

**COMMENT ON THE PROPOSED REVISION OF  
FEDERAL RULE OF EVIDENCE 702:  
“CLARIFYING” THE COURT’S GATEKEEPING  
RESPONSIBILITY OVER EXPERT TESTIMONY**

RICHARD COLLIN MANGRUM<sup>†</sup>

Expert testimony has always presented the courts with an analytical dilemma. On the one hand, jurors may benefit from the insight of experts in understanding complex issues. On the other hand, jurors have limited capacity to evaluate whether expert testimony is “reliable” even aided by the crucibles of cross-examination, rebuttal expert testimony, and closing arguments. One procedural way to handle expert “overstatements” is for the court to have a strong “gatekeeping” responsibility for excluding from the jury unreliable expert opinions. Crafting an evidentiary rule that will effectively exclude unreliable expert opinions without depriving the jury of reliable opinions has proven challenging. The Federal Rules Advisory Committee recently proposed a revision to Federal Rule of Evidence 702 (“Rule 702”). Revised Rule 702 clarifies, not changes, the “gatekeeping” responsibility of the judge over unreliable expert opinions.

A brief review of the history of the court’s gatekeeping responsibility over unreliable expert testimony may clarify the issue and explain the rationale for the Advisory Committee proposing amendments to “clarify” the court’s gatekeeping responsibility under Rule 702.

The United States Court of Appeals for the District of Columbia, in *Frye v. United States*,<sup>1</sup> offered a “generally accepted” gatekeeping standard for courts serving as gatekeepers over expert opinions resting upon “untested” scientific principles:

Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently

---

<sup>†</sup> Yossem Professor of Law, Creighton University School of Law; B.A. 1872, Harvard University; J.D. 1975, University of Utah School of Law; B.C.L., 1978, Oxford University; S.J.D., 1983, Harvard University School of Law.

1. 293 F. 1013 (D.C. Cir. 1923).

established to have gained general acceptance in the particular field in which it belongs.<sup>2</sup>

Most federal and state courts adopted the *Frye* standard of "general acceptability" for excluding overstatements of expert testimony.<sup>3</sup> Over time the *Frye* standard received criticism.<sup>4</sup> Some courts suggested that the *Frye* standard should be only one of many factors considered by the court when deciding whether expert opinions should be excluded.<sup>5</sup> Others suggested that the *Frye* standard too liberally permitted the admission of "junk scholarship"<sup>6</sup> and that the standard should be "retired."<sup>7</sup> Others suggested that the *Frye* standard unduly restricted the admissibility of "reliable" cutting edge expert testimony.<sup>8</sup> Some suggested that admissibility of expert testimony should

2. *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923).

3. *Reed v. State*, 391 A.2d 364, 382 (Md. 1978) ("This criterion of 'general acceptance' in the scientific community has come to be the standard in almost all of the courts in the country which have considered the question of the admissibility of scientific evidence.").

4. *People v. Kelly*, 549 P.2d 1240, 1244 (Cal. 1976) ("Some criticism has been directed at the *Frye* standard, primarily on the ground that the test is too conservative, often resulting in the prevention of the admission of relevant evidence.").

5. *United States v. Downing*, 753 F.2d 1224, 1237 (3d Cir. 1985)

[T]he *Frye* test suffers from serious flaws. The test has proved to be too malleable to provide the method for orderly and uniform decision-making envisioned by some of its proponents. Moreover, in its pristine form the general acceptance standard reflects a conservative approach to the admissibility of scientific evidence that is at odds with the spirit, if not the precise language, of the Federal Rules of Evidence. For these reasons, we conclude that "general acceptance in the particular field to which [a scientific technique] belongs," . . . should be rejected as an independent controlling standard of admissibility. Accordingly, we hold that a particular degree of acceptance of a scientific technique within the scientific community is neither a necessary nor a sufficient condition for admissibility; it is, however, one factor that a district court normally should consider in deciding whether to admit evidence based upon the technique.

*Id.* (quoting *Frye*, 293 F. at 1014); see also *State v. Chapple*, 660 P.2d 1208 (Ariz. 1983) (en banc); *United States v. Smith*, 736 F.2d 1103 (6th Cir. 1984) (per curiam); *People v. McDonald*, 690 P.2d 709 (Cal. 1984) (en banc).

6. Kenneth Chesebro, *Galileo's Retort: Peter Huber's Junk Scholarship*, 42 AM. U. L. REV. 1637, 1693-96 (1993).

7. Bert Black, *A Unified Theory of Scientific Evidence*, 56 FORDHAM L. REV. 595, 636-37 (1988); Roger S. Hanson, *James Alphonzo Frye is Sixty-Five Years Old; Should He Retire?*, 16 W. ST. U. L. REV. 357, 367-68 (1989); Frederick B. Lacey, *Scientific Evidence*, 24 JURIMETRICS 254, 265 (1984) (*Frye* jurisdictions will always lag behind advances in science); Joseph G. Petrosinelli, Note & Comment, *The Admissibility of DNA Typing: A New Methodology*, 79 GEO. L.J. 313, 317 (1990).

8. *People v. Kelly*, 549 P.2d 1240, 1244 (Cal. 1976) ("Some criticism has been directed at the *Frye* standard, primarily on the ground that the test is too conservative, often resulting in the prevention of the admission of relevant evidence."); *United States v. Baller*, 519 F.2d 463, 466 (4th Cir. 1975) ("Unless an exaggerated popular opinion of the accuracy of a particular technique makes its use prejudicial or likely to mislead the jury, it is better to admit relevant scientific evidence in the same manner as other expert testimony and allow its weight to be attacked by cross-examination and refutation."); see also *United States v. Sample*, 378 F. Supp. 44, 53 (E.D. Pa. 1974) ("The *Frye* test of general acceptance . . . precludes too much relevant evidence . . ."); *United*

be analyzed under the “preponderance” standard for civil cases and the “beyond a reasonable doubt” in criminal cases when offered against the accused.<sup>9</sup> Uncertainty prevailed.

In 1975, Congress enacted the Federal Rules of Evidence.<sup>10</sup> Rule 702, which provided a statutory basis for the admissibility of expert testimony, simply provided:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.<sup>11</sup>

Federal Rule of Evidence 702 left unanswered many reliability questions, including whether the *Frye* standard of “general acceptability” remained the gatekeeping threshold for admissibility. In 1993, the United States Supreme Court answered this question. The Court offered the most significant interpretation ever given of Rule 702 in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*<sup>12</sup> In *Daubert*, parents, on behalf of infants with birth defects, sued a pharmaceutical company to recover for birth defects allegedly caused by the mother’s ingestion of a “morning sickness” pill marketed under the name “Bendectin.” The plaintiffs presented the testimony of eight qualified experts who each based their opinions that Bendectin presented a risk factor for birth defects upon the unpublished “reanalysis” of previously published human statistical studies.<sup>13</sup> The trial and appellate court excluded the expert testimony related to the proffered general causation theory on the basis that the theory of causation did not meet *Frye*’s “generally accepted” theory of admissibility.

Justice Blackman delivered the opinion of the Court and provided the framework for determining the admissibility of expert testimony

---

States v. Stifel, 433 F.2d 431, 438 (6th Cir. 1970) (“Every useful new development must have its first day in court. And court records are full of the conflicting opinions of doctors, engineers, and accountants, to name just a few of the legions of expert witnesses.”).

9. Paul C. Giannelli, *The Admissibility of Novel Scientific Evidence: Frye v. United States, A Half Century Later*, 80 COLUM. L. REV. 1197, 1248-50 (1980) (criminal defendant and civil litigants should be required to establish the validity of the scientific principle or technique by a preponderance of the evidence; the prosecution in a criminal trial should be required to prove validity beyond a reasonable doubt).

10. Federal Rules of Evidence, Pub. L. 93-595, 88 Stat. 1926 (1975) (The United States Supreme Court adopted the Federal Rules of Civil Procedure in 1938 pursuant to the Rules Enabling Act, 28 U.S.C. Section 2072, in which Congress delegated to the judicial branch the authority to promulgate rules related to the procedures of the federal courts. The Supreme Court attempted to enact the Federal Rules of Evidence under The Rules Enabling Act, but Congress refused and instead enacted the Federal Rules of Evidence as a statute in 1975.).

11. FED. R. EVID. 702.

12. 509 U.S. 579 (1993).

13. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 583 (1993).

in the federal courts as well as most state courts ever since. First, the Court held that Rule 702 did not adopt *Frye's* "generally accepted" standard for admissibility.<sup>14</sup> Second, under a combination of the relevancy standard contained in Rule 402 and the expert reliability standard contained in Rule 702, the Court held that the trial court has a "gatekeeping" responsibility to "ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable."<sup>15</sup> The Court explained, that:

[I]n the event the trial court concludes that the scintilla of evidence presented supporting a position is insufficient to allow a reasonable juror to conclude that the position more likely than not is true, the court remains free to direct a judgment, Fed. Rule Civ. Proc. 50(a), and likewise to grant summary judgment, Fed. Rule Civ. Proc. 56.<sup>16</sup>

Third, the Court observed that "[t]he 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."<sup>17</sup> Fourth, and most importantly, the Court provided a checklist of criteria for determining whether the theories and methodologies relied upon by the expert in forming his or her opinion are sufficiently reliable to be admissible. The checklist included whether the theories and methodologies have been (1) scientifically "tested,"<sup>18</sup> (2) the testing has been subject to peer-reviewed critique and publication,<sup>19</sup> (3) the testing has produced a "known" "rate of error,"<sup>20</sup> and (4) the theories

---

14. *Daubert*, 509 U.S. at 589 n.6 ("[W]e hold that *Frye* has been superseded and base the discussion that follows on the content of the congressionally enacted Federal Rules of Evidence.").

15. *Id.* at 589.

16. *Id.* at 596.

17. *Id.* at 589.

18. *Id.* at 593 ("Scientific methodology today is based on generating hypotheses and testing them to see if they can be falsified; indeed, this methodology is what distinguishes science from other fields of human inquiry." (citing E. GREEN & C. NESSON, PROBLEMS, CASES, AND MATERIALS ON EVIDENCE 645 (1983))); see also CARL HEMPEL, PHILOSOPHY OF NATURAL SCIENCE 49 (Prentice-Hall, Inc. 1966) ("[T]he statements constituting a scientific explanation must be capable of empirical test."); KARL POPPER, CONJECTURES AND REFUTATIONS: THE GROWTH OF SCIENTIFIC KNOWLEDGE 37 (Basic Books, New York London, 5th ed. 1962) ("[T]he criterion of the scientific status of a theory is its falsifiability, or refutability, or testability." (emphasis omitted)).

19. *Daubert*, 509 U.S. at 593-94

Another pertinent consideration is whether the theory or technique has been subjected to peer review and publication. . . . The fact of publication (or lack thereof) in a peer reviewed journal thus will be a relevant, though not dispositive, consideration in assessing the scientific validity of a particular technique or methodology on which an opinion is premised.

*Id.*

20. *Id.* 509 U.S. at 594

Additionally, in the case of a particular scientific technique, the court ordinarily should consider the known or potential rate of error, see, e.g., United States

and methodologies are “general acceptable,” a deferential acknowledgment that the earlier *Frye* standard is relevant, but not a single outcome determinative factor.<sup>21</sup>

Rule 702’s assignment of a “gatekeeper” role for the court in excluding unreliable expert testimony, together with the criteria for exercising the “gatekeeping” responsibility,<sup>22</sup> provided much assistance to the courts in exercising their gatekeeping responsibility over expert testimony. Rather than answering a single question, “is it novel scientific evidence,” the judge as gatekeeper has the responsibility to review *Daubert’s* four-part test of “reliability” with respect to the underlying theories<sup>23</sup> and methodologies,<sup>24</sup> if not the conclusions they generated.<sup>25</sup>

The *Daubert* paradigmatic change for expert testimony in the federal courts dramatically impacted the issue of admissibility of expert testimony in both federal and state courts, making the subject one of the most commonly reviewed issues on appeal.<sup>26</sup> Following the Supreme Court’s decision in *Daubert*, many state courts abandoned the

---

v. Smith, 869 F.2d 348, 353-54 ([7th Cir.] 1989) (surveying studies of the error rate of spectrographic voice identification technique), and the existence and maintenance of standards controlling the technique’s operation, see *United States v. Williams*, 583 F.2d 1194, 1198 ([2nd Cir.] 1978) (noting professional organization’s standard governing spectrographic analysis), *cert. denied*, 439 U.S. 1117 (1979).

*Id.*

21. *Daubert*, 509 U.S. at 594 (“Finally, ‘general acceptance’ can yet have a bearing on the inquiry. A ‘reliability assessment does not require, although it does permit, explicit identification of a relevant scientific community and an express determination of a particular degree of acceptance within that community.’”) (quoting *United States v. Downing*, 753 F.2d 1224, 1238 (3d Cir. 1985)); see also 4 JACK B. WEINSTEIN ET AL., WEINSTEIN’S FEDERAL EVIDENCE ¶ 702-03, 702-41-42 (Matthew Bender Elite Products, 2d ed. 2018).

22. *Daubert*, 509 U.S. at 597 (“We recognize that, in practice, a *gatekeeping* role for the judge, no matter how flexible, inevitably on occasion will prevent the jury from learning of authentic insights and innovations.” (emphasis added)).

23. *Id.* at 593 (“Another pertinent consideration is whether the theory or technique has been subjected to peer review and publication.”).

24. *Id.* 509 U.S. at 593 (“Scientific methodology today is based on generating hypotheses and testing them to see if they can be falsified; indeed, this methodology is what distinguishes science from other fields of human inquiry” (citing E. GREEN & C. NESSON, PROBLEMS, CASES, AND MATERIALS ON EVIDENCE 645 (1983))); see also CARL HEMPEL, PHILOSOPHY OF NATURAL SCIENCE 49 (Prentice-Hall, Inc. 1966) (“[T]he statements constituting a scientific explanation must be capable of empirical test.”); KARL POPPER, CONJECTURES AND REFUTATIONS: THE GROWTH OF SCIENTIFIC KNOWLEDGE 37 (Basic Books, New York London, 5th ed. 1962) (“[T]he criterion of the scientific status of a theory is its falsifiability, or refutability, or testability.” (emphasis deleted)).

25. *Daubert*, 509 U.S. at 595 (“The focus, of course, must be solely on principles and methodology, not on the conclusions that they generate.”).

26. As of August 4, 2022 Westlaw indicates that *Daubert* has been cited 175,725 times.

*Frye* test and adopted the *Daubert* analysis as controlling.<sup>27</sup> Many of the states that did not adopt the entirety of the *Daubert* analysis still relied on the *Daubert* decision for guidance in determining their own standard for the admissibility of expert testimony.<sup>28</sup> A few states that

---

27. See, e.g., *State v. Porter*, 698 A.2d 746 (Conn. 1997) (adopting the *Daubert* standard); *Motorola Inc. v. Murray*, 147 A. 3d 751, 758-59, (D.C. 2016) (“We adopt Rule 702 to apply to the trial of this case and to any civil or criminal case in which the trial begins after the date of this opinion.”); *Commonwealth v. Lanigan*, 641 N.E.2d 1342, 1349 (Mass. 1994) (“We accept the basic reasoning of the *Daubert* opinion because it is consistent with our test of demonstrated reliability.”); *State v. Moore*, 885 P.2d 457, 471 (Mont. 1994), *abrogated by State v. Gollehon*, 906 P.2d 697 (1995); *Billings v. Bruce*, 965 P.2d 866 (Mont. 1998) (“We conclude that the guidelines set forth in *Daubert* are consistent with our previous holding in *Barmeyer* concerning the admission of expert testimony of novel scientific evidence, and we, therefore, adopt the *Daubert* standard for the admission of scientific expert testimony.”); *Schafersman v. Agland Coop*, 631 N.W.2d 862 (Neb. 2001).

28. See, e.g., *People v. Shreck*, 22 P.3d 68, 78 (Colo. 2001)

We conclude that CRE 702, rather than *Frye*, represents the appropriate standard for determining the admissibility of scientific evidence. We hold that under this standard, the focus of a trial court’s inquiry should be on the reliability and relevance of the scientific evidence, and that such an inquiry requires a determination as to (1) the reliability of the scientific principles; (2) the qualifications of the witness; and (3) the usefulness of the testimony to the jury. We also hold that when a trial court applies CRE 702 to determine the reliability of scientific evidence, its inquiry should be broad in nature and consider the totality of the circumstances of each specific case.

*Id.*; *Ingram v. State*, 699 N.E.2d 261, 262 & no.5 (Ind. 1998):

In determining reliability, while various factors have been identified, there is no specific ‘test’ or set of ‘prongs’ which must be considered in order to satisfy Indiana Evidence Rule 702(b). . . Such factors may include, but are not limited to: 1) whether the technique has been or can be empirically tested; 2) whether the technique has been subjected to peer review and publication; 3) the known or potential rate of error, as well as the existence and maintenance of standards controlling the technique’s operation; and 4) general acceptance within the relevant scientific community.

*Ingram*, 699 N.E.2d at 262 & no.5 (quoting *McGrew*, 682 N.E.2d at 1292); *State v. Hungerford*, 697 A.2d 916, 922 (N.H. 1997).

Specifically, we considered important the presence of objective, quantifiable evaluation results, the existence of a “logical nexus” between the expert’s observations and conclusions, the verifiability of any interpretive steps, and the likely difficulty of effective cross-examination of the expert. . . . Also helpful are the considerations enunciated by the United States Supreme Court in *Daubert*. In applying Federal Rule of Evidence 702, the *Daubert* Court discussed four considerations bearing upon the reliability and helpfulness of scientific evidence: (1) whether the theory or technique has been or can be tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) the potential or known error rate; and (4) whether there is general acceptance of the theory or technique in the relevant scientific community.

*Id.* (internal citations omitted); *Higgs v. State*, 222 P.3d 648, 658-59 (Nev. 2010)

By not adopting the *Daubert* standard as a limitation on judges’ considerations with respect to the admission of expert testimony, we give Nevada trial judges wide discretion, within the parameters of NRS 50.275, to fulfill their gatekeeping duties. We determine that the framework provided by NRS 50.275 sets a degree of regulation upon admitting expert witness testimony, without usurping the trial judge’s gatekeeping function.

...

initially retained the *Frye* single-factor standard of general acceptability subsequently modified that standard.<sup>29</sup>

Following *Daubert*, the Supreme Court has on occasion returned to the subject of expert testimony on related issues. The Supreme Court, in *General Electric Co. v. Joiner*,<sup>30</sup> noted that under the *Daubert* analysis “conclusions and methodology are not entirely distinct from one another.”<sup>31</sup> The Court in *Joiner* also adopted an “abuse of discretion” standard of review for the trial court’s *Daubert* determinations, making it difficult on appeal to challenge the court’s *Daubert* rulings.<sup>32</sup> The Supreme Court in *Kumho Tire Co., Ltd. v. Carmichael*<sup>33</sup> explained that the trial judge’s general “‘gatekeeping’ obligation” applies not only “to testimony based on ‘scientific’ knowledge, but also to testimony based on ‘technical’ and ‘other specialized’ knowl-

---

In sum, *Daubert*, as any other case decided by the U.S. Supreme Court, is looked upon favorably by this court. We do not, however, adopt the *Daubert* standard as a limitation on the factors considered for admissibility of expert witness testimony. We hold that NRS 50.275 provides the standard for admissibility of expert witness testimony in Nevada.

*Id.*; *McDaniel v. CSX Transp., Inc.*, 955 S.W.2d 257, 265 (Tenn. 1997)

[W]e conclude that Tennessee’s adoption of Rules 702 and 703 in 1991 as part of the Rules of Evidence supersede the general acceptance test of *Frye*. In Tennessee, under the recent rules, a trial court must determine whether the evidence will substantially assist the trier of fact to determine a fact in issue and whether the facts and data underlying the evidence indicate a lack of trustworthiness. The rules together necessarily require a determination as to the scientific validity or reliability of the evidence. Simply put, unless the scientific evidence is valid, it will not substantially assist the trier of fact, nor will its underlying facts and data appear to be trustworthy, but there is no requirement in the rule that it be generally accepted.

...

Although we do not expressly adopt *Daubert*, the non-exclusive list of factors to determine reliability are useful in applying our Rules 702 and 703. A Tennessee trial court may consider in determining reliability: (1) whether scientific evidence has been tested and the methodology with which it has been tested; (2) whether the evidence has been subjected to peer review or publication; (3) whether a potential rate of error is known; (4) whether, as formerly required by *Frye*, the evidence is generally accepted in the scientific community; and (5) whether the expert’s research in the field has been conducted independent of litigation.

*Id.*

29. *Sargon Enters., Inc. v. Univ. of S. Cal.*, 288 P.3d 1237, 1252 (Cal. 2012). Although previously following the *Frye* standard, the court explained that the trial court, in considering expert testimony, should “conduct[] a ‘circumscribed inquiry’ to ‘determine whether, as a matter of logic, the studies and other information cited by experts adequately support the conclusion that the expert’s general theory or technique is valid.’ The goal of trial court gatekeeping is simply to exclude ‘clearly invalid and unreliable’ expert opinion.” *Id.* (internal citations omitted).

30. 522 U.S. 136 (1997).

31. *General Electric Co. v. Joiner*, 522 U.S. 136, 146 (1997).

32. *Joiner*, 522 U.S. at 139.

33. 526 U.S. 137 (1999).

edge” depending upon “the particular circumstances of the particular case at issue.”<sup>34</sup>

Inspired by *Daubert*, *Joiner*, and *Kumho*, the Advisory Committee on Evidence Rules in 2000 amended Rule 702 to provide:

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.<sup>35</sup>

The 2000 amendment provided much needed assistance to the courts in exercising their gatekeeping responsibility, but “incorrect” interpretive rulings continued. The “incorrect” Rule 702 decisions prompted a five-year project by the Advisory Committee discussing the possibility of an amendment to Rule 702 to clarify the standard of admissibility.<sup>36</sup> The Advisory Committee appointed “a Subcommittee on Rule 702 . . . to consider possible treatment of forensic experts, as well as the weight/admissibility question.”<sup>37</sup> The Chair of the Subcommittee on Rule 702, Chief United States District Judge for the Middle District of North Carolina, Thomas Shroeder, in a nonrepresentational capacity, wrote a law review article during the period of investigation documenting the many “mistakes” by many of the federal circuits that prompted the Advisory Committee’s recommendation. Judge Shroeder concluded:

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). Decision making 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

---

34. *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 141 (1999).

35. FED. R. EVID. 702 (2000) (amended in 2011).

36. Advisory Committee on the Rules of Evidence, *Memorandum Report, in* COMM. ON RULES OF PRAC. AND PROC. OF THE JUD. CONF. OF THE U.S., 870 (June 7, 2022) [hereinafter, COMM. ON RULES OF PRAC. AND PROC.].

37. *Id.* at 871.

review, should avoid blanket statements suggesting that any alleged flaws affect the weight of the evidence, not its admissibility.<sup>38</sup>

The Advisory Committee on Evidence Rules (the “Committee”) met in Washington, D.C., on May 6, 2021 and “discussed and unanimously approved a proposed amendment to Federal Rule of Evidence 702 that the Committee had been discussing for five years.”<sup>39</sup> Initially, the Committee “was reluctant to propose a change to the text of Rule 702,” but a “fair number” of “mistakes” by courts where the courts had “misapplied” 702 “questions as ones of weight rather than admissibility,” prompted the Committee unanimously to approve an amendment to Rule 702 for public comment.<sup>40</sup>

At the spring 2022 meeting, “the Committee recommend[ed] that the proposed amendment, and the accompanying Committee Note, be approved by the Standing Committee and referred to the Judicial Conference.”<sup>41</sup> In the Advisory Committee’s Note, the Committee explained two purposes for proposing an amendment to Rule 702. “First the rule has been amended to clarify and emphasize that the proffered testimony meets the admissibility requirements set forth in the rule.”<sup>42</sup> The Committee explained, “many courts have held that the critical questions of the sufficiency of an expert’s basis, and the application of the expert’s methodology, are questions of weight and not admissibility. These rulings are an incorrect application of Rules 702 and 104(a).”<sup>43</sup> The Committee also added a second purpose:

---

38. Thomas D. Schroeder, *Toward A More Apparent Approach to Considering the Admission of Expert Testimony*, 95 NOTRE DAME L. REV. 2039, 2062 (2020).

39. COMM. ON RULES OF PRAC. AND PROC., *supra* note 36, at 870-71.

40. *Id.* at 871.

41. *Id.* at 873.

42. Fordham University School of Law, *Memorandum re. Possible Amendment to Rule 702*, in ADVISORY COMM. ON EVID. RULES REPORT, at 139-40 (June 7, 2022) [hereinafter, ADVISORY COMM. ON EVID. RULES] (citing FED. R. OF EVID. 104 and *Bourjaily v. United States*, 483 U.S. 171 (1987)).

43. ADVISORY COMM. ON EVID. RULES, *supra* note 42, at 126. For examples of incorrect Rule 702 rulings *see*, *Manpower, Inc. v. Ins. Co. of Pa.*, 732 F.3d 796, 801 (7th Cir. 2013) (holding that a “[d]istrict 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 employed.”); *Milward v. Acuity Specialty Prods. Grp., Inc.*, 639 F.3d 11, 13 (1st Cir. 2011) (criticizing the district court for “repeatedly challeng[ing] the factual underpinnings of [the expert’s opinion],” and holding that “[s]oundness 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.”); *Bresler v. Wilmington Tr. Co.*, 855 F.3d 178, 195 (4th Cir. 2017) (“[C]hallenges to the accuracy of [an expert’s] calculations ‘affect the weight and credibility’ of [the expert’s] assessment, not its admissibility”); *City of Pomona v. SQM N. Am. Corp.*, 750 F.3d, 1036, 1047-48 (9th Cir. 2017) (“In the Ninth Circuit, however, 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 . . . .’”); *Quiet Tech. DC-8*,

Rule 702(d) has also been amended to emphasize that a trial judge must exercise gatekeeping authority with respect to the opinion ultimately expressed by a testifying expert. A testifying expert's opinion must stay within the bounds of what can be concluded by a reliable application of the expert's basis and methodology. Judicial gatekeeping is essential because just as jurors may be unable to evaluate meaningfully the reliability of scientific and other methods underlying expert opinion, jurors may also be unable to assess the conclusions of an expert that go beyond what the expert's basis and methodology may reliably support.<sup>44</sup>

Emphasizing the court's gatekeeping responsibility, the Committee explained:

Under this amendment, the following statements, made by some courts in the past, are not supportable. These include:

- “There is a presumption in favor of admitting expert testimony.”
- “The sufficiency of facts or data supporting an expert opinion is a question for the jury, not the court.”
- “Whether the expert has properly applied the methodology is a question for the jury, not the court.”
- “The Federal Rules of Evidence establish a liberal thrust in favor of expert testimony.”<sup>45</sup>

After publication of the proposed amendment and comment, the Advisory Committee deleted “preponderance” and inserted in its place, “demonstrates to the court that it is more likely than not” to

---

Inc. v. Hurel-Dubois UK Ltd., 326 F.3d 1333, 134 (11th Cir. 2003) (“[T]he identification of such [methodological] flaws in generally reliable scientific evidence is precisely the role of cross examination” and misuse of a methodology goes “to the weight, not admissibility, of the evidence he offered.”) (internal citations omitted). See also Thomas D. Schroeder, *Toward A More Apparent Approach to Considering the Admission of Expert Testimony*, 95 NOTRE DAME L. REV. 2039, 2062 (2020).

44. ADVISORY COMM. ON EVID. RULES, *supra* note 42, at 137.

45. Advisory Committee on the Rules of Evidence, *Memorandum Report*, in COMM. ON RULES OF PRAC. AND PROC. OF THE JUD. CONF. OF THE U.S., 148 (May 6, 2022). See *eg.*, *Manpower, Inc. v. Ins. Co. of Pa.*, 732 F.3d 796, 801 (7th Cir. 2013) (holding 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 employed.”); *Milward v. Acuity Specialty Prods. Grp., Inc.*, 639 F.3d 11, 13 (1st Cir. 2011) (criticizing the district court for “repeatedly challeng[ing] the factual underpinnings of [the expert’s opinion],” and holding that “[s]oundness 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.”); *Bresler v. Wilmington Tr. Co.*, 855 F.3d 178, 195 (4th Cir. 2017) (“[C]hallenges to the accuracy of [an expert’s] calculations ‘affect the weight and credibility’ of [the expert’s] assessment, not its admissibility”). See also, Thomas D. Schroeder, *Toward A More Apparent Approach to Considering the Admission of Expert Testimony*, 95 NOTRE DAME L. REV. 2039, 2062 (2020).

“emphasize that the more likely than not showing is made to the court.”<sup>46</sup>

The Advisory Committee’s final proposed amendments to Rule 702 read as follows:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if **the proponent demonstrates to the court that it is more likely than not:**

- (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 expert’s opinion reflects a reliable application of** the facts of the case.<sup>47</sup>

The Committee explained the final edit as follows:

[T]he Committee recognized that it would be possible to replace the term ‘preponderance of the evidence’ with a term that would achieve the same purpose while not raising the concerns (valid or not) mentioned by many commentators. The Committee unanimously agreed to change the proposal as issued for public comment to provide that the proponent must establish that it is “more likely than not” that the reliability requirements are met. This standard is substantively identical to “preponderance of the evidence,” but it avoids any reference to “evidence” and thus addresses the concern that the term “evidence” means only admissible evidence. . . . The Committee was also convinced by the suggestion in the public comment that the rule should clarify that it is the court and not the jury that must decide whether it is more likely than not that the reliability requirements of the rule have been met. Therefore, the Committee unanimously agreed with a change requiring that the proponent establish “to the court” that it is more likely than not that the reliability requirements have been met. The proposed Committee Note was amended to clarify that nothing in amended Rule 702 requires a court to make any findings about reliability in the absence of a proper objection.<sup>48</sup>

The United States Supreme Court is scheduled to review the final draft of the textual changes to Rule 702 in the fall of 2022. The Court

---

46. COMM. ON RULES OF PRAC. AND PROC., *supra* note 36, at 872, 895.

47. *Id.* at 891-92.

48. *Id.* at 872.

has until May 2023 to approve the amendments. If approved, the amended FRE 702 will take effect on December 1, 2023.

In conclusion, the Advisory Committee's amendments to Rule 702 have not been proposed to change Rule 702, but in the words of the Advisory Committee, "to clarify and emphasize that the admissibility requirements set forth in the rule must be established to the court by a preponderance of the evidence."<sup>49</sup> Because the Rule 702 amendments "clarify" existing law and are "made necessary by the decisions that have failed to apply" the "reliability requirements of Rule 702," the proposed amendments are likely to influence judicial interpretation of Rule 702 even prior to the scheduled effective date of December 1, 2023.

The proposed amendments clarify that the trial court has a Rule 104(a) "gatekeeping" responsibility over unreliable expert testimony. The amendments ask the courts to accept more responsibility over screening unreliable expert opinions, rather than treating Rule 702 admissibility requirements as issues of weight for the jury under Rule 104(b). The final draft of the amendment emphasizes that the court has the gatekeeping responsibility to screen out unreliable expert testimony.

The proposed amendments warn counsel that they should give outcome-determinative attention to selecting qualified experts, preparing the expert's opinion with the complete Daubert checklist in mind as a framework of analysis, and disclosing the expert's opinions and bases through mandatory discovery. Because the proposed amendments of Rule 702 focus on the court's role as gatekeeper, the Rule 702 motion in limine hearing will take on enhanced significance. Because the court's 702 ruling will receive an abuse of discretion standard of review under *Joiner*, counsel should not expect an appellate court to reverse a trial court's exclusion of expert opinion that only has a fig leaf of cover as a basis.

Finally, because the demands upon the judge in making the Rule 702 rulings will take on enhanced significance under amended Rule 702, both the courts and counsel should review what the Advisory Committee labeled as prior "incorrect" interpretations of 702, to avoid future Rule 702 mistakes.

---

49. *Id.* at 870.