

# CIVIL JUSTICE RESPONSE AND TOXIC AND HAZARDOUS SUBSTANCES LITIGATION

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## IN THIS ISSUE

*The current article is drawn from a larger analysis of the same issues, published in the Fall of 2015 in the William & Mary Law Review. 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).*

## It is Time to Amend Federal Rule of Evidence 702

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In 2000, the Federal Judicial Conference amended Federal Rule of Evidence 702 governing the standards of admissibility of expert testimony in federal courts. While the 2000 Amendments are commonly characterized as “codifying” the standards set forth by the United States Supreme Court in the *Daubert* trilogy, the Advisory Committee Notes to the rule change and drafting history demonstrate that the Judicial Conference had the further objective of resolving a debate that had emerged in the lower courts as to their *Daubert* gatekeeping responsibility. As the Advisory Committee Reporter, Professor Dan Capra, explained, in the first six years after the *Daubert* ruling in 1993:

[C]ourts have divided over how to even approach a *Daubert* question. Some courts seem to approach *Daubert* as a rigorous exercise requiring trial courts to scrutinize, in detail, the expert’s basis, methods, and application. Other courts seem to think that all *Daubert* requires is that the trial court assures itself that the expert’s opinion is something more than mere unfounded speculation – all possible defects go to the jury.<sup>1</sup>

Through the 2000 Amendments, the Advisory Committee sought to end this

debate and “provide uniformity in the approach to *Daubert* questions” by coming down squarely on the side of “a more rigorous and structured approach than some courts were currently employing.”<sup>2</sup>

Fifteen years have passed, and it is now apparent that the 2000 Amendments to Rule 702 have only been partially successful in achieving this goal. Although many courts have faithfully applied amended Rule 702, the same divisions that existed in the courts prior to 2000 continue to exist today – and on the very same issues that the Judicial Conference sought to resolve. It is not terribly surprising that some judges have continued to resist the revolutionary change in the way federal district courts address the admissibility of expert testimony. Rule 702, as amended, not only codified fundamental changes in the substantive law of expert testimony, but it also placed substantial new demands on judges by requiring them to take a far more managerial role over expert witnesses and serve as gatekeepers against unreliable testimony. Although the language of the 2000 amendments appeared sufficient at the time to rein in recalcitrant judges who had tried to evade the *Daubert* trilogy’s exacting admissibility standards, with the benefit of hindsight, it is now clear that the Judicial Conference failed to account for the tenacity of those who prefer

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<sup>1</sup> See March 1, 1999 Memorandum from Dan Capra, Reporter, to Advisory Committee on Evidence Rules, at 47-48 (hereinafter “Mar. 1, 1999 Memorandum”), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Evidence/EV1999-04.pdf>.

<sup>2</sup> *Id.* at 48; see also May 1, 1999 Report of the Advisory Committee on Evidence Rules to the Standing Committee on Rules of Practice and Procedure, at 7, available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/EV05-1999.pdf>.

the pre-*Daubert* approach to expert testimony.

The fractured response to the amendments to Rule 702 is not unique. The federal judiciary experienced a similar rocky transition following amendments to Rule 26 of the Federal Rules of Civil Procedure in 1983, 1993 and 2000, by which the Judicial Conference had sought to control the problem of expensive over-discovery and codify a requirement of proportionality so as to encourage trial courts to be more aggressive in identifying and discouraging discovery abuses.<sup>3</sup> These difficulties resulted in a renewed effort to refine the Rule's language reaching fruition this past year in a subsequent round of amendments to Rule 26.<sup>4</sup>

A similar effort is needed for Federal Rule of Evidence Rule 702.

### **I. The Problem: Federal Courts Are Ignoring Rule 702 and the Express Objectives of the 2000 Amendments**

During the past fifteen years, a number of courts have simply ignored the Rule 702

amendment, relying instead on *Daubert* case law prior to the amendment or even on case law prior to *Daubert* itself. For example, in *Liquid Dynamics Corp. v. Vaughan Corp.*, 449 F.3d 1209 (Fed. Cir. 2006), the Court never so much as mentioned Rule 702 in relying instead on a 1986 Eighth Circuit opinion for the proposition that inadequacies in expert testimony are a matter of weight, not admissibility.<sup>5</sup> In *Johnson v. Mead Johnson & Co.*, 754 F.3d 557 (8th Cir. 2014), *cert denied*, 135 S. Ct.489 (2014). the court reached back through a sequential series of case citations to a 1991 opinion to support its incorrect conclusion that Rule 702 reflects an attempt to *liberalize* the rules governing the admissibility of expert testimony.<sup>6</sup> Likewise, in *Milward v. Acuity Specialty Products Group, Inc.*, 639 F.3d 11, 22 (1st Cir. 2011), the court took a two-step jump back to a 1986 opinion for the proposition that "weak" expert testimony should be admitted for jury consideration.<sup>7</sup>

Many other courts, moreover, have blatantly misconstrued the language of Rule 702 and ignored statements in the 2000 Advisory Committee notes explaining the Rule's intended meaning. For example, the 2000

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<sup>3</sup> Fed. R. Civ. Proc. 26 advisory committee's notes to 2015 amendment (detailing changes required to effectuate objectives of 1983, 1993 and 2000 amendments).

<sup>4</sup> See Lawyers for Civil Justice, *The 2015 Discovery Amendments*, available at <http://www.lfcj.com/the-2015-discovery-amendments.html>

<sup>5</sup> *Id.* at 1221 (citing *Wilmington v. J.I. Case Co.*, 793 F.2d 909, 920 (8th Cir. 1986)).

<sup>6</sup> *Johnson* cited to *Lauzon v. Senco Products, Inc.*, 270 F.3d 681, 686 (8th Cir. 2001), which in turn cited to

*Weisgram v. Marley Co.*, 169 F.3d 514, 523 (8th Cir. 1999), *aff'd on different grounds*, 528 U.S. 440 (2000), which in turn cited to *Arcoren v. United States*, 929 F.2d 1235, 1239 (8th Cir. 1991).

<sup>7</sup> *Id.* (quoting *United States v. Vargas*, 471 F.3d 255, 264 (1st Cir. 2006) (citing *Int'l Adhesive Coating, Co. v. Bolton Emerson Int'l*, 851 F.2d 540, 545 (1st Cir. 1988)).

Advisory Committee notes state that “[t]he amendment [to Rule 702] 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.”<sup>8</sup> The Advisory Committee further emphasized that “any step that renders the analysis unreliable ... renders the expert’s testimony inadmissible,” citing to the Third Circuit’s opinion in *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 745 (3d Cir. 1994). But in *City of Pamona v. SQM North America Corp.*, 750 F.3d 1036, 1047-48 (9th Cir. 2014), *cert. denied*, 135 S.Ct. 870 (2014), the Ninth Circuit held squarely to the contrary on both points, concluding that (1) “only a faulty methodology or theory, as opposed to imperfect execution of laboratory techniques, is a valid basis to exclude expert testimony,” and (2) that the “any steps” analysis in *Paoli* was inconsistent with the admissibility standard in that circuit. Numerous other federal courts have likewise improperly held that a district court may not consider a faulty application of an expert methodology in the admissibility decision.<sup>9</sup>

Numerous courts likewise have failed to follow the intent of amended Rule 702 on the question whether an expert’s testimony must be based upon facts that reliably support his opinion. The history of the amendments to Rule 702 indicate that the drafters believed that this requirement was established through the interplay of the amended Rules 702(c), 702(d) and 703, with Professor Capra explaining “it is hard to see what kind of unreliable basis of information might slip through the cracks.”<sup>10</sup> This belief led the drafters to focus in the language of amended Rule 702(b) on the quantitative question whether expert testimony “is based on *sufficient* facts or data.”<sup>11</sup> Fifteen years later, it is clear that this drafting decision was a mistake. While cases from the Second, Third, and Sixth Circuits properly recognize that Rule 702 requires trial courts to analyze the facts underlying expert testimony,<sup>12</sup> decisions from other circuit courts have abdicated this gatekeeping responsibility under Rule 702, mistakenly holding that “the factual basis of an expert opinion goes to the credibility of the testimony, not the admissibility”<sup>13</sup> and “[t]he

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<sup>8</sup> Fed. R. Evid. 702 advisory committee’s note to 2000 amendments.

<sup>9</sup> See *United States v. Gipson*, 383 F.3d 689, 696 (8th Cir. 2004); *Quiet Tech. DC-8, Inc. v. Hurel-Dubois UK Ltd.*, 326 F.3d 1333, 1343-46 (11th Cir. 2003); *Walker v. Gordon*, 46 F. App’x 691, 696 (3d Cir. 2002); *United States v. Shea*, 211 F.3d 658, 668 (1st Cir. 2000); see also *United States v. McCluskey*, 954 F. Supp. 2d 1224, 1247-48 (D.N.M. 2013) (noting split of judicial authority, but concluding that “[w]ell-reasoned caselaw holds that a court should not review the

application of a reliable methodology under the same *Daubert* analysis as the methodology itself”).

<sup>10</sup> Mar. 1, 1999 Memorandum, *supra* note 1, at 31.

<sup>11</sup> Fed. R. Evid. 702(b) (emphasis added).

<sup>12</sup> See *ZF Meritor, LLC v. Eaton Corp.*, 696 F.3d 254, 294 (3d Cir. 2012); *Amorgianos v. Nat’l R.R. Passenger Corp.*, 303 F.3d 256, 267 (2d Cir. 2002); *Kalamazoo River Study Grp. v. Rockwell Int’l Corp.*, 171 F.3d 1065, 1072 (6th Cir. 1999).

<sup>13</sup> *Bonner v. ISP Techs., Inc.*, 259 F.3d 924, 929 (8th Cir. 2001); see also *Milward*, 639 F.3d 11, 22 (“[t]he soundness of the factual underpinnings of the

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."<sup>14</sup>

Similarly, a number of courts have failed to heed the Advisory Committee's decision to amend Rule 702 so as to mandate "a rigorous exercise requiring the trial court to scrutinize, in detail, the expert's basis, methods, and application."<sup>15</sup> The most notable example here is the *Milward* decision, in which the First Circuit endorsed an expert's self-proclaimed "weight of the evidence" analysis<sup>16</sup> – in direct contrast to the United States Supreme Court 8-1 ruling rejecting such testimony.<sup>17</sup> In so doing, the First Circuit frankly acknowledged that "[n]o scientific methodology exists for th[e] process" purportedly used by the plaintiff's expert.<sup>18</sup> As the First Circuit acknowledged, this purported "weighing" of scientific evidence cannot be tested, it cannot be falsified, and it cannot be validated against known or potential rates of error.<sup>19</sup> Contrary to the intent of Rule 702, a court is left with nothing but the expert's *ipse dixit* assurances

that he has weighed the evidence in a scientifically reliable manner.

## II. The Solution: Amending Rule 702

Notwithstanding the rulemaking efforts of the Judicial Conference leading up to the 2000 amendments to Rule 702, the courts remain as divided over the proper standard for admissibility of expert evidence as they were in the late 1990s. Wayward courts continue to admit expert testimony based upon misapplied methodologies, unreliable factual foundations, and untestable *ipse dixit*. As a result, the judicial gatekeeping responsibility set forth in the *Daubert* trilogy – and purportedly cemented with the 2000 amendments to Rule 702 – is being eroded.

It is time for the Judicial Conference to go back to the drafting board. While the problem of improper admission of expert testimony noted above present serious risks to the fair administration of justice both in civil and criminal matters<sup>20</sup>, the solution is readily at hand. With fifteen years of experience, the latent ambiguities and unanticipated interpretations of the current

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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") (citation and quotations omitted).

<sup>14</sup> *Manpower, Inc. v. Ins. Co. of Pa.*, 732 F.3d 796, 806 (7th Cir. 2013) (emphasis added).

<sup>15</sup> May 1, 1999 Report, *supra* note 2, at 47.

<sup>16</sup> See *Milward*, 639 F.3d at 17-18

<sup>17</sup> See *General Electric Co. v. Joiner*, 522 U.S. 136 (1997), *rev'g* 78 F.3d 524, 532-34 (11th Cir. 1996) (in which circuit court endorsed weight of the evidence testimony); see also *id.* at 153 (Stevens, J., concurring

in part, dissenting in part) (providing lone vote in support of weight of the evidence methodology).

<sup>18</sup> *Milward*, 639 F.3d at 18.

<sup>19</sup> *Id.* at 17-18 & n. 7.

<sup>20</sup> For a discussion of the importance of Rule 702 in protecting criminal defendants from being convicted based upon unreliable scientific evidence, see, e.g., *Unvalidated or Improper Forensic Science*, Innocence Project, <http://www.innocenceproject.org/understand/Unreliable-Limited-Science.php> (last visited March 2, 2016).

Rule's language are apparent, and they can be resolved through the following relatively modest amendments to the current Rule (additions marked by italicized text; deletions marked by strikethrough):

### **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 testimony satisfies each of the following requirements:*

- (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 *that reliably support the expert's opinion;*
- (c) the testimony is the product of reliable *and objectively reasonable* principles and methods; and
- (d) the expert has reliably applied the principles and methods to the facts of the case *and reached his conclusions without resort to unsupported speculation.*

*Appeals of district court decisions under this Rule are considered under the abuse of discretion standard. Such decisions are evaluated with the same*

*level of rigor regardless of whether the district court admitted or excluded the testimony in question.*

*This Rule supersedes any preexisting precedent that conflicts with any or all sections of this Rule.*

The proposed amendments would: (1) move the *In re Paoli* "any step" standard from the Advisory Committee Note to the text of the Rule; (2) place the reliability requirement for an expert's factual predicate squarely within Rule 702(b), rather than counting on trial courts to read such a requirement from a combination of Rules 702(b), 702(c) and Rule 703; and (3) incorporate the Supreme Court's requirement of scientific methodology into the text of Rule 702(c). Finally, the proposed amendment would add two provisions to help ensure that courts properly apply the Rule. The first provision would codify the abuse-of-discretion standard set forth in *Joiner* for district court opinions whether they admit or exclude expert testimony, and thus prevent future courts from following an erroneous path laid out by some courts that have argued for less deference to gatekeeping opinions excluding expert testimony.<sup>21</sup> The second provision would expressly preclude courts from ignoring the plain language of Rule 702 and thus secure the priority of the newly amended Rule in governing the admissibility of expert testimony in federal courts.

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<sup>21</sup> See *Johnson*, 754 F.2d at 562.



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