discernible class characteristics, but insufficient for an identification.
b. Agreement of all discernible class characteristics without agreement or disagreement of individual characteristics due to an absence, insufficiency, or lack of reproducibility.
c. Agreement of all discernible class characteristics and disagreement of individual characteristics, but insufficient for an elimination.

Of the 16 examiners who gave an inconclusive result, 9 examiners have a result of inconclusive (c), four have a result of inconclusive (b), and two have a result of inconclusive (a).

Therefore, the majority of the examiners who gave an inconclusive result, thought that it was inconclusive (c) and that there was disagreement of individual characteristics; however, just not enough disagreement of individual characteristics to come to a conclusion of an elimination.

There can be several reasons why an examiner would choose an inconclusive result over elimination. As discussed earlier, it may be a laboratory policy not to eliminate based on individual characteristics.

Therefore, five of sixteen examiners who have this result was due to a laboratory policy. Another reason that an examiner may give the result of inconclusive in a test like this is because they feel it was not feasible to determine the reproducibility of the marks. If there are two representations of the bullet fired from a specific barrel, then an examiner can determine what striations are reproducing and what striations are not. Often times in casework, an examiner will compare the tests to each other and the evidence to each other. If the evidence marks consistently and the tests mark consistently and the evidence and tests mark differently, then the examiner can come to the result that the evidence and the tests are from different firearms. However, if there is only one representative of the evidence, this decision becomes more complicated if some of the marks are similar. If this is the case, the conservative approach is for the result to be inconclusive.

For eliminations, there were 18 false eliminations and 10,935 correct eliminations for a false-elimination error rate of 0.16%. Of the 18 false eliminations, eight false eliminations occurred with one examiner (almost half of the errors). In recent journal publications [28, 40], false identifications and false eliminations are calculated separately. As a scientific discipline, it is important for the firearm examiners to pay attention to both false identifications and false eliminations. However, a false elimination is less problematic than a false identification because the subject of an investigation is not going to be imprisoned for a false elimination. After calculating both the false identifications and the false eliminations, total error rate was calculated for this study. The total error was calculated to be 0.21% for the original submission and 0.16% for the corrected results (Tables 1 and 2).

Besides what was discussed earlier, there were other additional questions that asked about the examiner such as, the years of experience, whether the examiner's laboratory was accredited, whether the examiner was certified, and the method the examiner used for the examination (pattern matching, QCMS, or both). All but two of the participants responded to these questions, so this information was based on 72 responses. From this information, the examiners had a range of experience that went from 1 year of experience to 50+ years of experience. The average years of experience was 12.3 years. 91.7% (66) of examiners were from accredited laboratories. 33.3% (24) of the examiners were certified firearm examiners. 92.9% (65) reported that they used pattern matching as the method for their comparison while 7.1% (5) reported that they used both pattern matching and QCMS (Quantifiable Consecutive Matching Stria) (2 of the responses were incomplete). While none of this information appeared to have an effect on the results of the test, it does represent the information pertaining to the background of the examiners in this test.

## 6 | CONCLUSIONS

This study was designed to respond to many of the criticisms presented in the PCAST report. It was modeled after the requirements outlined in the PCAST report to enable forensic disciplines which analyze impression evidence to establish Foundational Validity. From the results of this study, trained and qualified firearm examiners throughout the United States and world are able to identify unknown samples to a known barrel in an "open set" format with a very low error rate. This test incorporated 30 consecutively manufactured Beretta barrels. It was divided into two different test sets, but combined results indicate, examiners are able to identify unknown bullets to the correct barrel from 30 consecutively manufactured barrels within a low error rate. Consecutively manufactured barrels are a firearm examiner's "worst case scenario" because a barrel manufactured by the same tool one after the next will have striations that are the most similar and it is more likely that an examiner could make an error. From the data submitted, the false identification error rate of the 74 examiners was 0.55% (1 in 182) with the result for the lower confidence interval as low as 0.2% (1 in 500) and with the upper confidence interval as high as 1.1% (1 in 91). The false identification error rate for the corrected data (data where the typographical errors were corrected) was 0.08% (1 in 1250) with the lower confidence interval being as low as 0.01% (1 in 10,000) and as high as 0.4% (1 in 250) for the upper confidence interval. These error rates are similar to previous studies (which may or may not have followed the model outlined in the PCAST Report) that have been published in the firearms examination discipline indicating that the specific requirements set up by PCAST have little effect on the overall error rates of firearm examiners.

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# Public beliefs about the accuracy and importance of forensic evidence in the United States

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ABSTRACT

Recent advances in forensic science, especially the use of DNA technology, have revealed that faulty forensic analyses may have contributed to miscarriages of justice. In this study we build on recent research on the general public's perceptions of the accuracy of 10 forensic science techniques and of each stage in the investigation process. We find that individuals in the United States hold a pessimistic view of the forensic science investigation process, believing that an error can occur about half of the time at each stage of the process. We find that respondents believe that forensics are far from perfect, with accuracy rates ranging from a low of 55% for voice analysis to a high of 83% for DNA analysis, with most techniques being considered between 65% and 75% accurate. Nevertheless, respondents still believe that forensic evidence is a key part of a criminal case, with nearly 30% of respondents believing that the absence of forensic evidence is sufficient for a prosecutor to drop the case and nearly 40% believing that the presence of forensic evidence – even if other forms of evidence suggest that the defendant is not guilty – is enough to convict the defendant.

## 1. Introduction

The collection and use of forensic evidence have increasingly become vital to criminal investigations and prosecutions [22]. Forensic evidence has been valuable in establishing key elements of a crime, identifying people who were at the crime scene, exonerating innocent defendants, and corroborating victim testimonies [10]. However, recent advances in forensic science, especially the use of DNA technology, have revealed that faulty forensic analyses have contributed to miscarriages of justice. This has led to calls to strengthen scientific foundations of the analysis and presentation of forensic evidence by identifying the types of errors that could occur, describing key concepts that clarify the sources of error, and developing strategies for how to reduce error in forensic analyses [34,35]). Given the importance of recognizing the limitations of forensic science, and the potential devastating consequences that the misuse of forensic science can yield, research on perceptions of forensic science is an important endeavor.

In the United States (US) criminal justice system, jurors are expected to determine guilt based upon relevant facts of a case. While there are attempts to minimize biases in juries, there remains concern that jurors may still hold preconceptions that influence their decisions. In recent years, one such concern relates to juror perceptions of forensic science. Dubbed the "*CSI* effect", this term refers to how television crime shows may affect juror expectations and perceptions, including creating unreasonable expectations among jurors; elevating forensic evidence over other forms of evidence; and perceiving forensic evidence as infallible, objective and free from human judgement or error [2,25,29]. While there have been multiples studies examining the influence of television crime shows on perceptions of forensic evidence or testimony, to the authors' knowledge, only one study to date [29] has directly examined public beliefs about how accurate various forensic techniques are and the role that human judgements plays in the forensic science investigation process. Ribeiro et al. [29] surveyed 101 members of the public in Australia to measure general perceptions of human judgement and error involved in forensic techniques and did not find support for a *CSI* effect. In fact, their findings suggest that participants believed forensic science was relatively error-prone, involved an appreciable amount of human judgement, and that different forensic techniques yielded different levels of accuracy.

While Ribeiro et al.'s [29] study provides important insights into perceptions of human judgement and error in the context of forensic science, the study was based upon an Australian sample, so it may not immediately translate to the American context. The Australian legal system is similar to that of the US in many ways (e.g., presumption of innocence, requirements to ensure voluntariness of confessions), but there are also crucial differences. These differences include whether

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illegally obtained evidence is excluded from trial, who has the power to determine charges (prosecutors in the United States but police officers and other criminal investigative units in Australia) as well as plea bargaining and sentencing practices [21,37]. Differences between the US and Australian criminal justice system more broadly necessitate an investigation into US perceptions of forensic science. The US serious crime rate, as well as its high rate of incarceration, give the criminal justice system a much broader role in public life in the United States than in Australia because it affects a far greater percent of the population. Moreover, while there have been acknowledgements of national reports outlining forensic science reliability concerns and errors among legal practitioners in the United States, other countries, such as Australia, have been slower to conduct independent inquiries into the validity and reliability of claims made in forensic science [9]. While there is some evidence that this situation is changing [20], there are differences between the two countries in the knowledge of legal practitioners regarding the fallibility of forensic science, and it is unknown whether such differences also exist among in the general public. Differences of opinion between the two populations could also be attributed to cultural differences distinct from institutional differences between the criminal justice systems of each nation. A sociological comparison of attitudes towards forensic science between Australia and the United States would be an interesting contribution to this discussion. However, this article will focus on documenting the differences in opinion rather than on attempting to explain their cause. As such, it is important to understand the extent to which Ribeiro et al.'s [29] findings are generalizable.

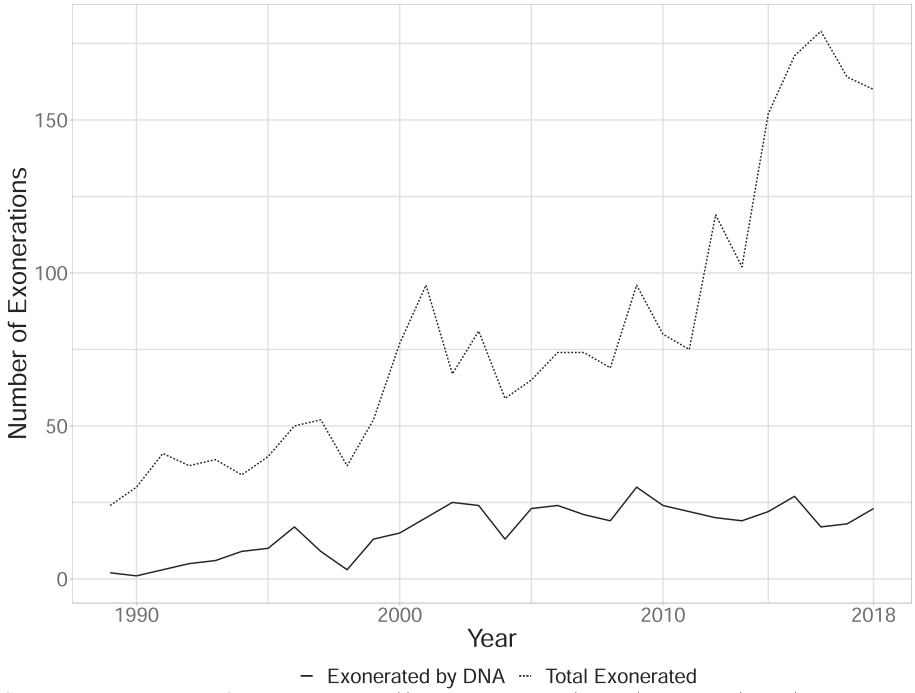
### 1.1. Miscarriages of justice

#### 1.1.1. Exonerations

With the increased use and application of forensic science over the years come increasing concern over the misuse of forensic evidence. The inappropriate use or application of forensic science has been estimated to contribute to almost a quarter of all wrongful convictions nation-wide [27]. In a study by Garrett and Neufeld [12], 60% of cases involved unsubstantiated or misleading forensic testimonies. There is an increasing trend in the annual number of exonerations in the United States (Fig. 1) and the number of exonerations due, at least in part, to inaccurate or misleading forensic evidence (Fig. 2) over the last two decades. These concerns are especially troubling when considering potential racial disparities in exoneration rates, with evidence that Blacks are exonerated at higher rates than Whites [31]. In an effort to review, rectify, and prevent cases of wrongful convictions, a growing number of prosecutorial offices are establishing conviction integrity units (CIUs). One tool that CIUs use to review cases involves the reexaminiation of forensic evidence. In 2018, CIUs have been responsible for 58 exonerations, some of which involved official misconduct such as falsifying forensic results [23]. Ultimately, flawed interpretations or misrepresentation by forensic analysts may negatively impact jury perceptions. This has augmented concerns about how forensic science may contribute to miscarriages of justice, and how pre-existing and contextual biases may play a role in how forensic evidence is perceived [16].

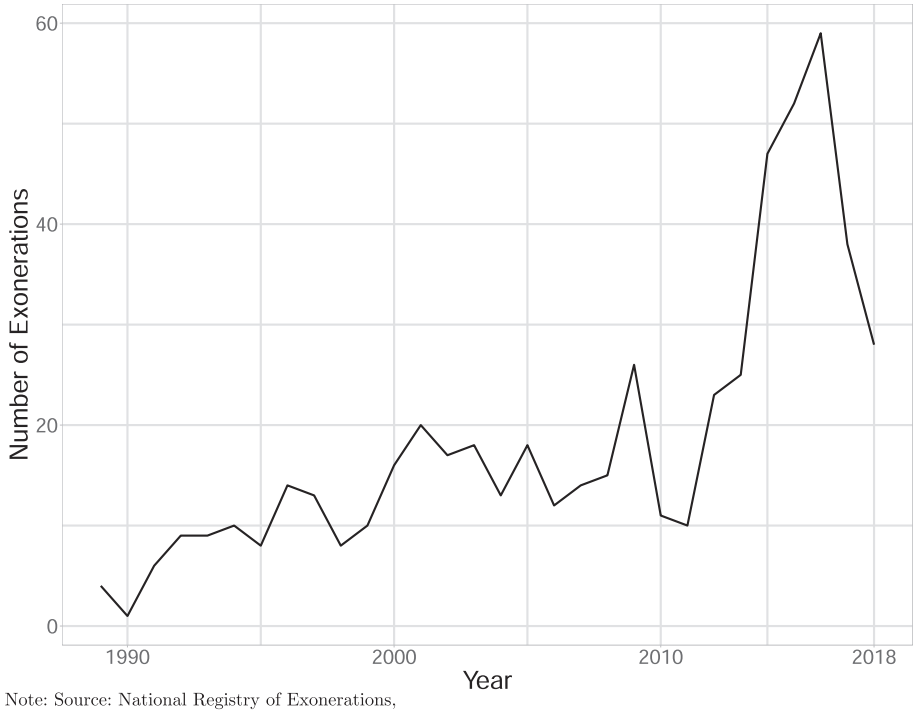
#### 1.1.2. Community relations

The consequences of erroneous use or interpretation of forensic techniques may disproportionately affect racial and ethnic minorities in the US, who have disproportionate contact throughout the criminal justice system. In recent years, there has been a spotlight on compounding racial tensions between criminal justice system and minority community members in particular. This has manifested in several ways, including the establishment and growth of the Black Lives Matters movement as well as the elections of progressive prosecutors. These efforts are part of a growing movement seeking to redress perceived wrongs that certain groups disproportionately experience within the criminal justice system. Indeed, perceptions of injustice or unfair treatment by the criminal justice system can undermine the perception of legitimacy of the system as a whole. This could foster distrust of certain types of evidence during trials, such as police or eyewitness testimony, if they are perceived as biased or subjective. If forensic evidence is seen as more objective than other types of evidence, there may be more reliance on these measures to avoid the flaws of other evidence types. However, there remain ethical concerns over various




Source: National Registry of Exonerations, http://www.law.umich.edu/special/exoneration/Pages/browse.aspx

**Fig. 1.** Annual Number of People Exonerated in the United States.




Note: Source: National Registry of Exonerations, http://www.law.umich.edu/special/exoneration/Pages/browse.aspx.

**Fig. 2.** Annual Number of People Exonerated in the United States Whose Conviction Included Inaccurate or Misleading Forensic Evidence.

aspects of forensic evidence. The existence of DNA databases, for example, may be helpful in identifying DNA recovered from a crime scene if the perpetrator has a record in the DNA database already. However, Amankwaa [1] and Machado and Silva [19] identify key risks that may occur with the improper use of these databases, including exacerbating existing stigmas and stereotypes due to the over-representation of certain social and racial groups in criminal DNA databases, as well as mistaken identification resulting from erroneous interpretations of the information provided by DNA profiles that can lead to wrongful convictions.

### 1.2. How frequently is forensic evidence used?

A study analyzing forensic science collection practices by law enforcement in Denver and San Diego found that in nearly all homicide cases, at lest one type of forensic evidence – primarily DNA, fingerprints, evidence from the weapon used, or hair – was collected [22]. For the crime of sexual assault, over half of cases in Denver and two-thirds of cases in San Diego collected forensic evidence, with the vast majority being DNA or hair. Forensic evidence collection is far less common in other crimes with under one-third of burglaries in San Diego and < 16% of burglaries in Denver having a single type of forensic evidence collected. The cases which do collect evidence primarily collect fingerprints. While forensic evidence is primarily collected in cases of violent crime, there is growing interesting in collecting forensic evidence – in particular DNA evidence - at property crime scenes, vastly expanding the scope of cases in which forensic evidence may play a role [30]. Recent advances in technology have reduced the cost of DNA collection and dramatically increased the speed at which DNA collected at a crime scene can be compared against a DNA registry [14]. This had led to even small police agencies collecting forensic evidence for violent as well as property crimes. As forensic evidence becomes increasingly common in criminal cases, research on how the general public – specifically, jury-eligible members of the public – respond to this evidence is crucial to understanding how they will behave when presented with forensic evidence in a criminal trial.

### 1.3. Levels of accuracy from literature reports

While differences in public opinion about the validity and reliability of forensic methods are of intrinsic interest to policy makers and other researchers, it is also important to compare public opinion to the findings of scientific experts about the validity and reliability of these methods. At the time of this writing, the authors are not aware of a single standard by which the claims of forensic science can be evaluated. However, a number of studies have been conducted in the US to determine the validity and reliability of forensic methods. In this study, we will compare our survey findings to the expert opinions articulated in one prominent report from the United States, the President's Council of Advisors on Science and Technology (PCAST) report [35]. We use this report because it is a recent, careful analysis by independent scientists of the validity and reliability of a number of forensic methods.

There is no simple score from zero to 100 for the levels of accuracy of forensic methods. However, there are available reviews about whether these methods are valid, meaning accurate and consistent. In the United States, Rule 702 (Fed. R. Evid. 702), from the Federal Rules of Evidence sets the standards of admissibility of scientific evidence in court.[2] Among other sections, it states that the expert may testify if the testimony is "the product of reliable principles and methods" and "the expert has reliably applied the principles and methods to the facts of the case." PCAST called these two standards *foundational validity* and *validity as applied*, respectively. The report reviewed the research about seven forensic disciplines (DNA single-source and simple mixture, DNA complex mixture, bitemarks, fingerprint, firearms, footwear, and hair). The reviewed research consisted of studies of error rates of the methods, and consistency if an analyst performs the analysis at different times and if different analysts perform the same analysis with the same

[2] While Rule 702 establishes federal standards for the admissibility of evidence, the standards within states are somewhat more heterogeneous. States typically adopt the Frye (Frye v. United States, 293F. 1013 (D.C. Cir. 1923)) or Daubert (Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993) at 592) standards, which are based on precedents from case law.

materials. While PCAST is not the only review that could be used for comparison (for instance, The National Research Council [34] could be used as well), we chose it because it is a recent, careful analysis by independent scientists that provides a clear and supported categorization of the validity and reliability of a number of forensic methods. It is left as future work to use other reviews for comparison with our survey responses.

PCAST [35] determined that, out of the seven disciplines reviewed, only DNA analysis of single-source simple mixture (two sources where one source is known) samples and latent fingerprint analysis were foundationally valid. DNA analysis of complex-mixture samples with probabilistic genotyping and firearms analysis were not foundationally valid, but had the potential to be so with current and future research. DNA analysis of complex-mixture samples with combined-probability-of-inclusion (CPI) methods, bitemark analysis, footwear analysis, and microscopic hair comparison were not foundationally valid and/or were missing serious research.

Regarding the techniques from our survey not included in the PCAST report, there is no single review that gives a definitive answer about their foundational validity. The National Research Council [34] concluded that for bloodstain analysis, "some experts extrapolate far beyond what can be supported" and "the uncertainties associated with bloodstain pattern analysis are enormous." For gunshot residue, there are no studies of which the authors are aware that estimate the accuracy or evaluate the validity of the technique, and thus they have not been demonstrated to be foundationally valid. For voice analysis, there is a recent review of the scientific validity of various methods by the Scientific Literature Working Group [36]. The review does not make a final conclusion about the scientific validity, but it does show promising research on the accuracy of various methods. For this study we leave voice analysis unranked in terms of actual accuracy. Toxicology is multidiscplinary since it uses analytical chemistry, pharmacology, and clinical chemistry to aid medical or legal investigation of death, poisoning, and drug use. There are studies of the accuracy of many of the methods used, so it should be considered foundationally valid. However, neither the National Research Council nor the PCAST present a careful review of its methodologies. Finally, while the current study includes brain imaging as a technique, it is not a traditional forensic discipline or a component of crime scene investigation. However, it has been offered as a potential method of gaining insight into individuals' psychological states after a suspect is in custody, and has been used as evidence in multiple phases of criminal trials by prosecutors and defense attorneys [6,7,13].

### 1.4. Current study

The current study aims to bridge the gap between the increasing importance of forensic evidence in criminal cases and the dearth of knowledge of the US public's view of that evidence. We do so by surveying members of the US public to assess their beliefs on the accuracy of forensic evidence and the process of collecting, analyzing, and reporting of such evidence. We approach this study with four hypotheses:

1. Respondents will have a high level of confidence in the forensic science investigation process as well as for the accuracy of each forensic science technique. Given the relatively high confidence found in Ribeiro et al.'s [29] Australian sample, we expect that our US sample will have a similar high degree of confidence in forensic science.
2. Respondents will overestimate the accuracy of forensic evidence. While determining the objective accuracy of forensic evidence is a difficult and ongoing process, we expect that respondents will perceive the evidence to be of a higher quality than supported by research.
3. Respondents will support the *CSI* effect by believing that what they see on fictional TV shows about forensic science reflects actual forensic science techniques and outcomes.
4. Forensic evidence will be given great weight in criminal trials and be considered a decisive factor in whether a defendant is considered guilty or not guilty. We expect that respondents will prioritize forensic evidence in criminal trials over other types of evidence, and consider its presence to be strong evidence that the defendant is guilty.

## 2. Method

### 2.1. Participants

This study utilized Amazon's Mechanical Turk, an online survey platform, to collect information about the general public's perceptions of various forensic science techniques. The survey consisted of 49 questions and took approximately 24 min to complete. Only Mechanical Turk users in the United States were eligible to take the survey. All surveys were collected between June 26th and 27th, 2019. Participants were financially compensated up to $1 for their participation. All study procedures were approved by the University of Pennsylvania's institutional review board. Users who agreed to take the survey were directed to a link on the Mechanical Turk website to the survey which was administered through the Qualtrics survey software.

In total, 180 people completed the survey. Two attention-check questions were used to determine whether responses were reliable. Following the introductory page explaining the purpose and topic of the survey, respondents were asked a multiple-choice question (the first attention-check question) on what the survey was about. Fifteen respondents chose an option other than "Forensic evidence." The second attention-check asked if the respondent had "ever been a victim of murder?" An additional 10 respondents said that they had. In total, 25 respondents failed the attention check and were dropped from the study analyses. Responses from the remaining 155 participants were used for the analyses.

Respondents varied in age from 19 to 70 with most respondents being in their 30s (Mean = 35.6, SD = 10.6). The majority of respondents identified as male (59%), 39% identified as female, and 2% identified as neither male nor female. Over two-thirds (70%) identified as White-only, 10% identified as Black-only, 6.5% identified as Asian or Pacific Islander, and 9% identified as Hispanic. The remaining respondents identified as mixed-race or as American Indians. This is similar to the United States population as a whole where 60.4% of residents are White-only, 13.4% are Black-only, and 5.9% are Asian-only, and 18% are Hispanic. These respondents are more educated than the United States general public. In the present sample, 87.2% have graduated high school, nearly the same as the 87.3% of the general public. However, approximately 52% had earned a four-year degree or higher in the sample compared to 31% in the entire United States. Twenty respondents (12.9% of the sample) had served on a jury, with 65% (13 respondents) of these being involved in a case that included forensic evidence.

The survey utilized in the current study is a modified version of the Ribeiro et al. [29] study (see Ribeiro et al. [29] for how to access their survey).

### 2.2. Forensic science investigation process

To understand public perceptions of the likelihood of an error occurring during the forensic science investigation process, we asked respondents "how likely is it that an error could occur" at each stage. The six stages of the forensic science investigation process are: collection, storage, testing, analysis, reporting, and presenting. The respondents' answers were on a slider from 0 to 100 with the default position set at 50.[3] Respondents

[3] Analyses were conducted in a separate pilot study to determine whether a default anchor of 0, 50, or 100 would affect participant responses. Results indicated that responses between the three anchors were similar on average, thus suggesting respondents were not influenced by the initial position of the anchor.

were required to select a value to proceed to the next question, even if they selected the value of 50. For each process, respondents were also asked "to what extent does the [process] involve human judgement?" with a 7-point Likert scale answer from N*one at all (1)* to *Entirely (7)*.

### 2.3. Forensic science techniques

Respondents were then asked how accurate they perceive each of 10 forensic science techniques to be and whether there was significant human judgement involved.[4] As with the forensic science investigation process questions, the accuracy was measured on a slider from 0 to 100 with the default position set to 50. We included 10 techniques or analyses in this survey: bloodstain pattern, brain imaging, DNA, dental, fingerprint, firearm and toolmark, footwear, gunshot residue, toxicology (e.g. urine, drugs), and voice analysis.

Eight of these techniques (all except for brain imaging and footwear analysis) were studied by Ribeiro et al. [29], allowing for a comparison of perceptions between US and Australian populations. In addition to the eight techniques shared with Ribeiro et al. [29], we included footwear analysis, since it is one of the primary methods in feature-comparison and is commonly used in forensic laboratories, and brain imaging because it has been used as evidence during criminal cases as a method of demonstrating defendants' mental states and capabilities. We decided not to include some of the techniques studied in Ribeiro et al. [29] (anthropological, document, faces, fire/explosives, geological materials, image, materials, and wildlife) because they were not included in reports that review the state of forensic science [35] and in the interest of focusing more heavily on feature-comparison methods.

Human judgement was measured by asking whether they believed there to be "key procedures that involve significant human judgement" in that forensic science technique. Respondents could answer *No*, *Yes*, or *Not Sure*.

### 2.4. CSI effect

The popularity of TV shows depicting forensic science such as *CSI* and *Law & Order* has led to concerns about a "*CSI* effect" where watchers believe that the shows accurately depict forensic science and use standards based on the show's inaccurate depictions as their basis for judging the validity of the techniques [29,5]. These shows often depict forensic science as infallible, nearly instantaneous, and entirely objective. If jurors do indeed base their opinion of forensic science on what is depicted on these shows, they may conclude that a piece of forensic evidence is more powerful than it actually is. Conversely, the lack of forensic evidence - which is found in nearly all crime scenes on these shows - may be seen as evidence that the defendant is not guilty.

Past studies of this topic primarily use TV viewing habits to measure whether watching these shows affects perceptions of forensic evidence [29,32,26]. This method has a number of limitations as it is unclear whether watching more of these shows reflects merely that the respondents watch more TV overall, if they are particularly interested in forensic evidence - and what other material they use to learn about forensic evidence – and only indirectly measures how watching these shows affects perceptions of forensic evidence. In this study we attempt to address the *CSI* effect directly by asking respondents how accurate they believe the "most accurate fictional show" and the "average fictional show" is in depicting forensic science. Respondents could choose from a 4-point Likert-scale from *Not Accurate at all* to *Very Accurate*, as well as *Not Sure*. As these shows are largely fictitious or a gross exaggeration of real forensic evidence techniques, asking respondents directly how accurate they believe these shows to be allows for a better measure of the CSI effect than previously evaluated [15].

[4] We did not define any of the forensic techniques to avoid biasing responses. As such, the results should be interpreted as baseline knowledge.

### 2.5. Importance of forensic evidence during criminal cases

Jurors may believe that there are substantial flaws in the accuracy of individual techniques or the forensic science investigation process yet may still be willing to accept forensic evidence presented at trial if they believe that only the strongest evidence - that which has avoided the concerns that they have for the evidence - will be presented. To assess this, we asked respondents how strongly they agreed with four statements about the usability and importance of evidence in criminal trials. These questions come from the Forensic Evidence Evaluation Bias Scale (FEEBS), a questionnaire designed and validated by Smith and Bull [32–33], to evaluate people's perceptions of forensic evidence.

1. Forensic evidence always provides a conclusive answer.
2. Forensic evidence always identifies the guilty person.
3. If no forensic evidence is recovered from a crime scene, then the prosecutor should drop the case.
4. If forensic evidence suggests a defendant is guilty, this should be enough to convict even if other evidence (e.g., eyewitness testimony, alibi) suggest otherwise.

## 3. Results

### 3.1. Forensic science investigation process

#### 3.1.1. Estimates of error

Table 1 shows how prone to error respondents believe the forensic process to be. Columns (1–2) show the results from the current study with Column (1) showing the percent likelihood of an error occurring and Column (2) showing the cumulative chance of an error occurring at each consecutive stage of the process. Columns (4–5) follow this same pattern and show results from Ribeiro et al.'s [29] study of the general public in Australia. To allow easy comparison between the US and Australian results, the final three columns are the difference between US and Australian values.

At each stage in the forensic science investigation process, respondents believe there to be a high chance of an error occurring. The first stage, collection, was perceived to be the riskiest stage with a 56% chance of an error occurring. The least risky stage, reporting, fared a little better with a perceived 44% chance of an error occurring. The forensic science investigation process is considered to be rife with possibilities for errors, with respondents perceiving that an error could occur about half the time at each stage. The Australian sample believed that an error would occur about 40% of the time on average, approximately 10 percentage points lower than the American sample. For each stage, American respondents believed that an error was more likely to occur - with differences ranging from +2.82 for presenting to +13.26 for collection – than Australian respondents did.

#### 3.1.2. Human judgement

For each stage in the forensic process, respondents were asked how much human judgement was involved in that stage. This question used a seven-point Likert-scale from *None at all* (1) to *Entirely* (7). Column (3) of Table 1 shows the mean respondent score. Respondents believed that there was a high level of human judgement involved at each stage, with all except two stages - storage at 4.65 and testing at 4.78 - having a score above 5. Because variables were nonnormally distributed, Kendall's tau-b correlations were run to examine the association between the likelihood of an error and the level of human judgement involved for each stage of the forensic process. There was a positive correlation between how likely an error could occur and how much human judgement was involved for all six stages: collection ($\tau_\beta$ = 0.363, $p <$ .001), storage ($\tau_\beta$ = 0.412, $p <$ .001), testing ($\tau_\beta$ = 0.289, $p <$ .001), analysis ($\tau_\beta$ = 0.229, $p <$ .001), reporting ($\tau_\beta$ = 0.350, $p <$ .001), and presentation ($\tau_\beta$ = 0.218, $p <$ .001). These correlational results suggest that respondents believe that people involved in

**Table 1**
Perceived Accuracy and Level of Human Judgement for Each Stage of the Forensic Science Process.

| | US Sample | | | Australian Sample | | | US – Australian Difference | | |
|---|---|---|---|---|---|---|---|---|---|
| Process Stage | Error | Cumulative Error | Human Judgement | Error | Cumulative Error | Human Judgement | Error | Cumulative Error | Human Judgement |
| Collection | 55.74 (27.37) | 55.74 | 5.39 (1.47) | 42.48 (27.12) | 42.48 | 5.55 (1.60) | 13.26 | 13.26 | −0.16 |
| Storage | 48.45 (26.29) | 104.19 | 4.65 (1.67) | 39.35 (28.11) | 81.83 | 5.15 (1.66) | 9.10 | 22.36 | −0.50 |
| Testing | 45.26 (27.07) | 149.45 | 4.78 (1.58) | 39.27 (27.77) | 121.10 | 4.94 (1.70) | 5.99 | 28.35 | −0.16 |
| Analysis | 52.45 (26.28) | 201.90 | 5.57 (1.46) | 44.55 (27.60) | 165.65 | 5.25 (1.52) | 7.90 | 36.25 | 0.32 |
| Reporting | 44.25 (27.38) | 246.15 | 5.06 (1.71) | 40.69 (26.87) | 206.34 | 5.43 (1.53) | 3.56 | 39.81 | −0.37 |
| Presenting | 45.04 (26.97) | 291.19 | 5.37 (1.63) | 42.22 (29.64) | 248.56 | 5.55 (1.53) | 2.82 | 42.63 | −0.18 |

*Note:* This table shows the mean and (standard deviation) for the perceived likelihood that an error could occur during each stage in the forensic science process. Error is measured on a scale from 0 to 100. Human judgement is measured on a seven-point scale from 1 to 7. A value of one indicates that no human judgement is involved in the process; a value of seven indicates that the process is entirely based on human judgement. Responses of "Not sure" for the amount of human judgement involved are excluded. The US sample is from the present study, the Australian sample is from Ribeiro et al.'s [29] study of 101 members of the public in Australia.

**Table 2**
Perceived Accuracy and Level of Human Judgement for Each Forensic Evidence Technique.

| | US Sample | | Australian Sample | US − Australian *t* value |
|---|---|---|---|---|
| Type of Forensic Evidence | Accuracy | Human Judgement | Accuracy | Accuracy |
| DNA | 83.09 (17.92) | 58% (49%) | 89.95 (15.85) | 3.13** |
| Fingerprints | 78.62 (17.47) | 54% (50%) | 88.15 (17.66) | 4.25*** |
| Toxicology (e.g. urine, drugs) | 76.12 (18.21) | 43% (50%) | 86.66 (13.75) | 4.97*** |
| Dental | 75.88 (22.02) | 41% (49%) | 89.26 (12.04) | 5.58*** |
| Firearms and toolmarks | 68.15 (19.41) | 82% (38%) | 79.63 (16.77) | 4.87*** |
| Gunshot residue | 67.98 (19.66) | 65% (48%) | 78.87 (17.97) | 4.48*** |
| Bloodstain pattern | 64.28 (20.50) | 85% (36%) | 78.53 (19.03) | 5.59*** |
| Brain imaging | 60.74 (24.92) | 58% (50%) | – | – |
| Footwear | 56.98 (23.44) | 82% (39%) | – | – |
| Voice | 55.30 (22.25) | 86% (35%) | 71.47 (19.16) | 6.00*** |

*Note:* This table shows the mean and (standard deviation) for perceived accuracy of each forensic science technique. Accuracy is measured on a scale from 0 to 100. Human judgement asks respondents whether they believe each technique involves 'key procedures that involve significant human judgement?' Responses shown are the percent the responded 'Yes', excluding those who responded 'Not Sure'. The US sample is from the present study, the Australian sample is from Ribeiro et al.'s [29] study of 101 members of the public in Australia. The final column shows the t-value from a *t*-test comparing US responses to Australian responses from Ribeiro et al. [29].
*p < 0.05.
**p < 0.01.
***p < 0.001.

the forensic science investigation process are liable to make mistakes that reduce the accuracy of the evidence. US respondents believe that there is slightly less human judgement than the general public in Australia (Column 6) do.

### 3.2. Forensic evidence techniques

#### 3.2.1. Estimates of accuracy

Table 2 assesses how accurate respondents believe each of the 10 forensic techniques examined are. Column (1) shows how accurate respondents believe each technique to be, from 0 to 100. Based on the perceived accuracy, the most accurate to least accurate technique are: DNA, fingerprints, toxicology, dental, firearms/toolmarks, gunshot residue, bloodstain pattern, brain imaging, footwear, and voice.

Respondents believe that DNA analysis is the most accurate forensic technique at 83% accurate, followed by fingerprint analysis at 79%. DNA analysis is the only technique considered above 80% accurate, with most within the range of 65–75% accurate. Two analyses are considered below 60% accurate: voice analysis is considered to be 55% accurate and footwear analysis is considered to be 57% accurate.

For a comparison to Ribeiro et al.'s [29] Australian sample, Column (3) show the accuracy rate among their participants. Column (4) shows the *t*-value from a *t*-test comparing the current study's responses to Ribeiro et al.'s [29] Australian sample. For each type of forensic evidence, there is a statistically significant ($p < 0.01$) difference between each sample's perceptions of accuracy. Relative to the Australian sample studied by Ribeiro et al. [29], American respondents viewed forensic techniques as less accurate. For the eight techniques studied which overlap with Ribeiro et al. [29], US respondents believed that the techniques were on average 12 percentage points less accurate than Australians did.[5] For every comparable technique, US respondents rated it as less accurate than Australian respondents did. In six of the eight comparable techniques, US respondents perceived it to be around 10 percentage points less accurate than Australian respondents.[6] These results may suggest that Americans are less trusting of forensic science overall, though they have relatively similar perceptions of the accuracy of forensic techniques relative to each other.

#### 3.2.2. Comparison between survey responses and levels of accuracy from reports

Table 3 shows the comparison of accuracy rankings between the

[5] Bloodstain pattern, DNA, dental, fingerprints, firearm and toolmarks, gunshot residue, toxicology, and voice analysis overlapped with the Ribeiro et al. [29] study. Brain imaging and footwear analysis were examined in this study but not Ribeiro et al.'s [29] study.

[6] The two exceptions are DNA at 6.86% less accurate and fingerprints at 9.53% less accurate.

**Table 3**
PCAST report conclusions about foundational validity, which requires a method to be repeatable, reproducible, and accurate, of forensic disciplines [35]. The conclusions derived from the PCAST report have been interpreted and summarized by the authors of this article.

| Conclusion by PCAST authors | Discipline |
|---|---|
| Foundationally valid | DNA Fingerprints |
| Not foundationally valid yet | Dental* |
| | Firearms/toolmarks** |
| | Footwear*** |
| Unranked | Bloodstain pattern |
| | Voice |
| | Gunshot residue |
| | Brain imaging |
| | Toxicology |

* There are low prospects of developing bitemark analysis into a scientifically valid method, according to PCAST.
** There is one appropriate study so far, but more are needed to show the technique is reproducible.
*** Source identification was found to not be foundationally valid, but the validity of class characteristic identification was not evaluated by PCAST.

survey responses and the conclusions from reports (see Section 1.3).[7] It is not possible to make a numerical comparison between these two sources, so instead we analyze the differences in ordering. Other researchers might have different opinions about the ordering of the levels of accuracy of the forensic disciplines.

Toxicology, gunshot residue, bloodstain pattern analysis, brain imaging, and voice analysis were unranked by PCAST, so it is not surprising that they are scattered in the survey responses (they are in places 3, 6, 7, 8, 10, respectively in the survey responses).

Of the techniques that are ranked, the top two disciplines in the survey responses (DNA and fingerprints) are also the only two that are considered foundationally valid by PCAST. It is notable that dental analysis scored high (4 out of 10) in the survey since it is considered not foundationally valid by PCAST. Indeed, PCAST found that "available scientific evidence strongly suggests that examiners not only cannot identify the source of bitemark with reasonable accuracy, they cannot even consistently agree on whether an injury is a human bitemark" [35]. In fact, dental scored higher than firearms and toolmarks, even though PCAST found that firearms and toolmarks was almost shown to be foundationally valid, but it was not yet because there was only one appropriate study of scientific validity instead of multiple, which are required to show reproducibility.

Similar to Ribeiro et al.'s [29] study, we did not separate the DNA analysis into different types (single-source, simple mixture, complex mixture) for the survey, but PCAST did make this important distinction. It would be interesting to study whether the general public is aware of these differences and whether it considers some more accurate than others, but that is left as future work. Thus, for our comparison in Table 3, we refer to any type of DNA evidence as just "DNA". Moreover, the survey asks about firearms/toolmarks, but most of the current research about the accuracy of these methods is about firearms, not toolmarks in general, such as the marks left by screwdrivers or wire cutters. It is common to present firearms and toolmarks as a single category, since imprints on a used bullet or cartridge (considered marks) were made by the firearm (considered a tool). These are issues for future research on forensic techniques to consider.

#### 3.2.3. Human judgement

To judge how objective respondents believed each technique to be, we asked whether they believed there to be "key procedures" in the technique involving human judgement. The percent of respondents who answered *Yes* are shown in Column (3) of Table 2, excluding those who responded *Not sure*.[8] Respondents believe that there is a high level of human judgement involved in each technique. Over 50% of respondents believe that human judgement is involved in the forensic technique for all except for toxicology (43% of respondents) and dental analysis (41% of respondents). Even for the two most trusted analyses, DNA and fingerprints, over half of respondents believe that human judgement is involved in "key procedures" for that analysis with 58% and 54% reporting so, respectively. Because responses were non-normally distributed, Mann-Whitney $U$ tests were conducted to examine differences in perception of accuracy between those who perceived the technique to involve human judgement or not. Individuals who believed no human judgement was involved in brain imaging (mean rank = 71.17) thought that this technique was more accurate than those who believed brain imaging involved human judgement (mean rank = 57.93), $U = 1528$, $p = .044$. Similarly, respondents who believed no human judgement (mean rank = 79.15) was involved in toxicology thought this technique was more accurate than individuals who believed the technique involved with human judgement (mean rank = 62.39), $U = 1914.5$, $p = .017$. For all other techniques, there were no significant differences in perception of accuracy between those who believed human judgement was involved and those who did not.

### 3.3. CSI effect

Table 4 shows the percent of respondents who chose each answer for the two questions used to measure the *CSI* effect. Column (1) shows the responses for the "most accurate fictional show" while Column (2) shows responses for the "average fictional show" that depicts forensic science. In both cases the vast majority of respondents believe that the shows are between slightly and moderately accurate. For the "most accurate" show, 43% of respondents believe it to be "moderately accurate," more than the 26% who say the "average" show is "moderately accurate." Approximately 10% of respondents believe that these shows are "very accurate." For the "most accurate show," the same number of respondents believe it to be "not at all accurate" as to be "very accurate." For the "average show," however, nearly twice as many (18%) of respondents believe it to be "not at all accurate."

When asked whether watching these shows changed their interest in forensic science, nearly three-quarters of respondents (99 of 135 respondents; 20 respondents in the sample did not watch these shows) claimed they are "Much more interested" or "Somewhat more interested" in forensic science as a result of these shows.

### 3.4. Importance of forensic evidence during criminal cases

Table 5 shows the responses to the four questions regarding the importance and reliability of forensic evidence during the criminal justice process. Each row is a single question and Columns (1–5) show the percent of respondents who choose each answer. Respondents could select if they strongly or somewhat agree or disagree, or if they are not sure.

Row (1) shows responses to the statement that "forensic evidence always provides a conclusive answer" and the majority of respondents (52%) somewhat or strongly agree. A smaller amount, 41%, agree that "forensic evidence always identifies the guilty person" while the majority of respondents (55%) somewhat or strongly disagreed (Row (2)). These results seem contradictory to previous sections which showed that the forensic science investigation process and many forensic science techniques were perceived to have high levels of human judgement involved and to be relatively inaccurate. It is unclear why

[7] The conclusions from reports are summarized by the authors of this article and are not a consensus that exists in the forensic science community.

[8] Ribeiro et al. [29] also assessed the degree of human judgement for each forensic technique. However, their question was a Likert-scale question, preventing a comparison from our *Yes-No* question.

**Table 4**
Perceived accuracy of fictional TV shows that depict forensic science.

| | Most Accurate Show | Average Show |
|---|---|---|
| Very accurate | 9.68 | 9.68 |
| Moderately accurate | 43.23 | 26.45 |
| Slightly accurate | 33.55 | 41.94 |
| Not accurate at all | 9.68 | 18.06 |
| Not sure | 3.87 | 3.87 |

*Note:* Respondents were asked "How accurate do you think the [most accurate/average] fictional show is in depicting forensic science?" This table shows the percent of respondents who gave each answer to the questions. Column percentages may not total to 100 due to rounding.

respondents appear to be more supportive of "forensic evidence" abstractly yet hold relatively negative views of each specific technique or stage of the forensic science investigation process.

Row (3) demonstrates the extent to which respondents agree that prosecutors should drop a case if there is no forensic evidence collected at the crime scene. Nearly a third of respondents (29%) somewhat or strongly agreed with this statement while 65% disagreed and 6.5% were not sure. This suggests that, even though overall forensic evidence is considered to be relatively inaccurate, a nontrivial number of respondents would be unwilling to convict a defendant without it. As this study did not assess perceptions of other forms of evidence, such as eyewitness testimony, it is unclear whether this group believes that forensic evidence itself is particularly strong or that other forms of evidence are less valid. Finally, Row (4) reflects how strongly respondents agree that if forensic evidence suggests that the defendant is guilty, they should convict that defendant even if other evidence suggests that the defendant is not guilty. Here, 37% of respondents either somewhat or strongly agreed with this statement. These results indicate that while overall respondents believe there to be serious flaws in forensic evidence, an appreciable portion are willing to make decisions on the defendant's guilt based solely on forensic evidence.

## 4. Discussion

This study sought to understand public perceptions of forensic science by surveying members of the general public in the United States. Overall, our hypotheses in general were not supported. While we expected respondents to have a high level of confidence in the forensic science investigation process and for the accuracy of each forensic science technique (Hypothesis 1), our results suggest that members of the US public hold significant doubts about the accuracy of forensic techniques and believe that each technique contains high levels of human judgement. The technique perceived to be most accurate was DNA evidence at 83% accuracy, while voice analysis at 55% and footwear analysis at 57% were perceived to be least reliable. Most forensic techniques were considered to be in the range of 65–75% accurate. Our results align with prior work indicating that DNA is often perceived to be among the most accurate forensic techniques, though our study yields lower perceptions of accuracy for DNA than reported elsewhere [18]. Additionally, respondents indicated that they believed there was a substantial risk of error at each stage of the forensic science process, and that each stage involves a large amount of human judgement. Relative to Ribeiro et al.'s [29] study in Australia, our sample reported a higher likelihood of error at every stage, especially in the collection, storage, and analysis stages.

Our second hypothesis reflected our expectation that respondents would overestimate the accuracy of forensic evidence. When comparing the accuracy rankings between the survey responses and the conclusions from reports, it was notable that the top two disciplines in the survey responses (DNA and fingerprints) were also the only two that were considered foundationally valid by the relevant literature [35]. Furthermore, dental analysis ranked 4th most accurate in the survey, although it is considered not foundationally valid by PCAST. In fact, PCAST considers that it is far from being so as examiners "cannot even consistently agree on whether an injury is a human bitemark." In fact, dental analysis scored higher than firearms and toolmarks in the survey, even though PCAST found that firearms and toolmarks was almost shown to be foundationally valid.[9] Several techniques that were ranked in the survey (toxicology, gunshot residue, bloodstain pattern analysis, brain imaging, and voice analysis) were not in the PCAST report, thus, we could not compare their rankings. Overall, there was mixed support for Hypothesis 2.

We also hypothesized that respondents would believe fictional forensic science television shows would be highly accurate (Hypothesis 3). Ribeiro et al. [29] used the number of hours of forensic science-related TV shows that a respondent watched as a measure of their interest in the field and examined the correlations between this measure and respondents' attitudes toward the likelihood of an error in the forensic science investigation process and for individual techniques. They found that there was no significant relationship between the number of hours watched and opinions on the likelihood of an error to occur. In this study we attempted to address the *CSI* effect directly by asking respondents how accurate they believe the "most accurate fictional show" and the "average fictional show" is in depicting forensic science. Our findings indicate that respondents believed that the average forensic science shows were only slightly accurate, and that even the "most accurate fictional show" was only moderately accurate. Arguably, a *CSI* effect would have been contingent on individuals believing what they see in forensic science-related TV shows (i.e., having most people report a *Very Accurate* rating), but the current results suggest that people do not blindly believe the accuracy of these shows. Respondents generally believe that such shows are slightly to moderately accurate at best. These results thus did not seem to indicate a *CSI* effect, and did not support our hypothesis. While this study measured the *CSI* effect in a different way than Ribeiro et al.'s [29] did, our findings are similar as neither study found support for a *CSI* effect.

Finally, we expected that respondents would give great weight to forensic evidence in criminal trials such that the evidence would be considered a decisive factor in whether a defendant is considered guilty or not guilty (Hypothesis 4). Results partially support this hypothesis as nearly 30% of respondents believe that the absence of forensic evidence is sufficient for a prosecutor to drop the case and almost 40% believed that the presence of forensic evidence, even if other forms of evidence suggest the defendant is not guilty, is enough to convict the defendant.

While the current study provides insights into public perceptions of forensic science, the impact of the current study may be limited in scope. In the US criminal justice system, jurors hold immense power during trials, determining whether the defendant is guilty of the crimes they are accused of committing. The Sixth Amendment to the United States Constitution guarantees that defendants the right to be judged by an "impartial jury" consisting of members of the public. In practice, however, juries only impact a small number of criminal cases as in nearly all but the most serious cases, the defendant pleads guilty or the case is dismissed before trial [17,4,28,3]. For the crime of murder, however, nearly 40% of cases do proceed to trial, where jury perceptions of the usefulness and validity of forensic science techniques can play an outsized role in determination of guilt. In the vast majority of murder cases at least one form of forensic evidence was collected by investigators at the scene [22].

However, juries are not presented only with forensic evidence during a trial. Their decision is likely based on other evidence involved in the case, personal biases, and how these factors interact with the forensic evidence presented. Therefore, asking respondents to rate the

[9] Firearms and toolmarks are not considered foundationally valid as there is only one appropriate study of scientific validity instead of multiple, which are required to show reproducibility.

**Table 5**
Importance of Forensic Evidence in Determining Guilt in a Criminal Trial.

| | Strongly Agree | Somewhat Agree | Somewhat Disagree | Strongly Disagree | Not Sure |
|---|---|---|---|---|---|
| Forensic evidence always provides a conclusive answer. | 16.13 | 36.13 | 28.39 | 16.13 | 3.23 |
| Forensic evidence always identifies the guilty person. | 10.32 | 30.32 | 37.42 | 17.42 | 4.52 |
| If no forensic evidence is recovered from a crime scene, then the prosecutor should drop the case. | 10.32 | 18.71 | 29.68 | 34.84 | 6.45 |
| If forensic evidence suggests a defendant is guilty, this should be enough to convict even if other evidence (e.g., eyewitness testimony, alibi) suggest otherwise. | 10.32 | 27.10 | 37.42 | 19.35 | 5.81 |

*Note:* This table shows the percent of respondents who gave each answer to the questions. Row percentages may not total to 100 due to rounding.

accuracy and degree of human judgement involved in each step on the forensic process or for each type of forensic science technique only captures some of the factors that potential jurors consider when deciding on a verdict. Future research may consider interviewing members of a jury whose case involved forensic science to determine how that piece of evidence influenced their decision. Additional research could use a vignette-design to simulate a juror's experience in a case and vary the forensic science technique involved to measure how much each technique influences their decision and what other variables matter in such a decision.

This study did not define any of the forensic science techniques, allowing the respondent to respond based on what knowledge they already have on the topic. While most of the techniques are self-explanatory, the interpretation of dental analysis may have needed to be clarified. It is unclear whether participants interpreted this as bite mark analysis, as was intended, or if they believed this item to refer to the identification of human remains based on teeth examination. This is a limitation that should be considered and clarified in future studies. In a trial, both the prosecution and the defense would likely explain to the jury what the technique is and argue about its accuracy and relevance. Therefore, this study measures people's baseline beliefs about each forensic technique rather than beliefs at the time that a juror must render a verdict. These results may be useful to attorneys who argue in front of a jury as it provides a guide on the techniques the jurors will expect to be accurate and those that prompt more skepticism. Lawyers may use these results to argue more forcefully for or against certain evidence with the knowledge that jurors already have certain beliefs about these techniques. In addition to its impact on lawyers, these results may be useful to investigative teams who can prioritize techniques that are both based in evidence and have a high degree of support by the public.

This study used data from 155 participants during late June 2019 through Mechanical Turk. Having a larger sample size and utilizing additional recruitment sources may provide more representative responses. The results of the current study may be a reflection of the characteristics of the sample and methods employed, thus replication is needed to assess the ecological validity of the current findings. Moreover, during the past several years the rise of movements such as Black Lives Matters and the election of progressive prosecutors in a number of major cities in the United States reflects a shift in attention towards negative aspects of the criminal justice system such as racial bias and miscarriages of justice. While a majority of those in the US overall remain confident in the police, a growing number − 14% in 2018 – report "very little" confidence [11]. Among Blacks and Hispanics in the US, groups which are over-represented in the criminal justice system, confidence in the police has fallen significantly with fewer than half of Hispanic people and fewer than a third of Black people having a "great deal or quite a lot" of confidence in police [24]. This attention towards negative aspects of the criminal justice system may have affected our results if respondents with low trust of the police cause low trust in the forensic evidence process - or in the people tasked at each stage of the forensic evidence process. A longitudinal study of this topic could detect whether perceptions of forensics change over time and if there is any relationship between trust in the criminal justice system and beliefs towards forensic evidence.

### 4.1. Implications and future directions

Based on our findings, US respondents believe that there is less human judgement but more errors at each stage of the forensic science process than their counterparts in Australia. It is unclear why this is the case, but this may suggest that US respondents believe that the science itself is more prone to error. Future research should investigate precisely which aspects of each stage is considered at risk of an error occurring. They should also continue to examine perceptions in different countries to better understand how people from different cultures understand and evaluate forensic evidence.

Our results also indicate that while fictional shows depicting forensic science are considered relatively accurate, the vast majority of US respondents do not believe that they are a perfect, or even near-perfect, representation of forensic science practices. The large difference in perceptions of accuracy between the "most accurate" and the "average" shows also indicate that people believe that they have enough knowledge of the field of forensic science to make this distinction between shows. Further studies of this topic should examine this question further, helping to distinguish how accurate these shows truly are and which specific features people believe to be accurate. While the *CSI* effect has been hypothesized to change viewers' opinions on forensic science because they believe that the shows are accurate, it may be that people already interested in forensic science are more likely to watch these shows. Watching shows may also change a person's belief in forensic science if they decide to look up the techniques that they see on the show to read more about them. In the current study, most respondents (99 of 135) acknowledged that their interest in forensic science increased as a result of forensic science-related shows. While this study did not ask if respondents did any research on the forensic science they saw, it does offer avenues for future research to examine if there was a behavioral change as a result of these shows.

## 5. Conclusion

This study found that US respondents believe that there is a high degree of human judgement involved and high risk of an error occurring at each stage of the forensic science process. When considering forensic science techniques specifically, those in the US hold a skeptical view of the vast majority of techniques, viewing some of them as little more accurate than a coin flip, and no technique more than 84% accurate. When compared to their counterparts in Australia, as studied by Ribeiro et al. [29], members of the US general public have a similar though more negative view of the field of forensic science than Australians.

Inaccurate perceptions of jurors towards forensic techniques likely has a severe and detrimental effect on the criminal justice system as it may influence their decisions of guilt or innocence. As the use of forensic science becomes more common in criminal cases that go before juries, it is increasingly important that we understand preconceptions

that jurors hold towards this field to better reduce biases during trials. Juries during criminal cases, however, are rare in the US justice system. The vast majority of criminal cases, over 90%, are settled through plea bargains, causing an outsized role of prosecutors in the criminal justice system [8]. However, little is known about prosecutors' perceptions of forensic science or how they use the evidence collected during the plea-bargaining process. It is important, therefore, for research in this field to continue to examine perceptions among members of the general public, who decide guilt for a small number of serious cases, and among prosecutors, whose decisions affect nearly all cases in the criminal justice system.

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**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, | : | |
| | : | Criminal Action No.: 19-358 (RC) |
| v. | : | |
| | : | Re Document No.: 22 |
| DEMONTRA HARRIS, | : | |
| | : | |
| Defendant. | : | |

# MEMORANDUM OPINION

## DENYING DEFENDANT'S MOTION IN LIMINE TO EXCLUDE EXPERT TESTIMONY AS TO FIREARM EXAMINATION TESTING

## I. INTRODUCTION

Defendant Demontra Harris is charged with unlawful possession of a firearm as a person previously convicted of a felony, assault with a dangerous weapon, and possession of a firearm during a crime of violence. Superseding Indictment at 1–2, ECF No. 39. On July 24, 2019, the D.C. Metropolitan Police Department ("MPD") responded to a report of gunshots and recovered four 9mm shell casings from the incident scene, which were then entered into the National Integrated Ballistic Information Network ("NIBIN"). A witness later provided MPD with a video filmed that night that allegedly shows Mr. Harris holding and then discharging a firearm in the location where the shell casings were later discovered. No firearm was recovered at the time. Roughly six weeks later on September 8, 2019, during a response to a call for service for a person with a weapon, MPD recovered a Glock 17 Gen4 9x19 pistol ("Glock 17"). This recovered firearm was test-fired and the resulting casings were entered into the NIBIN, where a match was identified with the casings recovered on the night of July 24, 2019. The Government then submitted the relevant evidence to an independent firearms examiner for forensic examination. Chris Monturo, a tool mark examiner who operates the Ohio-based forensic

services firm Precision Forensic Testing, examined the evidence and concluded in a report that he believed the four recovered casings from the July 24, 2019 incident scene were fired by the recovered Glock 17. *See* March 14, 2020 Report of Chris Monturo ("Monturo Report"), ECF No. 22-2. The Government intends to call Mr. Monturo to testify regarding these findings at the upcoming trial in this matter.

This opinion addresses Mr. Harris's *motion in limine* to Exclude Expert Testimony as to Firearm Examination Testing ("Def.'s Mot."), ECF No. 22, pursuant to *Daubert v. Merrell Dow Pharm. Inc*., 509 U.S. 579 (1993), Federal Rule of Evidence 702, and Federal Rule of Evidence 403. Def.'s Mot. at 1–2. The motion has been fully briefed, with both parties also filing supplemental motions. *See generally* Def.'s Mot.; Govt.'s Opp'n to Def.'s Mot. to Excl. Firearm and Toolmark Testimony ("Govt. Opp'n"), ECF No. 28; Def.'s Supp. Mot. to Excl. Expert Testimony as to Firearm Exam. Testing ("Def.'s Supp. Mot."), ECF No. 32; Govt.'s Opp'n to Def.'s Supp. to Excl. Firearm and Toolmark Testimony ("Govt. Supp. Opp'n"), ECF No. 33. In addition, the Court conducted a Daubert hearing on October 15, 2020 to consider this issue, taking the testimony of Todd Weller, an expert in the field. A jury trial in this matter is currently scheduled to begin on November 12, 2020.

Mr. Harris argues that the field of firearm and toolmark identification lacks a reliable scientific basis and is not premised on sufficient facts or data, is not the product of reliable principles and methods, and was not applied properly by Mr. Monturo to the facts of the case. Def.'s Mot. at 1–2. The Court disagrees, and will admit Mr. Monturo's testimony to the extent it falls within the Department of Justice's Uniform Language for Testimony of Reports for the Forensic Firearms/Toolmarks Discipline – Pattern Matching Examination ("DOJ ULTR"). While Mr. Harris raises important issues as to the reliability of firearm and toolmark

identification, memorialized most notably by the 2016 President's Council of Advisors on Science and Technology Report ("PCAST Report"), these issues are for cross-examination, not exclusion, as recent advancements in the field in the four years since the PCAST Report address many of Mr. Harris's concerns. Mr. Harris also remains free to have his own expert examine the firearm and ballistics evidence and contradict the Government's case.

## II. ANALYSIS

### A. Legal Standard

"Motions *in limine* are designed to narrow the evidentiary issues at trial." *Williams v. Johnson*, 747 F. Supp. 2d 10, 14 (D.D.C. 2010). "While neither the Federal Rules of Civil Procedure nor the Federal Rules of Evidence expressly provide for motions *in limine,* the Court may allow such motions 'pursuant to the district court's inherent authority to manage the course of trials.'" *Barnes v. District of Columbia*, 924 F. Supp. 2d 74, 78 (D.D.C. 2013) (quoting *Luce v. United States*, 469 U.S. 38, 41 n.4 (1984)).

Federal Rule of Evidence 702 provides that qualified expert testimony is admissible if "(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case." Fed. R. Evid. 702. "In general, Rule 702 has been interpreted to favor admissibility." *Khairkhwa v. Obama*, 793 F. Supp. 2d 1, 10 (D.D.C. 2011) (citing *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 587 (1993); Fed. R. Evid. 702 advisory committee's note to2000 amendment ("A review of the caselaw after *Daubert* shows that the rejection of expert testimony is the exception rather than the rule."). Indeed, the Supreme Court has clarified that it is not exclusion, but rather "vigorous

cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof" that "are the traditional and appropriate means of attacking shaky but admissible evidence." *Daubert*, 509 U.S. at 596.

When considering the admissibility of expert evidence under Federal Rule of Evidence 702, district courts are required to "assume a 'gatekeeping role,' ensuring that the methodology underlying an expert's testimony is valid and the expert's conclusions are based on 'good grounds.'" *Chesapeake Climate Action Network v. Export-Import Bank of the U.S.*, 78 F. Supp. 3d 208, 219 (D.D.C. 2015) (quoting *Daubert*, 509 U.S. at 590–97). This gatekeeping analysis is "flexible," and "the law grants a district court the same broad latitude when it decides how to determine reliability as it enjoys in respect to its ultimate reliability determination." *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141–42 (1999) (emphasis omitted). While district courts may apply a variety of different factors to assess reliability, in *Daubert* the Supreme Court provided a non-exhaustive list of five factors to guide the determination, including: (1) whether the technique has been or can be tested; (2) whether the technique has a known or potential rate of error; (3) if the technique has been subject to peer review and publishing; (4) the existence of controls that govern the technique's operation; and (5) whether the technique has been generally accepted within the relevant scientific community. *See Daubert,* 509 U.S. at 593–94. In contrast, expert testimony "that rests solely on 'subjective belief or unsupported speculation' is not reliable." *Groobert v. President & Directors of Georgetown Coll.*, 219 F. Supp. 2d 1, 6 (D.D.C. 2002) (citing *Daubert*, 509 U.S. at 590).

"The burden is on the proponent of [expert] testimony to show by a preponderance of the evidence that . . . the testimony is reliable." *Sykes v. Napolitano*, 634 F. Supp. 2d 1, 6 (D.D.C. 2009) (citing *Meister v. Med. Eng'g Corp.*, 267 F.3d 1123, 1127 n.9 (D.C. Cir. 2001)). Even if

the proposed expert testimony is reliable, the Court may nonetheless exclude it "if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Fed. R. Evid. 403; *see Bazarian Int'l Fin. Assocs., LLC v. Desarrolos Aerohotelco, C.A.*, 315 F. Supp. 3d 101, 128 (D.D.C. 2018) (analyzing expert testimony under Rule 403).

**B. Firearm and Toolmark Identification**

1. Firearm and Toolmark Identification Science

Mr. Harris's motion challenges the reliability of the Government's proposed use of firearm toolmark identification as a discipline for expert testimony. Firearm identification began as a forensic discipline in the 1920s, *see* James E. Hamby, *The History of Firearm and Toolmark Identification*, 31 Ass'n of Firearm and Tool Mark Examiners J. 266, 266–284 (1999), and "for decades" has been routinely admitted as appropriate expert testimony in district courts. *United States v. Taylor*, 663 F. Supp. 2d 1170, 1175 (D.N.M. 2009); *see also United States v. Brown*, 973 F.3d 667, 704 (7th Cir. 2020) (noting firearm and toolmark identification has been "almost uniformly accepted by federal courts") (citations omitted).

Firearm and toolmark identification "is used to determine whether a bullet or casing was fired from a particular firearm." *Brown*, 973 F.3d at 704. A firearm and toolmark examiner will make this determination "by looking through a microscope to see markings that are imprinted on the bullet or casing by the firearm during the firing process," which will include marks left on the bullet by the firing pin as well as scratches that occur when the bullet travels down the barrel. *Id.*

A firearm examiner is trained to observe and classify these marks into three types of characteristics during a firearm toolmark examination, which include:

> (1) Class characteristics: i.e., the weight or caliber of the bullet, the number of lands and grooves, the twist of the lands and grooves, and the width of the lands and grooves, that appear on all bullet casings fired from the same type of weapon and are predetermined by the gun manufacturer;
>
> (2) Individual characteristics: unique, microscopic, random imperfections in the barrel or firing mechanism created by the manufacturing process and/or damage to the gun post-manufacture, such as striated and/or impressed marks, unique to a single gun; and
>
> (3) Subclass characteristics: characteristics that exist, for example, within a particular batch of firearms due to imperfections in the manufacturing tool that persist during the manufacture of multiple firearm components mass-produced at the same time.
>
> *Ricks v. Pauch*, No. 17-12784, 2020 WL 1491750, at *8–9 (E.D. Mich. Mar. 23, 2020).

A qualified examiner can conclude that casings were fired by the particular firearm by "comparatively examining bullets and determining whether 'sufficient agreement' of toolmarks exist," which occurs when the class and individual characteristics match. *Id.* at *9; *see also Brown*, 973 F.3d at 704. The methodology of determining when sufficient agreement is present is detailed by the Association of Firearm Toolmark Examiners ("AFTE method"), and is "the field's established standard." *United States v. Ashburn*, 88 F. Supp. 3d 239, 246 (E.D.N.Y. 2015). Under the governing AFTE theory, no two firearms will bear the same microscopically identical toolmarks due to differences in individual characteristics. *United States. v. Otero*, 849 F. Supp. 2d 425, 427 (D.N.J. 2012).

In recent years three scientific reports have examined the underlying scientific validity of firearm and toolmark identification. They include the 2008 Ballistic Imaging Report, Def.'s Supp. Mot. Ex. 1, ECF No. 32-1, the 2009 National Academy of Science Report, Def.'s Supp. Mot. Ex. 2, ECF No. 32-2, and the 2016 President's Council of Advisors on Science and Technology Report ("PCAST Report"), Def.'s Supp. Mot. Ex. 3, ECF No. 32-3. Mr. Harris argues that these reports "reject the claim that firearms identification is a valid and reliable

science." Def.'s Supp. Mot. at 2–3. The Court is generally convinced by the Government's arguments and ample citations to case law that the 2008 Ballistic Imaging Report and the 2009 National Academy of Science Report are both "outdated by over a decade" due to intervening scientific studies and as a result have been repeatedly rejected by courts as a proper basis to exclude firearm and toolmark identification testimony. Govt. Supp. Opp'n at 2–4 (collecting cases holding firearms identification evidence admissible after considering these reports). The PCAST Report provides better support for Mr. Harris's arguments, given its more recent origin and use in recent opinions that have interrogated the danger of subjectivity in this discipline. *See, e.g.*, *United States v. Tibbs*, No. 2016-CF1-19431, 2019 WL 4359486 (D.C. Super. Ct. Sept. 5, 2019).

The PCAST Report ultimately concluded that firearm and toolmark identification fell "short of the criteria for foundational validity," after raising a number of critiques of the science. PCAST Report at 11. Chief among them was that the report concluded that "foundational validity can only be established through multiple independent black-box studies"[1] and at the time the report was published in 2016, there had only been one black-box study conducted on the discipline to date. Def.'s Supp. Mot. at 4 (citing PCAST Report at 106, 111). In response, the Government has put forth sworn affidavits from researchers that speak to post-PCAST Report scientific studies that they argue contradicts the PCAST Report's conclusions. The Government's Daubert hearing expert, Todd Weller, devoted much of his testimony to

[1] The PCAST report defined a black-box study as "an empirical study that assesses a subjective method by having examiners analyze samples and render opinions about the origin or similarity of samples." PCAST Report at 48. Mr. Weller added at the Evidentiary Hearing that a black-box study is one in which there are "question samples [given to examiners] that have a matching known, and question samples that do not have a matching known, and also that each of those comparisons is independent from each other." October 15, 2020 Evidentiary Hearing Tr. ("Evid. Hr'g Tr.") 49:6-12.

discussing the scientific advances that have occurred since the PCAST Report was published in 2016, all of which he posited affirms the discipline's validity. *See generally* Evid. Hr'g Tr.

2. Mr. Monturo's Report Methodology

Mr. Harris's *motion in limine* specifically challenges the proposed testimony of the Government's firearm and ballistics expert Chris Monturo, who examined the firearms evidence at issue in this case. In creating his report for the Government, Mr. Monturo first test fired the Glock 17 and found it to be operable. Monturo Report at 2. He then used the Glock 17 to create test-fired cartridge cases. *Id.* Mr. Monturo then microscopically compared his test-fired cartridge cases to the cartridge cases recovered from the crime scene on July 26, 2019, and found the two sets of cartridges "to have corresponding individual characteristics." *Id*. These results were then verified that same day by Calissa Chapin, another qualified firearm and ballistics expert from Mr. Monturo's lab. March 14, 2020 Report of Chris Monturo Notes ("Monturo Report Notes") at 3, ECF No. 22-3. As a result, Mr. Monturo is expected to testify that "[b]ased upon these corresponding individual characteristics. . . namely aperture sheer marks,"[2] "along with Mr. Monturo's training and experience, [he] is of the opinion that the Glock firearm fired" the cartridge casings recovered from the July 26, 2019 crime scene. Govt. Opp'n at 11–12.

**C. The Subject Matter of Mr. Monturo's Testimony Meets Rule 702's Standards**

Mr. Harris argues that the Government's proposed expert must be excluded under Rule 702 and *Daubert* because the underlying firearm and toolmark identification discipline "is based

[2] As defined in the AFTE Glossary, 6th Edition, a firing pin aperture shear is "[s]triated marks caused by the rough edges of the firing pin aperture scraping the primer metal during unlocking of the breech." Govt. Supp. Opp'n, Ex. 15, ECF No. 33-15. It is these individual characteristics Mr. Monturo used to classify the cartridge cases at issue.

not upon science but rather 'subjectivity.'"[3] Def.'s Supp. Mot. at 2. To address Mr. Harris's concerns about the admission of Mr. Monturo's expert testimony, the Court will undertake a factor-by-factor analysis of the discipline's reliability, using *Daubert* as a guide. Complicating this process is the fact that Mr. Harris did not specifically address the *Daubert* criteria in his briefing on this topic, so the Court will instead rely on the implications raised by the PCAST Report and other scientific reports he has brought to the Court's attention.

1. Whether the methodology has been tested

As previously noted, the first *Daubert* factor asks whether the technique in question has been or can be tested. *See Daubert*, 509 U.S. at 593–94. This "testability" inquiry, as articulated in the Advisory Committee Notes to Rule 702, concerns "whether the expert's theory can be challenged in some objective sense, or whether it is instead simply a subjective, conclusory approach that cannot be reasonably assessed for reliability." Fed. R. Evid. 702 advisory committee's note to 2000 amendment. Mr. Harris argues that firearm and toolmark identification is "unavoidably subjective," and also cites to the 2008 Ballistics Imagining Report which expressed concerns about "the fundamental assumptions of uniqueness and reproducibility of firearms-related toolmarks." Def.'s Supp. Mot. at 2–3. In response, the Government has put forth evidence to show "[f]irearms and toolmark identification has been thoroughly tested with

[3] Based on remarks such as these and his citation to *United States v. Glynn*, Mr. Harris appears to be peripherally raising the point that firearm and toolmark identification cannot "fairly be called 'science,'" *United States v. Glynn*, 578 F. Supp. 2d 567, 570 (S.D.N.Y. 2008), a preliminary inquiry some courts have investigated before proceeding to the *Daubert* analysis. The Court does not believe such an inquiry is required here, given that, as other courts have also found, firearm and toolmaking identification is "clearly is technical or specialized, and therefore within the scope of Rule 702." *United States v. Hunt*, No. CR-19-073-R, 2020 WL 2842844, at *3 n.2 (W.D. Okla. June 1, 2020) (citing *United States v. Willock*, 696 F. Supp. 2d 536, 571 (D. Md. 2010), *aff'd sub nom. United States v. Mouzone*, 687 F.3d 207 (4th Cir. 2012)).

ground-truth experiments designed to mimic casework." Govt. Opp'n at 1. The Court agrees with the Government that this factor supports admissibility.

A number of courts have examined this factor in depth to conclude that firearm toolmark identification can be tested and reproduced. *See, e.g.*, *Otero*, 849 F. Supp. 2d at 432 ("The literature shows that the many studies demonstrating the uniqueness and reproducibility of firearms toolmarks have been conducted."); *Taylor*, 663 F. Supp. 2d at 1175–76 (noting studies "demonstrating that the methods underlying firearms identification can, at least to some degree, be tested and reproduced."); *United States v. Diaz*, No. CR 05-00167, 2007 WL 485967, at *6 (N.D. Cal. Feb. 12, 2007) (holding that "the theory of firearms identification, though based on examiners' subjective assessment of individual characteristics, has been and can be tested."). Indeed, even Judge Edelman in the *Tibbs* opinion relied on by Mr. Harris concluded that "virtually every court that has evaluated the admissibility of firearms and toolmark identification has found the AFTE method to be testable and that the method has been repeatedly tested." *Tibbs,* 2019 WL 439486 at *7 (collecting cases).

The fact that there are subjective elements to the firearm and toolmark identification methodology is not enough to show that the theory is not "testable." Indeed, studies have shown that "the AFTE theory is testable on the basis of achieving consistent and accurate results." *Otero*, 849 F. Supp. 2d at 433; *see also* July 7, 2017 Decl. of Todd Weller ("Weller I") at 2–6, ECF No. 28-5 (describing various studies that support the reproducibility of the AFTE identification theory). This conclusion has only been further strengthened in recent years due to advances in three-dimensional imaging technology, which has allowed the field to interrogate the process and sources of "subjectivity" behind firearm and toolmark examiners' conclusions. For example, Mr. Weller testified regarding a study which used 3D image technology to assess the

process used by trained firearm examiners when identifying casings to a particular firearm. *See* Sept. 19, 2019 Decl. of Todd Weller ("Weller II") at 15–16 (citing Pierre Duez et al., *Development and Validation of a Virtual Examination Tool for Firearm Forensics,* 63 J. Forensic Sci, 1069–84 (2018), ("Heat Map Study")), ECF No. 28-6. The Heat Map Study indicated that firearm examiners from fifteen different laboratories, all conducting an independent assessment, were "mostly using the same amount and same location of microscopic marks when concluding identification." Weller II at 16. Critically, the trained examiners also correctly reported 100% of known matches while reporting no false positives or false negatives. *Id.*

It is also important to note that the testability criticism leveled at the firearm and toolmark field in the PCAST Report—that at the time of publishing "there [was] only a single appropriately designed study to measure validity and estimate reliability"—appears to now be out of date. PCAST Report at 112. As previously discussed, the PCAST Report only considered studies that were a "black-box" or "open-set" design, disregarding hundreds of validation studies in the process. *See* Evid. Hr'g Tr. 48:9-17 (noting that PCAST only evaluated nine of the hundreds of studies that were submitted for review). Setting aside for the moment the utility of this "black-box" requirement— which goes beyond what is required by Rule 702— the Government has provided to the Court three recent scientific studies that meet the PCAST's black-box model requirements and demonstrate the reliability of the firearm and toolmark identification method. These include one of the tests administered during the Heat Map Study detailed above, *see* Weller II at 16 n. 84, along with another recent black box study testing the identification of fired casings, which resulted in a .433% false positive error rate from three errors among 693 total comparisons. *See* Lilien et al., *Results of the 3D Virtual Comparison*

*Microscopy Error Rate (VCMER) Study for Firearm Forensics*, J. of Forensic Sci. Oct. 1, 2020 ("Lilien Study") at 1, ECF No. 41. A third post-PCAST Report study also followed the PCAST recommended black-box model and found that of 1512 possible identifications tested, firearms examiners correctly identified 1508 casings to the firearm from which the casing was fired. Keisler et. al., *Isolated Pairs Research Study*, Ass'n of Firearm and Tool Mark Examiners J. 56, 58 (2018) ("Keisler Study"), ECF No. 33-9; *see also* Evid. Hr'g Tr. 65:3-11. This evidence indicates that even under the PCAST's stringent black-box only criteria, firearm and toolmark identification can be tested and reasonably assessed for reliability.

A final factor demonstrating the strength of the testability prong is that firearm and toolmark examiners are required, as Mr. Monturo has done here, to document their results and findings through written reports and photo documentation, and have these results validated by another qualified examiner. These elements "ensure sufficient testability and reproducibility to ensure that the results of the technique are reliable." *Diaz*, 2007 WL 485967 at *5 (citing *United States v. Monteiro,* 407 F.Supp.2d 351, 369 (D. Mass. 2006)).[4] For all of these reasons, the Court concludes that the testability factor supports admissibility of Mr. Monturo's testimony.

2. The known or potential error rate

The second *Daubert* factor inquires as to whether the technique has a known or potential rate of error. *See Daubert,* 509 U.S. at 594. The PCAST Report concluded that non-black box

[4] Mr. Harris's only explicit acknowledgement of this Daubert factor is an assertion in a parenthetical that the court in *United States v. Green* found that "ballistic evidence fails to meet Daubert criteria regarding . . . testability." Def.'s Mot. at 7 (citing *United States v. Green*, 405 F. Supp. 2d 104, 120–22 (D. Mass. 2005)). But the facts at issue in *Green* were quite different than the instant case. Green's holding that the methods at issue could not be tested rested on an absence of notes and photographs from the initial examination that "made it difficult, if not impossible" for another expert to verify the examination. *Green,* 405 F. Supp. 2d at 120. In contrast, Mr. Monturo documented his work in addition to having it verified that same day by another certified firearms analyst. Accordingly, reproducibility is not at issue here.

studies had "inconclusive and false-positives rate that are dramatically lower (by more than 100-fold)" compared to partly black-box or fully black-box designed studies. PCAST Report at 109. The Government counters that "collectively, th[e] body of scientific data demonstrate[s] a low rate of error" for firearm and toolmark identification, and provides several recently published studies to refute the PCAST Report's finding of differences in rate of error tied to study design. Govt. Opp'n at 2; Govt. Supp. Opp'n at 13–14.

First, as the Government argues and this Court agrees, the critical inquiry under this factor is the rate of error in which an examiner makes a false positive identification, as this is the type of error that could lead to a conviction premised on faulty evidence. *See Otero*, 849 F. Supp. 2d at 434 (noting, "the critical validation analysis has to be the extent to which false positives occur").[5] Mr. Weller testified that "over the past couple of decades in research" he had seen a rate of false positives in research studies ranging from 0-1.6 percent. Evid. Hr'g. Tr. 84:19–22. To support this assertion, the Government provided the false positive error rates for nineteen firearm and toolmark validation studies conducted between 1998 and 2019, of which eleven studies had a false positive error rate of zero percent, and the highest false positive error rate calculated was 1.6%. Govt. Opp'n at 27–29. Other federal courts have also recognized that validation studies as a whole show a low rate of error for firearm and toolmark identification. *See, e.g.*, *United States v. Romero-Lobato*, 379 F. Supp. 3d 1111, 1119 (D. Nev. 2019) ("[T]he studies cited by [the firearms examiner] in his testimony and by other federal courts examining the issue universally report a low error rate for the AFTE method."); *Taylor*, 663 F. Supp. 2d at 1177 ("[T]his number [less than 1%] suggests that the error rate is quite low").

[5] Perhaps the false negative rate could be important in a case where a defendant asserts his co-defendant (or a third party) was the culprit and examination of that person's firearm tested negative. But that situation does not apply here.

As was the case under the testability prong of the *Daubert* analysis, here too recent studies have resolved some of the concerns raised by the PCAST Report. Mr. Weller described for the Court how three black box studies that post-date the PCAST Report all have extremely low rates of error. Govt. Supp. Opp'n at 14, Evid. Hr'g Tr. 65:2-77:8. The Heat Map and Keisler studies both had an overall error rate of zero percent, and the Lilien study produced a false positive rate of only 0.433%. Govt. Supp. Opp'n at 14. Because the evidence shows that error rates for false identifications made by trained examiners is low—even under the PCAST's black-box study requirements—this factor also weighs in favor of admitting Mr. Monturo's expert testimony.

3. Whether the methodology has been subject to peer review and publication

The third *Daubert* factor concerns if the methodology has been subject to peer review and published in scientific journals, a component the Supreme Court emphasized as critical to "good science" since "it increases the likelihood that substantive flaws in methodology will be detected." *See Daubert,* 509 U.S. at 593–94. The Government contends that scientific data concerning firearms and toolmark identification "have been published in a multitude of scientific peer-reviewed journals," Govt. Opp'n at 1, and Mr. Weller presented evidence to this effect at the evidentiary hearing, describing the variety of scientists from different disciplines who have published on the topic in several different peer-reviewed journals. *See* Weller I at 9–10. The Court agrees with the Government that this factor weighs in favor of admissibility.

Much of the literature in this discipline has been published in the AFTE Journal, a peer-reviewed journal that "publishes articles, studies and reports concerning firearm and toolmark evidence." *United States v. McCluskey*, No. CR 10-2734 JCH, 2013 WL 12335325, at *6 (D.N.M. Feb. 7, 2013). The AFTE Journal uses a formal process for article submissions,

including "specific instructions for writing and submitting manuscripts, assignment of manuscripts to other experts within the scientific community for a technical review, returning of manuscripts to other experts within the scientific community for clarification or re-write, and a final review by the Editorial Committee." *Id.* (quoting Richard Grzybowski, et al., *Firearm/Toolmark Identification: Passing the Reliability Test Under Federal and State Evidentiary Standards*, 35 AFTE J. 209, 220 (2003)).

Other courts have examined the scientific credibility of the AFTE Journal. Notably, the court in *Tibbs* concluded that the AFTE Journal's lack of a double-blind peer review process along with the fact that it is published by the group of practicing firearms and toolmark examiners could create an "issue in terms of quality of peer review." *Tibbs*, 2019 WL 4359486, at *10. In response, the Government asserts, citing to testimony from Dr. Bruce Budowle, "the most published forensic DNA scientist in the world," that there is far from consensus in the scientific community that double-blind peer review is the only meaningful kind of peer review. Govt. Supp. Opp'n at 23; *see also* Affidavit of Bruce Budowle at 2, ECF No. 33–17. To this point, Mr. Weller described the various advantages and disadvantages of each type of peer review. Weller II at 22–24. Compellingly, the Government also refuted the allegation by Judge Edelman in *Tibbs* that the AFTE Journal does not provide "meaningful" review, by bringing to the Court's attention a study that was initially published in the AFTE Journal, and then was subsequently published in the Journal of Forensic Science with no further alterations. Govt. Supp. Opp'n at 27. Because the Journal of Forensic Science employs a double-blind peer review process, this indicates that at least in this instance, the open peer review process of the AFTE Journal led to the same outcome as a double-blind peer review. *Id*. In addition, numerous courts have concluded that publication in the AFTE Journal satisfies this prong of the *Daubert*

admissibility analysis. *See, e.g., Romero-Lobato*, 379 F. Supp. 3d at 1119; *United States v. Johnson*, No. 16 Cr. 281, 2019 WL 1130258, at *16 (S.D.N.Y. Mar. 11, 2019); *Ashburn*, 88 F. Supp. 3d at 245–46; *Otero*, 849 F. Supp. 2d at 433; *Taylor*, 663 F. Supp. 2d at 1176; *Monteiro*, 407 F. Supp. 2d at 366–67. The Court queries whether excluding certain journals from consideration based on the type of peer review the journal employs goes beyond a court's appropriate gatekeeping function under *Daubert*.

And even if the Court were to discount the numerous peer-reviewed studies published in the AFTE Journal, Mr. Weller's affidavit also cites to forty-seven other scientific studies in the field of firearm and toolmark identification that have been published in eleven other peer-reviewed scientific journals. Weller II at Ex. A. This alone would fulfill the required publication and peer review requirement.

Because the toolmark identification methodology used by Mr. Monturo has been subject to peer review and publication, the Court finds this *Daubert* factor to also weigh in favor of admission.

4. The existence and maintenance of standards to control the methodology's operation

The fourth *Daubert* factor inquires as to whether there are proper standards and controls to govern the operation of the technique in question. *See Daubert,* 509 U.S. at 594. Mr. Harris argues that there are insufficient objective standards in place, citing to the PCAST Report to claim that the AFTE's "sufficient agreement" analysis that is used by examiners to reach their conclusions is subjective and impermissibly based on the "personal judgment" of each examiner. Def.'s Supp. Mot. at 4 (citing PCAST Report at 47, 60, 104, 113). In opposition, the Government argues that "the firearms community has implemented standards," citing to a

number of industry guidebooks and regulations. Govt. Opp'n at 2. While a close call, the Court finds that the lack of objective standards ultimately means this factor cannot be met.[6]

The Government identifies a number of what they refer to as "standards for professional guidance" for the firearm and toolmark profession, Govt. Opp'n at 32–33, but the primary standard that governs the discipline is the AFTE Theory of Identification, which describes the methodology examiners should undertake when "pattern matching" between firearms and cartridges. *See, e.g.*, Govt. Opp'n at 8 (explaining that Theory of Identification was created "to explain the basis of opinion of common origin in toolmark comparisons"). According to the AFTE Theory of Identification, examiners can conclude that a firearm and cartridges have a common origin when a comparison of toolmarks shows there is "sufficient agreement" between "the unique surface contours of two toolmarks." The Association of Firearm and Tool Mark Examiners, *AFTE Theory of Identification as It Relates to Toolmarks*, https://afte.org/about-us/what-is-afte/afte-theory-of-identification (last visited November 4, 2020). This theory of identification dictates that "sufficient agreement" between two toolmarks exists only when "the agreement of individual characteristics is of a quantity and quality that the likelihood another tool could have made the mark is so remote as to be considered a practical impossibility." *Id.* The Court finds this standard to be generally vague, and indeed, the AFTE Theory acknowledges that "the interpretation of individualization/identification is subjective in nature, founded on scientific principles and based on the examiner's training and experience." *Id.* As other courts have found, under this method "matching two tool marks essentially comes down to the examiner's subjective judgment based on his training, experience, and knowledge of firearms."

[6] This *Daubert* factor is, as the Government concedes, "the only Daubert factor that some courts have found lacking" in firearm toolmark identification. Govt. Opp'n at 33. This makes it all the more puzzling that the Government fails entirely to address this factor in its reply.

*Romero-Lobato*, 379 F. Supp. 3d at 1121; *Glynn,* 578 F. Supp. 2d at 572 ("[T]he standard defining when an examiner should declare a match – namely 'sufficient agreement' – is inherently vague.").

Accordingly, it is evident and hardly disputed that the "AFTE theory lacks objective standards." *Ricks*, 2020 WL 1491750, at *10. The entire process of reaching a conclusion regarding the "sufficient agreement in individual characteristics" is one that relies wholly on the examiner's judgment, without any underlying numerical standards or guideposts to direct an examiner's conclusion. *See* Evid. Hr'g Tr. 37:16–38:25 (noting the absence at this time of objective standards to guide an examiner's findings). And as Mr. Weller testified, even in contrast to other subjective disciplines such as fingerprint analysis, firearm toolmark identification does not provide objective standards even as a quality control measure, such as a baseline to trigger further verification. *See* Evid. Hr'g Tr. 112:18-113:17 (explaining that while fingerprint testing does not have an agreed-upon standard for the number of matching points required for an identification, it does use matching points as a quality control measure that triggers further verification if below a certain threshold). While Mr. Monturo's additional use of "basic scientific standards" through taking contemporaneous notes, documenting his comparison with photographs, and the use of a second reviewer for verification surely assist in maintaining reliable results, without more the Court cannot conclude this *Daubert* factor is met.

It should be noted, however, that even if this factor cannot be met, a partially subjective methodology is not inherently unreliable, or an immediate bar to admissibility. Rule 702 "does not impose a requirement that the expert must reach a conclusion via an objective set of criteria or that he be able to quantify his opinion with a statistical probability. *Romero-Lobato*, 379 F. Supp. 3d at 1120. And indeed, "all technical fields which require the testimony of expert

witnesses engender some degree of subjectivity requiring the expert to employ his or her individual judgment, which is based on specialized training, education, and relevant work experience." *Johnson*, 2019 WL 1130258 at *18 (citations omitted); *see also* Evid. Hr'g Tr. at 30:14–31:6 (Mr. Weller testified that "all science involves some level of interpretation," and went on to describe subjective components to both drug testing and DNA interpretation). Accordingly, this factor weighs against the admission of Mr. Monturo's testimony, but does not disqualify it.

5. Whether the methodology has achieved general acceptance in the relevant community

Finally, the fifth and last *Daubert* factor asks whether the technique has been generally accepted within the relevant scientific community, reasoning that "a known technique which has been able to attract only minimal support within the community, may properly be viewed with skepticism." *See Daubert,* 509 U.S. at 594. The Court finds that the Government has put forth more than sufficient evidence to show that the AFTE theory as used by Mr. Monturo enjoys widespread scientific acceptance. *See* Govt. Opp'n at 2; Govt. Supp. Opp'n at 28.

Mr. Weller testified that firearm and toolmark identification is practiced by accredited laboratories in the United States and throughout the world, including England (Scotland Yard), New Zealand, Canada, South Africa, Australia, Germany, Sweden, Greece, Turkey, China, Mexico, Singapore, Malaysia, Belgium, Netherlands, and Denmark. *See* Weller II at 30. In the United States alone, there are 233 accredited firearm and toolmark laboratories, that often operate within a larger forensic laboratory providing chemistry, DNA, and fingerprint identification, and scientists from a variety of disciplines author studies within the area of firearms and toolmark identification. *Id.*

The criticism contained in the PCAST Report does not undermine this factor, as "techniques do not need to have universal acceptance before they are allowed to be presented before a court." *Romero-Lobato*, 379 F. Supp. 3d at 1122. Even courts that have been critical of the validity of the discipline have conceded that it does enjoy general acceptance as a reliable methodology in the relevant scientific community of examiners. *See Otero*, 849 F. Supp. 2d at 435 (collecting cases). Furthermore, as Mr. Weller noted at the evidentiary hearing, the committee responsible for the PCAST Report did not include any firearm and toolmark examiners or researchers in the field, *see* Evid. Hr'g Tr. 47:18-23, thus raising the question of whether the PCAST Report criticism would even constitute a lack of acceptance from the "relevant scientific community." For all of these reasons, this factor weighs in favor of admitting Mr. Monturo's testimony.

6. The *Daubert* Analysis Urges Admission of Mr. Monturo's Testimony

Balancing all five *Daubert* factors, the Court finds that the Government's proposed expert testimony of Mr. Monturo is reliable and admissible, though subject to what the Court considers prudent limitations, discussed in detail below. The only factor that does not favor admissibility is the lack of objective criteria under the fourth *Daubert* factor, but as discussed, "the subjectivity of a methodology is not fatal under Rule 702 and Daubert." *Ashburn*, 88 F. Supp. 3d at 246. And as other courts have also found, this deficiency "is countered by the method's relatively low rate of error, widespread acceptance in the scientific community, testability, and frequent publication in scientific journals." *Romero-Lobato*, 379 F. Supp. 3d at 1122. Accordingly, the Court will allow the admission of Mr. Monturo's expert testimony as to his firearm and toolmark identification analysis, subject to certain limitations.

**D. Federal Rule of Evidence 702(d)**

Federal Rule of Evidence 702(d) provides that qualified expert testimony is admissible only when "the expert has reliably applied the principles and methods to the facts of the case." Fed. R. Evid. 702. Mr. Harris challenges the admission of Mr. Monturo's testimony, asserting that he "has not applied the principles and methods reliably to the facts of the case." Def.'s Mot. at 1. However, he provides no evidence or further analysis to flesh out this conclusory claim. Accordingly, the Court finds this argument to be without merit.

As previously described, Mr. Monturo detailed the firearm and toolmark examination he conducted in his report, providing both a description of his process and photo documentation. *See generally* Monturo Report. Mr. Monturo's findings were then verified by another qualified examiner the same day. Monturo Report Notes at 2. In contrast, Mr. Harris has not put forth any evidence to suggest that Mr. Monturo applied the firearm and toolmarking methodology in an unreliable manner. Mr. Monturo also appears to be well-qualified, with the Government noting that he "has significant training and experience, has not failed any proficiency exams, and has designed consecutively manufactured firearms test kits for training other firearms examiners," information that they plan to elicit at trial during qualification of his testimony and also set out in his curriculum vitae. Govt. Opp'n at 35. In light of his failure to identify any unreliability on Mr. Monturo's part, and also because Mr. Harris will have the ability to question Mr. Harris regarding his analysis during cross examination, the Court is convinced exclusion on this ground is not warranted. *See Daubert,* 509 U.S. at 596 ("Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence."). If Mr. Harris has lingering concerns about Mr. Monturo's application of the firearm and toolmark methodology in this case,

he is welcome to retain an independent expert to review Mr. Monturo's work, or have an independent examination of his own performed.

**E. Federal Rule of Evidence 403**

Next, Mr. Harris argues that even if the proposed testimony of Mr. Monturo is admissible pursuant to *Daubert* and Federal Rule of Evidence 702, it is inadmissible under Federal Rule of Evidence 403. Def. Mot. at 2. In support of this claim, Mr. Harris argues that Mr. Monturo's "conclusions appear to extend beyond his claimed expertise and are not reliable since they are not based on objective standards but rather his subjective observations and conclusions." *Id*. "The prejudice to Mr. Harris is simple, a connection to a firearm, a connection to a shell casing, all premised on analysis that at its best can only conclude that it 'may' be correct." Def. Supp. Mot. at 2.

Under Rule 403, a Court may exclude otherwise probative testimony if its value is substantially outweighed by unfair prejudice, confusing the issues, misleading the jury, undue delay, a waste of time, or cumulative evidence. Fed. R. Evid. 403. Mr. Harris's concern under Rule 403 appears to be that the value of Mr. Monturo's testimony will be substantially outweighed by the risk of him potentially misleading the jury through his reliance on a methodology Mr. Harris does not believe is sufficiently reliable. First, Mr. Harris's concerns about the reliability of the firearm and toolmarking methodology have already been analyzed, and the Court has found the underlying analysis sufficiently reliable such that Mr. Harris's concerns do not "substantially outweigh" the value of Mr. Monturo's testimony. Additionally, the Court believes that the risk of prejudice raised here can be alleviated through alternatives to exclusion. Cross-examination of Mr. Monturo's testimony, in conjunction with the appropriate limiting instruction governing the degree of certainty Mr. Monturo can express about his conclusions will sufficiently deter the risks of harm Mr. Harris has raised.

**F. Limiting Instruction**

In his final request, Mr. Harris asks that if the testimony of Mr. Monturo is not excluded, then the Court put in place limitations on his testimony. Def. Supp. Mot. at 6–7. Specifically, he requests that Mr. Monturo not "use the term 'match'" but he "may be allowed to tell the jury that he could not exclude the gun as the weapon that produced a casing." *Id.*

Limitations restricting the degree of certainty that may be expressed on firearm and toolmark expert testimony are not uncommon. *See, e.g., Romero-Lobato*, 379 F. Supp. 3d at 1117 (noting the "general consensus" of the courts "is that firearm examiners should not testify that their conclusions are infallible or not subject to any rate of error, nor should they arbitrarily give a statistical probability for the accuracy of their conclusions"); *Ashburn*, 88 F. Supp. 3d at 249 (limiting expressions of an expert's conclusions to that of a "reasonable degree of ballistics certainty" or a "reasonable degree of certainty in the ballistics field."); *Diaz*, 2007 WL 485967 at *1 (same).

With respect to Mr. Harris's stated concerns, the Government has already agreed to a number of limitations on Mr. Monturo's testimony, chief among them that he will not use terms such as "match," he will "not state his expert opinion with any level of statistical certainty," and he will not use the phrases when giving his opinion of "to the exclusion of all other firearms" or "to a reasonable degree of scientific certainty." Govt. Opp'n at 12. These limitations are in accord with the Department of Justice Uniform Language for Testimony and Reports for the Forensic Firearms/Toolmarks Discipline—Pattern Matching Examination. *See* Govt. Opp'n, Ex. 4 ("DOJ ULTR"), ECF No. 28-4. The DOJ ULTR permits firearms examiners to conclude that casings were fired from the same firearm when all class characteristics are in agreement, and "the quality and quantity of corresponding individual characteristics is such that the examiner

would not expect to find that same combination of individual characteristics repeated in another source and has found insufficient disagreement of individual characteristics to conclude they originated from different sources." *Id.* at 2–3. This Court believes, as other courts have also concluded, *see Hunt,* 2020 WL 2842844, at *8, that the testimony limitations as codified in the DOJ ULTR are reasonable and should govern the testimony at issue here. Accordingly, the Court instructs Mr. Monturo to abide by the expert testimony limitations detailed in the DOJ ULTR.

## III. CONCLUSION

For the foregoing reasons, Defendant's Motion to Exclude Expert Testimony as to Firearm Examination Testing, ECF No. 22, is DENIED. An order consistent with this Memorandum Opinion is separately and contemporaneously issued.

Dated: November 4, 2020

RUDOLPH CONTRERAS
United States District Judge

2020 WL 2842844
United States District Court, W.D. Oklahoma.

UNITED STATES of America, Plaintiff,
v.
Dominic Eugene HUNT, Defendant.

Case No. CR-19-073-R
|
Signed 06/01/2020

**Synopsis**

**Background:** Defendant was charged with being a felon in possession of ammunition. Defendant moved in limine to exclude ballistic evidence, or alternatively, for *Daubert* hearing.

**Holdings:** The District Court, David L. Russell, Senior District Judge, held that:

[1] expert testimony derived from Association of Firearms and Toolmark Examiners (AFTE) methodology was reliable and therefore admissible;

[2] experts reliably applied AFTE method;

[3] formal *Daubert* hearing in advance of qualifying expert was not required; and

[4] experts could testify that their conclusions were reached to reasonable degree of ballistic certainty.

Motion denied.

**Procedural Posture(s):** Pre-Trial Hearing Motion.

West Headnotes (13)

**[1] Criminal Law** Subjects of Expert Testimony

When it comes to the admissibility of expert evidence, a district court maintains the role of gatekeeper. Fed. R. Evid. 702.

**[2] Criminal Law** Knowledge, Experience, and Skill

**Criminal Law** Necessity and sufficiency

A court assesses proffered expert testimony to ensure it is both relevant and reliable; to do this, the court generally first determines whether the expert is qualified, and if the expert is sufficiently qualified, the court then determines whether the expert's opinion is reliable. Fed. R. Evid. 702.

**[3] Criminal Law** Hearing, ruling, and objections

When faced with a party's objection to proffered expert testimony, a court must adequately demonstrate by specific findings on the record that it has performed its duty as gatekeeper, although it has discretion in how it performs its gatekeeping function. Fed. R. Evid. 702.

**[4] Criminal Law** Preliminary evidence as to competency

The proponent of expert testimony bears the burden of showing that its proffered expert's testimony is admissible. Fed. R. Evid. 702.

**[5] Criminal Law** Necessity and sufficiency

A court assesses the reasoning and methodology underlying the expert's opinion to determine reliability. Fed. R. Evid. 702.

**[6] Criminal Law** Necessity and sufficiency

The proponent has to show a court only that its expert opinion is reliable, not that it is substantively correct, because the reliability standard is lower than the merits standard of correctness.

**[7] Criminal Law** Necessity and sufficiency

The reliability inquiry for expert testimony is specific to the case and facts: no one factor is dispositive or always applicable, and the goal

  

remains ensuring that an expert employs the same level of intellectual rigor in the courtroom that characterizes the practice of an expert in the relevant field. Fed. R. Evid. 702.

[8] **Criminal Law** Identification of persons, things, or substances

Expert testimony derived from Association of Firearms and Toolmark Examiners (AFTE) methodology was reliable and therefore admissible in defendant's trial on felon in possession charges; although AFTE's processes were subjective and some peer review was unfavorable, method had been tested, it had been reviewed by peers and subject to publication, it had been found to have potential low rate of error, and it had been widely accepted in relevant community. Fed. R. Evid. 702.

[9] **Criminal Law** Necessity and sufficiency

*Daubert* does not mandate a technique, such as a black-box study, to satisfy its error rate element.

[10] **Criminal Law** Identification of persons, things, or substances

Experts reliably applied Association of Firearms and Toolmark Examiners (AFTE) method, as required for expert testimony to be admissible in defendant's trial on felon in possession charges, where experts wrote detailed reports explaining their analysis, those reports were reviewed by other examiners in field, experts' examination reports detailed what case-specific facts of which they were aware when drawing their conclusions, and they demonstrated their experience, certifications, and continued training. Fed. R. Evid. 702(d).

[11] **Criminal Law** Hearing, ruling, and objections

Formal *Daubert* hearing in advance of qualifying expert on Association of Firearms and Toolmark Examiners (AFTE) method was not required for expert testimony to be admissible in defendant's trial on felon in possession charges, since reliability of government's expert testimony was sufficiently addressed on the briefs. Fed. R. Evid. 702.

[12] **Criminal Law** Hearing, ruling, and objections

A court is not required to hold a formal *Daubert* hearing in advance of qualifying an expert. Fed. R. Evid. 702.

[13] **Criminal Law** Identification of persons, things, or substances

In defendant's trial on felon in possession charges, experts on Association of Firearms and Toolmark Examiners (AFTE) method could testify that their conclusions were reached to reasonable degree of ballistic certainty, reasonable degree of certainty in field of firearm toolmark identification, or any other version of that standard, but they could not assert that two toolmarks originated from same source to exclusion of all other sources, assert that examinations conducted in forensic firearms-toolmarks discipline were infallible or had zero error rate, provide conclusion that included statistic or numerical degree of probability except when based on relevant and appropriate data, or cite number of examinations conducted in forensic firearms-toolmarks discipline performed in his or her career as direct measure for accuracy of proffered conclusion. Fed. R. Evid. 702.

1 Cases that cite this headnote

**Attorneys and Law Firms**

Jacquelyn M. Hutzell, US Attorney's Office, Oklahoma City, OK, for Plaintiff.

  

**ORDER**

DAVID L. RUSSELL, UNITED STATES DISTRICT JUDGE

***1** Before the Court is Defendant Dominic Hunt's Motion in Limine to Exclude Ballistic Evidence, or Alternatively, for a *Daubert* Hearing. Doc. No. 67. The Government has responded in opposition to the motion. Doc. No. 81. Upon review of the parties' submissions, the Court denies Defendant's motion.

**I. Background**

On November 6, 2019, a federal grand jury returned a nine-count, third superseding indictment charging Defendant with, as relevant here, two counts of being a felon in possession of ammunition. Doc. No. 41. The two counts—Counts Eight and Nine—stem from two shootings: One in January of 2019 and another in February of 2019. *Id.* During the Oklahoma Police Department's (OCPD) investigation at the scene of the first shooting, officers found a Blazer 9mm Luger cartridge casing—the basis for Count Eight. *Id.* at 5–6. During the OCPD's investigation at the scene of the second shooting, officers found a Blazer 9mm Luger cartridge casing and two Winchester 9mm Luger cartridge casings—the basis for Count Nine. *Id.* at 6. Ronald Jones, a firearm and toolmark examiner for the OCPD, examined the casings and concluded that all four casings were likely fired from the same unknown firearm, potentially a Smith & Wesson 9mm Luger caliber pistol. Doc. Nos. 81–1, 81–2. Howard Kong, a firearm and toolmark examiner for the Bureau of Alcohol, Tobacco, Firearms and Explosives' (ATF) Forensic Science Laboratory, found the same. Doc. No. 81–4. The Government anticipates calling Mr. Jones and Mr. Kong at trial to "testify regarding their training, experience, and qualifications, the basis for firearms identification, their methods of examination in this case, their findings, and the basis for those findings." Doc. No. 81, pp. 4–5. Specifically, the Government intends its experts to testify that:

> (1) the ammunition charged in Count Eight was not fired from the Springfield Armory 9mm Luger caliber pistol [the Defendant's brother] had on March 11, 2019; (2) the ammunition charged in Count Eight was not fired from the Smith & Wesson .40 caliber pistol [the Defendant's cousin] was convicted of possessing on January 20, 2019; (3) the probability the ammunition charged in Count Nine were fired in different firearms is so small it is negligible; (4) the ammunition charged in Count Nine was not fired from [the] Smith & Wesson .40 caliber pistol ...; (5) the probability the ammunition charged in Counts Eight and Nine were fired in different firearms is so small it is negligible; and (6) the unknown firearm was likely a Smith & Wesson 9mm Luger caliber pistol.

*Id.* Defendant now moves to exclude the testimony of Mr. Jones and Mr. Kong, or alternatively, for a *Daubert* hearing. Doc. No. 67.

**II. Legal Standard**

**[1]** **[2]** **[3]** **[4]** When it comes to the admissibility of expert evidence, district courts maintain the role of gatekeeper. *Bitler v. A.O. Smith Corp.*, 400 F.3d 1227, 1232 (10th Cir. 2005). In that role, district courts must adhere to Federal Rule of Evidence 702, which demands that courts "assess proffered expert testimony to ensure it is both relevant and reliable." *United States v. Avitia-Guillen*, 680 F.3d 1253, 1256 (10th Cir. 2012). To do this, "the district court generally must first determine whether the expert is qualified ...." *United States v. Nacchio*, 555 F.3d 1234, 1241 (10th Cir. 2009) (en banc). If the expert is sufficiently qualified, then "the court must determine whether the expert's opinion is reliable ...." *Id.* "Although a district court has discretion in how it performs its gatekeeping function, 'when faced with a party's objection, [the court] must adequately demonstrate by specific findings on the record that it has performed its duty as gatekeeper.' " *Avitia-Guillen*, 680 F.3d at 1257 (quoting *Goebel v. Denver & Rio Grande W. R.R. Co.*, 215 F.3d 1083, 1088 (10th Cir. 2000)). "The proponent of expert testimony bears the burden of showing that its proffered expert's testimony is admissible." *Nacchio*, 555 F.3d at 1241.

  

***2** Here, Defendant Hunt does not object to the relevancy of the experts' testimony nor to the experts' qualifications. Defendant objects only to the reliability of the experts' testimony. Doc. No. 67, pp. 11–18. Therefore, the Court need only address whether the experts' testimony is reliable. *See Avitia-Guillen*, 680 F.3d at 1257.

**[5]** **[6]** **[7]** "To determine reliability, courts assess the reasoning and methodology underlying the [experts'] opinion ...." *Thompson v. APS of Oklahoma, LLC*, No. CIV-16-1257-R, 2018 WL 4608505, at *4 (W.D. Okla. Sept. 25, 2018) (internal quotation marks and citation omitted). "The reliability standard is lower than the merits standard of correctness, and plaintiffs need only show the Court that their experts' opinions are reliable, not that they are substantively correct." *Id.* (internal quotation marks and citation omitted).

In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), the Supreme Court provided a non-exhaustive list of factors to aid in this determination:

> (1) whether the particular theory can be and has been tested; (2) whether the theory has been subjected to peer review and publication; (3) the known or potential rate of error; (4) the existence and maintenance of standards controlling the technique's operation; and (5) whether the technique has achieved general acceptance in the relevant scientific or expert community.

*United States v. Baines*, 573 F.3d 979, 985 (10th Cir. 2009) (citing *Daubert*, 509 U.S. at 592–94, 113 S.Ct. 2786). [1] The reliability inquiry, however, is fact- and case-specific: no one factor is dispositive or always applicable, and the goal remains "ensuring that an expert 'employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.' " *Bitler*, 400 F.3d at 1233 (quoting *Kumho Tire Co.* v. Carmichael, 526 U.S. 137, 152, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999)).

**III. Firearm Toolmark Identification**

In his motion, Defendant challenges the Governments use of firearm toolmark identification. "Forensic toolmark identification is a discipline that is concerned with the matching of a toolmark to the specific tool that made it. Firearm identification is a specialized area of toolmark identification dealing with firearms, which involve a specific category of tools." *United States v. McCluskey*, No. 10-2734, 2013 WL 12335325, at *3 (D.N.M. Feb. 7, 2013) (citation omitted). "Toolmark identification is based on the theory that tools used in the manufacture of a firearm leave distinct marks on various firearm components, such as the barrel, breech face, or firing pins ... [and] that the marks are individualized to a particular firearm through changes the tool undergoes each time it cuts and scrapes metal to create an item in the production of the weapon." *Id.* at *4. The field of firearm toolmark examination is based on the theory that some of these markings will be transferred to a bullet fired from the gun. *Id.* In conducting a firearm toolmark examination, a firearms examiner observes three types of characteristics:

***3** (1) Class characteristics: i.e., the weight or caliber of the bullet, the number of lands and grooves, the twist of the lands and grooves, and the width of the lands and grooves, that appear on all bullet casings fired from the same type of weapon and are predetermined by the gun manufacturer;

(2) Individual characteristics: unique, microscopic, random imperfections in the barrel or firing mechanism created by the manufacturing process and/or damage to the gun post-manufacture, such as striated and/or impressed marks, unique to single gun; and

(3) Subclass characteristics: characteristics that exist, for example, within a particular batch of firearms due to imperfections in the manufacturing tool that persist during the manufacture of multiple firearm components mass-produced at the same time.

*Ricks v. Pauch*, No. 17-12784, 2020 WL 1491750, at *8–9 (E.D. Mich., 2020). Pursuant to the theory used by the Government's experts in this case—the Association of Firearms and Toolmark Examiners (AFTE) method—"a qualified examiner can determine whether two bullets were fired by the same gun by comparatively examining bullets and determining whether 'sufficient agreement' of toolmarks exist," meaning that there is significant similarity in the individual markings found on each bullet. *Id.* at *9.

  

## IV. *Daubert* Analysis

**[8]** The use of this type of firearm toolmark identification in criminal trials is "hardly novel." *United States v. Taylor*, 663 F. Supp. 2d 1170, 1175 (D.N.M. 2009). "For decades ... admission of the type of firearm identification testimony challenged by the defendant[ ] has been semi-automatic ...." *United States v. Monteiro*, 407 F. Supp. 2d 351, 364 (D. Mass. 2006); *see also, e.g.*, *United States v. Hicks*, 389 F.3d 514 (5th Cir. 2004); *United States v. Johnson*, 875 F.3d 1265, 1281 (9th Cir. 2017). Indeed, no federal court has deemed such evidence wholly inadmissible. *See United States v. Romero-Lobato*, 379 F. Supp. 3d 1111, 1117 (D. Nev. 2019). Having been routinely admitted, "[c]ourts [are] understandably ... gun shy about questioning the reliability of [such] evidence," *Monteiro*, 407 F.Supp.2d at 364. However, because of the seriousness of the criticisms launched against the methodology underlying firearms identification by Defendant in this case, the Court will carefully assess the reliability of this methodology, using *Daubert* as a guide. *See, e.g.*, *Taylor*, 663 F. Supp. 2d at 1176. [2]

The first *Daubert* factor asks whether the experts' particular theory can be and has been tested. *Daubert*, 509 U.S. at 592–94, 113 S.Ct. 2786. Defendant argues—without citation—that the theory of firearm toolmark identification rests on an assumption that has not been properly tested. Doc. No. 67, pp. 13–14. The Government responds that its experts' testimony is based upon the theory and methodology developed by the Association of Firearms and Toolmark Examiners (AFTE), and that this theory has been well tested. Doc. No. 81, pp. 15–16. The Court agrees.

***4** Put simply, the theory of firearm toolmark identification can be and has been tested. *See, e.g.*, The Association of Firearm and Tool Mark Examiners, *Testability of the Scientific Principle* (last visited May 14, 2020), https://tinyurl.com/yal3ja4t (collecting studies). This conclusion is supported by other courts within the Tenth Circuit that have already addressed the issue at length, *see, e.g.*, *United States v. Taylor*, 663 F. Supp. 2d 1170, 1176 (D.N.M. 2009) ("[T]he methods underlying firearms identification can, at least to some degree, be tested and reproduced"), in addition to a number of other courts outside the Circuit, *see, e.g., Romero-Lobato*, 379 F. Supp. 3d at 1118–19 (collecting cases where "federal courts have held that the AFTE method can be and has been frequently tested" and holding the same). Accordingly, this first *Daubert* factor weighs in favor of admissibility.

The second *Daubert* factor asks whether the technique has been subjected to peer review and publication. *Daubert*, 509 U.S. at 593–94, 113 S.Ct. 2786. Defendant argues that there have not been enough studies done of firearm toolmark identification, and that the studies available have not been subject to peer review. Doc. No. 67, p. 14. The Government contends that analysis recently provided by federal courts tells a different story. The Court agrees.

In evaluating whether AFTE's method of firearm toolmark identification satisfies the second *Daubert* factor, the United States District Court for the District of Nevada recently found that:

> AFTE publishes its own journal, the appropriately named *ATFE Journal*, which is subject to peer review. According to AFTE's website, the *AFTE Journal*, "is dedicated to the sharing of information, techniques, and procedures," and the papers published within "are reviewed for scientific validity, logical reasoning, and sound methodology." [*What is the Journal?*, The Association of Firearm and Tool Mark Examiners, https://afte.org/afte-journal/what-is-the-journal (last visited May 1, 2019) ]. Several published federal decisions have also commented on the *AFTE Journal*, with all finding that it meets the *Daubert* peer review element. *See U.S. v. Ashburn*, 88 F.Supp.3d 239, 245–46 (E.D.N.Y. 2015) (finding that the AFTE method has been subjected to peer review through the *AFTE Journal*); *U.S. v. Otero*, 849 F.Supp.2d 425, 433 (D.N.J. 2012) (describing the *AFTE Journal*'s peer reviewing process and finding that the methodology has been subjected to peer review); *U.S. v. Taylor*, 663 F.Supp.2d 1170, 1176 (D.N.M. 2009) (finding that the *AFTE* method has been subjected to peer review through the *AFTE Journal* and two articles submitted by the government in a peer-reviewed journal about the methodology); *U.S. v. Monteiro*, 407 F.Supp.2d 351, 366–67 (D. Mass. 2006) (describing the *AFTE Journal*'s peer reviewing process and finding that it meets the *Daubert* peer review element).

> And of course, the NAS and PCAST Reports themselves constitute peer review despite the unfavorable view the two reports have of the AFTE method.

*Romero-Lobato*, 379 F. Supp. 3d at 1119. The second *Daubert* factor thus weighs in favor of admissibility.

Defendant suggests that the studies mentioned above are insufficient because they were not "black-box" studies.[3] Doc. No. 67, p. 14. Defendant then cites the PCAST Report, arguing that there has been only one black-box study on firearms identification and that this one study has never been subject to peer review. *Id.* The PCAST Report cited by Defendant "rejected studies that it did not consider to be blind, such as where the examiners knew that a bullet or spent casing matched one of the barrels included with the test kit...." However, "The PCAST Report did not reach a conclusion as to whether the AFTE method was reliable or not because there was only one study available that met its criteria." *Id.* The Court does not similarly restrict its judicial review to techniques tested through black-box studies. The Court does, however, approve of the PCAST Report's ultimate conclusion: "[W]hether firearms analysis should be deemed admissible based on the 'current evidence' is a decision that should be left to the courts." *Id.*

***5** The third *Daubert* factor asks whether the technique has a known or potential rate of error. *Daubert*, 509 U.S. at 594, 113 S.Ct. 2786. Defendant contends that because there is only one black-box study, there is not enough information available to determine a known or potential rate of error in the field of firearm toolmark identification. Doc. No. 67, p. 14. The Government objects, citing federal cases discussing studies that evidence a low rate of error in firearms analysis. Doc. No. 81, pp. 17–18. Again, the Court agrees with the Government.

**[9]** As noted above, the Court declines Defendant's invitation to restrict judicial review to techniques tested through black-box studies. "*Daubert* does not mandate such a prerequisite for a technique to satisfy its error rate element." *Romero-Lobato*, 379 F. Supp. 3d at 1120. Still, the Government bears the burden to demonstrate that its experts' methodology is reliable. *See* *Nacchio*, 555 F.3d at 1241. To that end, the Government cites federal cases that discuss a number of studies which report a low error rate for the AFTE method. Doc. No. 81, p. 17 (citing *Romero-Lobato*, 379 F. Supp 3d at 1117–18 and *United States v. Otero*, 849 F. Supp. 2d 425, 433–34 (D.N.J. 2012)). Those cases discuss, for example, a Miami-Dade Study that reported a potential error rate of less than 1.2% and an error rate by the participants of 0.07%, in addition to an Ames Study that reported a false positive rate of 1.52%. *Id.*

Other federal courts examining the AFTE method's rate of error have likewise found it to be low. *See, e.g., v.* *Ashburn*, 88 F. Supp. 3d 239, 246 (E.D.N.Y. 2015) ("the error rate, to the extent it can be measured, appears to be low, weighing in favor of admission"); *United States v. Taylor*, 663 F. Supp. 2d 1170, 1177 (D.N.M. 2009) ("this number [less than 1%] suggests that the error rate is quite low"). Even courts that have found it impossible to calculate an absolute error rate for firearm toolmark identification, have ultimately concluded that the known error rate is not "unacceptably high." *United States v. Monteiro*, 407 F. Supp. 2d 351, 367–68 (D. Mass. 2006). Defendant does not introduce any contradictory studies. *See* Doc. No. 67, p. 14. Based on the record before the Court, this third *Daubert* factor weighs in favor of admissibility.

The fourth *Daubert* factor asks whether there are standards that control the technique's operation. *Daubert*, 509 U.S. at , 113 S.Ct. 2786594. Defendant argues that there are no uniform standards controlling the AFTE method of firearm toolmark identification, and that instead, the AFTE method is based on subjective methodology. Doc. No. 67, p. 14. The Government argues that this subjectivity does not weigh against admissibility under the fourth *Daubert* factor. Doc. No. 81, p. 18. The Court disagrees.

A main criticism of the AFTE method is that firearm examiners do not reach their conclusions through objective criteria. *See* *Romero-Lobato*, 379 F. Supp. 3d at 1120-121. Instead, examiners use a high-powered microscope, in conjunction with their experience and training, to determine if there is "sufficient agreement" between the "unique surface contours" of two firearm toolmarks. *AFTE Theory of Identification*, The Association of Firearm and Tool Mark Examiners, *available at* https://afte.org/about-us/what-is-afte/afte-theory-of-identification (last visited May 14, 2020). "The statement that "sufficient agreement" exists between two toolmarks means that the agreement of individual characteristics is of a quantity and quality that the likelihood

  

another tool could have made the mark is so remote as to be considered a practical impossibility."[4] *Id.* Ultimately, the AFTE itself recognizes that their method is "is subjective in nature." *Id.* So too have other courts. *See Romero-Lobato*, 379 F. Supp. 3d at 1121 (collecting cases). This fourth factor, unlike the previous three, weighs against admissibility.

***6** The fifth and final *Daubert* factor asks whether the theory or technique enjoys general acceptance within the relevant community. *Daubert*, 509 U.S. at 594, 113 S.Ct. 2786. Defendant argues that the limitations of firearm toolmark identification is recent and growing, and that because courts have not seriously considered all aspects of the field or tested its reliability since the PCAST Report was published, the fifth *Daubert* factor is not satisfied here. Doc. No. 67, p. 15. The Government responds arguing that nearly every court to have addressed the issue has found that the AFTE method enjoys general acceptance within the relevant community—both before and after publication of the PCAST Report. Doc. No. 81, p. 19. The Court agrees.

The AFTE method easily satisfies this final factor. *See Romero-Lobato*, 379 F. Supp. 3d at 1122 (collecting cases finding the AFTE theory to be widely accepted in the relevant community and finding the same). In fact, the AFTE method used by the Government's experts here, is "the field's established standard." *See Ashburn*, 88 F. Supp. 3d at 246. That the NAS and PCAST Reports criticize the method does not undermine the Court's conclusion. "Techniques do not need to have universal acceptance before they are allowed to be presented before a court." *Romero-Lobato*, 379 F. Supp. 3d at 1122 (citing *Daubert*, 509 U.S. at 588–99, 113 S.Ct. 2786). Accordingly, this factor weighs in favor of admissibility.

Balancing the *Daubert* factors, the Court finds that the Government's expert testimony, derived from the AFTE methodology, is reliable and therefore admissible—though subject to the limitations discussed below. The only factor that weighs against admissibility is the fourth *Daubert* factor, which highlights the AFTE's subjective processes. But, "the subjectivity of a methodology is not fatal under Rule 702 and *Daubert*." *United States v. Ashburn*, 88 F. Supp. 3d 239, 246 (E.D.N.Y. 2015). By its terms, Federal Rule of Evidence 702 permits an expert with sufficient knowledge, experience, or training to testify about a particular subject matter. *See* Fed. R. Evid. 702; *Romero-Lobato*, 379 F. Supp. 3d at 1120. *Daubert* does not impose a rigid requirement that the expert reach a conclusion through an entirely objective set of criteria. *See Daubert*, 509 U.S. at 594–595, 113 S.Ct. 2786. Here, the lack of objective criteria is overcome by the Government's introduction of evidence demonstrating that the method has been tested, reviewed by peers and subject to publication, found to have a potential low rate of error, and widely accepted in the relevant community. Moreover, Defendant has not cited a single case where a federal court has completely prohibited firearms toolmark identification testimony under *Daubert.*

## V. Federal Rules of Evidence 702(d)

**[10]** Next, Defendant argues that even if the expert testimony is admissible under *Daubert*, the Government has not met its burden under Rule 702(d) to show that its experts reliably applied the AFTE method in this case. Under that Rule:

> 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:
>
> ...
>
> (d) the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702(d). Here, Defendant makes four specific objections. He argues that the Government has not complied with Rule 702(d) because its experts failed to document the basis for their findings, that a second examiner did not verify or review the experts' work, and that the experts failed to comply with two "validity" requirements discussed by the PCAST Report. Doc. No. 67, p. 17. The Government denies the validity of each objection. Doc. No. 81, pp. 21–23.

***7** First, as the Government demonstrates, both Mr. Jones and Mr. Kong wrote detailed reports explaining their analysis. Doc. Nos. 81–9, 81–10. Second, those reports were reviewed by other examiners in the field. Doc. Nos. 81–1, 81–2, 81–3, 81–4. Finally, the two validity requirements discussed by the PCAST Report—that experts must provide evidence demonstrating their rigorous proficiency testing, in addition to whether they were aware of any facts of the case that might influence their conclusion—are not required under Rule 702(d). Nevertheless, the Government has presented evidence demonstrating the experience, certifications, and

  

continued training of both experts. *See* Doc. Nos. 81–6, 81–7, 81–8; *cf.* Doc. No. 81–5. And both experts' examination reports detail what case-specific facts they were aware of when drawing their conclusions. *See* Doc. Nos. 81–1, 81–2. Accordingly, the Court finds that Defendant's objections are without merit.

## VI. *Daubert* Hearing

**[11]** **[12]** As an alternative, Defendant requests a *Daubert* hearing to require the Government to prove that Mr. Jones's and Mr. Kong's testimony will be reliable before admitting their testimony. Doc. No. 17. Again, the Government objects. Doc. No. 81, pp. 24–25. Nothing requires the Court to hold a formal *Daubert* hearing in advance of qualifying an expert. *See* *Goebel v. Denver and Rio Grande Western RR Co.*, 215 F.3d 1083, 1087 (10th Cir. 2000); *see also* *Kumho Tire*, 526 U.S. at 152, 119 S.Ct. 1167 ("The trial court must have the ... latitude ... to decide whether or when special briefing or other proceedings are needed to investigate reliability"). Considering the parties' briefing, in addition to the *Daubert* and Rule 702 analysis above, the Court finds it unnecessary to conduct such a proceeding here. *See, e.g.*, *Ashburn*, 88 F. Supp. 3d at 244 (finding *Daubert* hearing unnecessary). The reliability of the Government's expert testimony has been sufficiently addressed on the briefs. *See* *Goebel*, 215 F.3d at 1087 (noting that a *Daubert* hearing "is not mandated" and that a district court may "satisfy its gatekeeper role when asked to rule on a motion in limine").

## VII. Expert Testimony Limitations

**[13]** In his penultimate argument, Defendant asks the Court to place limitations on the Government's firearm toolmark experts because the jury will be unduly swayed by the experts if not made aware of the limitations on their methodology. Doc. No. 67, p. 18. The Government responds that no limitation is necessary because Department of Justice guidance sufficiently limits a firearm examiner's testimony. Doc. No. 81, pp. 23–24.

Some federal courts have imposed limitations on firearm and toolmark expert testimony. *See, e.g.*, *Ashburn*, 88 F. Supp. 3d at 249. However, many courts have continued to allow unfettered testimony. *See, e.g.*, *Romero-Lobato*, 379 F. Supp. 3d at 1117.

> The general consensus is that firearm examiners should not testify that their conclusions are infallible or not subject to any rate of error, nor should they arbitrarily give a statistical probability for the accuracy of their conclusions. Several courts have also prohibited a firearm examiner from asserting that a particular bullet or shell casing could only have been discharged from a particular gun to the exclusion of all other guns in the world.

*Id.* (citing David H. Kaye, *Firearm-Mark Evidence: Looking Back and Looking Ahead*, 68 Case W. Res. L. Rev. 723, 734 (2018)).

In accordance with recent guidance from the Department of Justice, *see* Doc. No. 81–11, the Government's firearm experts have already agreed to refrain from expressing their findings in terms of absolute certainty, and they will not state or imply that a particular bullet or shell casing could only have been discharged from a particular firearm to the exclusion of all other firearms in the world. Doc. No. 81, p. 24. The Government has also made clear that it will not elicit a statement that its experts' conclusions are held to a reasonable degree of scientific certainty. *Id.*

***8** The Court finds that the limitations mentioned above and prescribed by the Department of Justice are reasonable, and that the Government's experts should abide by those limitations. *See* Doc. No. 81–11, p. 3. To that end, the Governments experts:

> [S]hall not [1] assert that two toolmarks originated from the same source to the exclusion of all other sources.... [2] assert that examinations conducted in the forensic firearms/toolmarks discipline are infallible or have a zero error rate.... [3] provide a conclusion that includes a statistic

> or numerical degree of probability except when based on relevant and appropriate data.... [4] cite the number of examinations conducted in the forensic firearms/toolmarks discipline performed in his or her career as a direct measure for the accuracy of a proffered conclusion..... [5] use the expressions 'reasonable degree of scientific certainty,' 'reasonable scientific certainty,' or similar assertions of reasonable certainty in either reports or testimony unless required to do so by [the Court] or applicable law.

*Id.* As to the fifth limitation described above, the Court will permit the Government's experts to testify that their conclusions were reached to a reasonable degree of ballistic certainty, a reasonable degree of certainty in the field of firearm toolmark identification, or any other version of that standard. *See, e.g.,* *U.S. v. Ashburn*, 88 F. Supp. 3d 239, 249 (E.D.N.Y. 2015) (limiting testimony to a "reasonable degree of ballistics certainty" or a "reasonable degree of certainty in the ballistics field."); *U.S. v. Taylor*, 663 F. Supp. 2d 1170, 1180 (D.N.M. 2009) (limiting testimony to a "reasonable degree of certainty in the firearms examination field."). Accordingly, the Government's experts should not testify, for example, that "the probability the ammunition charged in Counts Eight and Nine were fired in different firearms is so small it is negligible," *see* Doc. No. 81, p. 5. To the extent Defendant wishes to question or clarify the experts' findings, he may do so through cross examination or through direct examination of his own firearm toolmark expert.

### VIII. Additional Expert Information

Defendant's final objection is to the alleged lack of information relating to Mr. Jones's expert testimony. Doc. No. 67, p. 19. Defendant claims that the Government should be required to provide "a significantly more detailed summary of what it expects Mr. Jones will testify about." *Id.* Notably, Defendant provides no support for his objection, and the Government has failed to respond in opposition. Upon review, the Court finds that the Government has provided sufficient information relating to Mr. Jones's expert testimony. *See* Doc. No. 81, pp. 4–5; Doc. Nos. 81–1, 81–6, 81–7, 81–9.

### IX. Conclusion

For the forgoing reasons, the Court denies Defendant Hunt's Motion in Limine to Exclude Ballistic Evidence, or Alternatively, for a *Daubert* Hearing, Doc. No. 67.

**IT IS SO ORDERED** this 1st day of June 2020.

**All Citations**

--- F.Supp.3d ----, 2020 WL 2842844, 112 Fed. R. Evid. Serv. 901

## Footnotes

1 *Daubert* itself was limited to scientific evidence, *see United States v. Baines*, 573 F.3d 979, 985 (10th Cir. 2009), but in *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999), the Supreme Court made clear that the gatekeeping obligation of the district courts described in *Daubert* applies, not just to scientific testimony, but to all expert testimony. *Id.* at 141, 119 S.Ct. 1167.

2 Some Courts have analyzed whether firearm toolmark identification can fairly be called "science" before evaluating the *Daubert* factors. *See* *United States v. Glynn*, 578 F. Supp. 2d 567, 570 (S.D.N.Y. 2008). The Court need not conduct such an analysis here. Though Defendant argues firearm toolmark identification is not a science, Doc. No. 67, p. 14, it is clearly "technical or specialized, and therefore within the scope of

  

Rule 702." *United States v. Willock*, 696 F. Supp. 2d 536, 571 (D. Md. 2010), *aff'd sub nom.* *United States v. Mouzone*, 687 F.3d 207 (4th Cir. 2012).

3 A black-box study is a blind study where "many examiners are presented with many independent comparison problems—typically involving 'questioned' samples and one or more 'known' samples—and asked to declare whether the questioned samples came from the same sources as one of the known samples. The researchers then determine how often examiners reach erroneous conclusions." President's Council of Advisors on Science and Technology, Exec. Office of the President, Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods, 49 (2016), available at https://tinyurl.com/j29c5ua.

4 The AFTE further details their methodology in the following manner:

> "[S]ufficient agreement" is related to the significant duplication of random toolmarks as evidence by the correspondence of a pattern or combination of patterns of surface contours. Significance is determined by the comparative examination of two or more sets of surface contour patterns comprised of individual peaks, ridges and furrows. Specifically, the relative height or depth, width, curvature and spatial relationship of the individual peaks, ridges and furrows within one set of surface contours are defined and compared to the corresponding features in the second set of surface contours. Agreement is significant when the agreement in individual characteristics exceeds the best agreement demonstrated between toolmarks known to have been produced by different tools and is consistent with agreement demonstrated by toolmarks known to have been produced by the same tool.

*AFTE Theory of Identification*, The Association of Firearm and Tool Mark Examiners, *available at* https://afte.org/about-us/what-is-afte/afte-theory-of-identification (last visited May 14, 2020).

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