SUPPLEMENTAL PUBLIC COMMENT
to the
ADVISORY COMMITTEE ON EVIDENCE RULES

February 14, 2022

ENDING THE AMBIGUITY: THE PROPOSED RULE 702 AMENDMENT SHOULD PROVIDE THE CLEAREST POSSIBLE DIRECTION ABOUT THE COURT'S GATEKEEPING ROLE AND RESPONSIBILITIES

Following the Advisory Committee on Evidence Rules hearing on January 21, 2022, Lawyers for Civil Justice ("LCJ")[1] respectfully submits this supplemental public comment addressing issues recently raised about the Committee's proposed Rule 702 amendment.

I. The Proposed Amendment Should Retain the Well-Understood "Preponderance of the Evidence" Burden of Production Standard Rather than Inject an Unknown and Potentially Disruptive "Preponderance of the Information" Test

"Preponderance of the evidence" is a well-established term that courts have used for many years in deciding the admissibility of evidence, including expert opinions offered under Rule 702. Surprisingly, several witnesses at the recent public hearing urged the Committee to jettison that test from the proposed amendment and to replace it with a novel "preponderance of the information" test.[2] Doing so would dislodge developed caselaw and sow significant uncertainty.

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[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] *See* Written Testimony of Wayne Hogan, *in* Public Hearing on Proposed Amendments to the Federal Rules of Evidence (Jan. 21, 2022), Tab 7 (hereinafter "Public Hearing"), available at https://www.uscourts.gov/sites/default/files/evidence_rules_hearing_testimony_package_-_january_21_2022_final_0.pdf. *See also* Written Testimony of Jared Pacitella, Public Hearing, Tab 16; Written Testimony of William Rossbach, Public Hearing, Tab 17; Written Testimony of Navan Ward, Public Hearing, Tab 20; Written Testimony of Michael J. Warshauer, Public Hearing, Tab 21.

"Preponderance of the evidence" has long been recognized as the standard courts should use when evaluating whether to admit opinion testimony. The Supreme Court has established that proof by a preponderance of the evidence is required when, as with Rule 702 challenges, admissibility hinges on preliminary questions.[3] Accordingly, the Advisory Committee Note to the 2000 Amendment instructs "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." Although some judges erroneously use standards biased toward allowing any expert to testify,[4] courts that apply Rule 702 as it was intended employ the preponderance of evidence burden of production to decide if an expert's opinions are admissible.[5] Including the phrase "preponderance of the evidence" within the rule's text will promote consistency by maintaining, rather than calling into question, the caselaw from courts that have applied the correct burden of production.

There is no foundation underlying the hearing witnesses' speculation that courts will misunderstand "preponderance of the evidence" as requiring that an expert's basis and methodology must be based upon admissible evidence. That misconception has not developed in the courts over the years, and the hearing witnesses urging different language have not identified any problematic rulings that misinterpreted the Committee's phrase in that way.[6] This is not

[3] *Bourjaily v. United States*, 483 U.S. 171, 175-76 (1987).

[4] *See* Lawyers for Civil Justice, *Clarity and Emphasis: The Committee's Proposed Rule 702 Amendment Would provide Much-Needed Guidance About the Proper Standards for Admissibility of Expert Evidence and the Reliable Application of an Expert's Basis and Methodology* at 5-6, Sept. 1, 2021 (hereinafter "LCJ Sept. 1, 2021 Comment"), available at https://www.regulations.gov/comment/USC-RULES-EV-2021-0005-0007. Since LCJ submitted its previous comment, courts have continued to resolve Rule 702 objections using alternative burdens of production that favor admission. *See*, *e.g.*, *Matzkow v. United N.Y. Sandy Hook Pilots Asso.*, 18-CV-2200 (RER), 2022 WL 79725 (S.D.N.Y. Jan. 7, 2022) (Overruling objection because "Martucci's testimony is not so fundamentally unsupported that it offers no possible assistance to the jury."); *U.S. v. Ray*, No. 20-CR-110 (LJL), 2022 WL 101911, at *2 (S.D.N.Y. Jan. 11, 2022) ("Courts are to adhere to a liberal standard of admissibility for expert opinions, beginning with a presumption that expert evidence is admissible[.]") (quotations omitted).

[5] *See*, *e.g.*, *Robinson v. Ethicon, Inc.*, No. CV H-20-03760, 2022 WL 125035, at *3 (S.D. Tex. Jan. 13, 2022) ("The party proffering expert testimony has the burden of establishing by a preponderance of the evidence that the challenged expert testimony is admissible. *See* Fed. R. Evid. 104(a)"); *U.S. v. Janssen Prod., LP*, No. CV127758ZNQLHG, 2022 WL 94535, at *2 (D.N.J. Jan. 10, 2022) ("The party offering the expert testimony bears the burden of establishing the existence of each factor by a preponderance of the evidence."); *Adams v, BRG Sports, Inc.*, No. 17 C 8972 et al., 2022 WL 93497, at *2 (N.D. Ill. Jan. 10, 2022) ("The party seeking to introduce expert witness testimony bears the burden of demonstrating, by a preponderance of the evidence, that it satisfies the *Daubert* standard.").

[6] To the contrary, courts employing the preponderance of evidence standard when considering Rule 702 objections have recognized that an expert's basis may come from facts that are disputed or that are otherwise inadmissible. *See*, *e.g.*, *Trevelyn Enterprises, L.L.C. v. SeaBrook Marine, L.L.C.*, No. CV 18-11375, 2021 WL 65689, at *1 (E.D. La. Jan. 7, 2021) ("An expert may rely upon otherwise inadmissible facts and data, including hearsay, if experts in the particular field would reasonably rely on such evidence.") (quotation omitted); *Colon v. Ashford Bucks Cty., LLC*, No. 2:11-CV-01464-CDJ, 2012 WL 12903092, at *1 n.1 (E.D. Pa. Nov. 8, 2012) ("This Court will not preclude expert testimony that is based on facts in the record, despite the fact that some are in dispute. Because the

surprising, because Rule 104(a) itself directs that when a court undertakes preliminary admissibility questions it "is not bound by evidence rules" and the Advisory Committee Note to Rule 104 provides additional confirmation that the court is not restricted in the type of material it can consider when performing these assessments.[7] Further, Rule 703 establishes that the bases for expert opinions may include "facts or data" that themselves "need not be admissible." Together with these provisions, the Committee's draft Note provides all the clarification needed that the burden of production does not limit the court to consider only admissible evidence when it decides the preliminary question of whether an expert's testimony passes gatekeeping muster.

In contrast, inserting the novel phrase "preponderance of the information" into the rule would risk substantial confusion. Such a departure from the language of the 2000 Advisory Committee Note and the *Bourjaily* holding would surely be interpreted as a change in the standard. And it would not be a clear change, because "preponderance of the information" is rarely used in federal decisions, appearing in isolated settings such as the establishment of mitigating factors under the Federal Death Penalty Act[8] or in institutional codes of conduct,[9] where it has been controversial. Substituting the term would yield inconsistent and unpredictable outcomes.

For most state courts, as with federal courts, incorporating "preponderance of the evidence" into the text of Rule 702 will harmonize rather than disrupt current law. Courts in states that have adopted present Rule 702 already apply the "preponderance of the evidence" standard in making gatekeeping decisions.[10] This outcome arises not only from following federal practice in using "preponderance of the evidence" as the applicable burden of production, but also from state

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expert's opinions are based upon a sufficient factual record, . . ., I conclude that preclusion on this basis is inappropriate.").

[7] Notes of the Advisory Committee on Proposed Rule 104 ("If the question is factual in nature, the judge will of necessity receive evidence pro and con on the issue. The rule provides that the rules of evidence in general do not apply to this process.").

[8] *See* 18 U.S.C. § 3593(c) ("The burden of establishing the existence of any mitigating factor is on the defendant and is not satisfied unless the existence of such a factor is established by a preponderance of the information.").

[9] *See*, *e.g.*, *Norris v. Univ. of Colorado, Boulder*, 362 F. Supp. 3d 1001, 1006 (D. Colo. 2019) (university's Student Conduct Code "instituted a 'preponderance of information' standard regarding the evaluation of complaints that a student violated its terms.").

[10] *See*, *e.g.*, *State v. Dobbs*, 945 N.W.2d 609, 624 (Wis. 2020) ("The party proffering the expert testimony bears the burden of satisfying each of these preliminary questions by a preponderance of the evidence."); *Commonwealth v. Camblin*, 86 N.E.3d 464, 470 (Mass. 2017) ("Because the admissibility of expert testimony is a preliminary question of fact, the proponent's burden of proof to demonstrate the reliability of the expert opinion is by a preponderance of the evidence."); *State v. Bernstein*, 349 P.3d 200, 202 (Ariz. 2015) ("As the proponent of the expert testimony, the State bears the burden of establishing its admissibility by a preponderance of the evidence."); *Bowen v. E.I. DuPont de Nemours & Co.*, 906 A.2d 787, 795 (Del. 2006) ("The party seeking to introduce the expert testimony bears the burden of establishing its admissibility by a preponderance of the evidence.").

courts' incorporation of both Rule 104(a) and Rule 702.[11] And despite the attempt by certain hearing witnesses to make hay over the practice by some states of adopting the federal rules without the Advisory Committee Notes, it is of course common for states that embrace the Federal Rules of Evidence to look to federal authorities – including the Advisory Committee Notes – for guidance as to the rules' meaning.[12]

Injecting a new test for the burden of production would be counterproductive to the Committee's goal of fostering more consistency in gatekeeping. The Committee should move forward with its current proposal to clarify the burden of production by adding "preponderance of the evidence" to the text of Rule 702.

II. The Committee Note Should Help Courts and Lawyers "Get it Right" by Identifying the Most Common Sources that Perpetuate Misstatements about Rule 702.

Courts and practitioners seeking to understand expert admissibility standards have made a habit of turning to three cases that the Committee knows to contain incorrect statements about the application of Rules 702 and 104(a): *Loudermill*, *Viterbo*, and *Smith*.[13] The consequence is hundreds of recent district court rulings stating that, as a general consideration, the sufficiency of an expert's factual basis does not constitute an admissibility issue for the court to evaluate. Despite the unmistakable fact that those three cases are the predominant source of continuing misstatements about Rule 702, certain hearing witnesses urged the Committee to resist the compelling reasons why citing them would improve the Note's usefulness to readers who, after all, will turn to the Note for guidance on how to "get it right."[14] They argue that identifying these three cases is motivated by an unseemly urge to scold judges, and that doing so would confuse readers because the Note would be unclear as to whether the amendment rejects every word of those cases and the outcome of those decisions, or just the discrete misstatements of law for which they are commonly cited.

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[11] *See*, *e.g.*, *Burnett*, 815 N.E.2d at 206–07 ("The trial court determines preliminary questions with respect to the admissibility of expert testimony under Rule 104(a), which imposes a burden of proof by a preponderance of the evidence. Accordingly, for expert scientific testimony to be admitted under Rule 702(b), the proponent of the testimony must persuade the trial court that it is more likely than not that the scientific principles upon which the testimony rests are reliable.").

[12] *See*, *e.g.*, *Dobbs*, 945 N.W.2d at 624 (citing Fed. R. Evid. 702, Advisory Committee Notes to the 2000 Amendment); *Bernstein*, 349 P.3d at 202 ("Because Rule 702 mirrors its federal counterpart, we may look to the federal rule and its interpretation for guidance."); *Burnett*, 815 N.E.2d at 206 ("Thus, although not binding upon the determination of state evidentiary law issues, the federal evidence law of *Daubert* and its progeny are helpful to the bench and bar in applying Indiana Rule of Evidence 702(b).").

[13] *See* LCJ Sept. 1, 2021 Comment at 2-3.

[14] *See* Written Testimony of Leslie W. O'Leary, Public Hearing, Tab 15; Written Testimony of William Rossbach, Public Hearing, Tab 17; Written Testimony of Navan Ward, Public Hearing, Tab 20.

The reason the Note should cite the three cases is simple: they are the demonstrated source of *specific misstatements about Rule 702* that have led hundreds of courts to misapply the rule. If ignored, those cases will continue to be the source of specific misstatements about Rule 702 even after the amendment takes effect. That's because the Note's readers will be consulting the Note *for the very purpose of navigating the difference between the rule and the caselaw*, and if they don't find clear direction, they will find it easy to continue the default practice of citing the established caselaw.

The Committee can easily draft Note language that focuses readers on the specific misstatements in the three decisions rather than the entirety of the opinions. The Note need not, and should not, make blanket reference to the overall holdings in the three cases, but rather, should focus only on the specific, oft-quoted misstatements in the decisions that are incompatible with Rule 702(b). Readers will want to know that re-using these misstatements is likely to lead courts to misapply the law. As an illustration, Note language could be drafted along the following lines to help courts and parties avoid the trap created by these much-recycled statements without overreaching into other areas of the opinions:

> …. These rulings are an incorrect application of Rules 702 and 104(a), and are rejected to the extent they contain statements that are inconsistent with the amended rule; examples include *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"); *Viterbo v. Dow Chem. Co.*, 826 F.2d 420, 422 (5th Cir. 1987) "[Q]uestions relating to the bases and source of an expert's opinion affect the weight to be assigned that opinion rather than its admissibility."); and *Smith v. Ford Motor Co.*, 215 F.3d 713, 719 (7th Cir. 2000)("Soundness of the factual underpinnings of the expert's analysis . . . are factual matters to be determined by the trier of fact[.]").

Far from chastising prior courts, or creating confusion about which particular aspects of the opinions are at issue, a Note that straightforwardly addresses the specific misstatements and identifies their most widely cited sources will help readers follow the intent of the amendment by understanding the specific incongruity between the caselaw and the language of Rule 702.

III. The Proposed Amendment Would Safeguard, Not Undermine, the Right to Jury Trial.

The proposed Rule 702 amendment would affirm the truth-finding purpose of jury trials by protecting against unfair, misleading, unsubstantiated, or overblown opinion testimony. It would do so by clarifying that expert opinions must arise from a sufficient factual basis, reliable methodology, and a reliable application of the methodology to the facts of the case before they are presented to a jury. This gatekeeping function has long been considered to protect the right to a jury trial because it serves as a bulwark against deceiving juries. The *Daubert* Court recognized that courts' obligation to scrutinize and potentially exclude opinion testimony has always been implicit in Rule 702:

> That the *Frye* test was displaced by the Rules of Evidence does not mean, however, that the Rules themselves place no limits on the admissibility of purportedly scientific evidence. Nor is the trial judge disabled from screening such evidence. To the contrary, under the Rules the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable. The primary locus of this obligation is Rule 702, which clearly contemplates some degree of regulation of the subjects and theories about which an expert may testify.[15]

Although lawyers of all backgrounds value and respect the right to a jury trial, some opponents of the Committee's proposed Rule 702 amendment are attempting to portray it as somehow threatening that right.[16] Properly understood, their argument impugns not only the proposed amendment, but Rule 702 itself and all other rules that give or describe the court's authority to admit or exclude evidence. In fact, it is Rule 104 that requires "[t]he court must decide any preliminary question about whether … evidence is admissible[.]" Similarly, Rule 403 requires the court to exclude an exhibit if its probative value is substantially outweighed by a danger of misleading the jury, and Rule 803(2) requires the judge to determine whether a declarant actually was under the stress of excitement caused by an event when making a statement describing that occurrence before allowing the jury to consider certain hearsay statements. Such rules do not undermine the right to a trial by jury, but rather safeguard it by promoting fairness in the resolution of disputes. Rule 702, and the proposed amendment to clarify it, reflects the truth that expert testimony "can be both powerful and quite misleading,"[17] and so warrants judicial assessment to ensure "that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand."[18] Consistent with this understanding, the amendment's action to promote consistency and completeness in the application of Rule 702 supports, rather than undermines, litigants' right to have the legally cognizable claims and defenses determined by a jury.

IV. Adding "If the Court Determines" to the Text of Rule 702 Would Prevent Confusion About the Court's Role.

The Committee should restore the phrase "if the court determines that" to the proposed amendment to provide effective guidance. The removal of those important words renders the proposed amendment less understandable because any straightforward explanation of the

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[15] *Daubert*, 509 U.S. at 589.

[16] *See* Written Testimony of Michael J. Warshauer, Public Hearing, Tab 21. *See also* Tom Antunovich, Comment Re proposed Changes to Rule 702, Jan. 25, 2022, available at https://www.regulations.gov/comment/USC-RULES-EV-2021-0005-0037; Sean Domnick, Comment, Jan. 23, 2022, available at https://www.regulations.gov/comment/USC-RULES-EV-2021-0005-0034.

[17] *Daubert*, 509 U.S. at 595 (quoting Weinstein, 138 F.R.D. 631, 632 (1991)).

[18] *Daubert*, 509 U.S. at 597.

amendment (including the Committee's own description to the Standing Committee) identifies the court, not the jury, as the agent that must assess the sufficiency of the expert's factual basis and the reliability of the methodology's application to the case. Without an explicit reference to the court, the amendment hopes the reader will draw the inference rather than instructs the reader on how Rule 702's requirements must be fulfilled. Including "if the court determines" will add precision and clarity for those judges who mistakenly believe that some of the Rule 702 elements are matters for the jury to decide.

Certain witnesses have argued that adding the phrase "if the court determines" to the text of Rule 702 would create confusion and even encourage some judges to believe that they have the responsibility to decide if an expert's analysis is correct.[19] These assertions seem to overlook the context in which the words would appear. By placing "if the court determines" immediately before the enumerated list of admissibility elements set forth in subsections (a) through (d), the rule would unambiguously identify both the decision-maker and the particular matters to be evaluated. "Correctness of the opinion" neither appears in the list nor is suggested by any of the elements. An explicit reference to the court in the text of the rule will encourage a correct understanding of the courts' gatekeeping role.

Conclusion

Opponents of the Committee's proposed amendment clarifying Rule 702 are urging the Committee to water down not only the amendment, but the underlying Rule 702 standard itself. By asking the Committee to jettison the well-developed "preponderance of the evidence" standard in favor of an unknown and problematic new "preponderance of the information" construct, by beseeching the Committee not to identify the three wellspring sources of the caselaw that will continue to confuse future judges and practitioners about the 702 standard, and by pressing the Committee to keep "the court" out of the rule, the opponents would perpetuate the current confusion and frequent misapplication of the rule.

The proposed amendment holds great promise for resolving the widespread misapplications that the Committee has identified. Correcting deeply ingrained misunderstandings will depend on unambiguous communication in the rule's text and accompanying Note so that judges and lawyers in the future will address admissibility challenges as the rule intends and avoid the pitfalls that resulted in misapplications in the past.

[19] *See* Written Testimony of Larry E. Coben, Public Hearing, Tab 3; Written Testimony of Navan Ward, Public Hearing, Tab 20.