Recognizing and Addressing Misconceptions of Federal Rule of Evidence 702

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Recognizing and Addressing Misconceptions of Federal Rule of Evidence 702

Three ongoing misconceptions of the Rule 702 standard frequently appear in court rulings addressing the admissibility of opinion testimony. First, despite the explicit directives of Rule 702(b) and (d), some courts declare the factual basis of an expert's opinion and the application of the methodology to the facts of the case to be matters of weight and not admissibility considerations for the court to decide. Second, some courts do not assess proffered expert testimony under the preponderance of the evidence burden of production that applies to Rule 702 inquiries, but instead rely on characterizations of Rule 702 as being a "liberal" standard or "presuming admissibility." Finally, some courts have allowed experts to overstate the conclusions that their methodology will actually support, resulting in expressions of a degree of confidence in the opinions that go beyond what reliable science will allow. Each of these misunderstandings reflect a perspective that has been recognized as legally flawed. The Advisory Committee on Evidence on April 30, 2021, voted to recommend action on an amendment to Rule 702 with an accompanying Committee Note that addresses each of these misconceptions. This proposal will be considered by the Committee on Practice & Procedure on June 22, 2021, and, if approved, subsequently released for publication and public comment.

1. An Expert's Factual Basis and Application of Methodology Are Questions of Admissibility, Not Weight, under Federal Rule of Evidence 702.

Courts frequently declare that challenges to the factual basis of an expert's opinion conceptually raise issues of weight for the jury to determine, not questions of weight that the court must decide. Between January 1, 2015, and February 1, 2021:

- 232 federal cases recited variations of the following statement: "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."[1]

[1] *E.g.*, *NuTech Orchard Removal, LLC, v. DuraTech Indus. Int'l, Inc.*, No. 3:18-CV-00256, 2020 WL 6994246, at *5 (D.N.D. Oct. 14, 2020)("It is well settled that 'the factual basis of an expert opinion goes to the credibility of the testimony, not the admissibility.' In the Court's view, the differences between the 5064T and

- 170 federal cases reiterated this statement: "[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."[2]

- 79 federal cases incorporated the following statement: "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[.]"[3]

Statement such as these are pervasive, appearing in decisions in every federal circuit. But they are wrong on the law:

> It is clear that a judge should not allow expert testimony without determining that all requirements of Rule 702 [, including that it is based on sufficient facts or data,] are met by a preponderance of the evidence. . . . *It is not appropriate for these determinations to be punted to the jury, but judges often do so*.[4]

5064 models can be adequately addressed during cross-examination and are not a basis for excluding [the expert's] opinions.").

[2] *See, e.g., Trevelyn Enterprises, L.L.C. v. SeaBrook Marine, L.L.C.*, No. CV 18-11375, 2021 WL 65689, at *2 (E.D. La. Jan. 7, 2021)("With respect to defendants' arguments that Boulon's testimony is based upon unsupported factual and legal conclusions and speculation, this challenge goes to the bases for Boulon's opinion. '[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 and should be left for the [fact-finder's] consideration.'").

[3] *See, e.g., Stapleton v. Union Pac. R.R. Co.*, No. 16-CV-00889, 2020 WL 2796707, at *6 (N.D. Ill. May 29, 2020)("these and Stapleton's other factual criticisms go to the weight of Mathias's opinions, not their admissibility. *See Smith*, 215 F.3d at 718 ('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.').").

[4] *See, e.g.*, Minutes - Committee on Rules of Practice & Procedure, Report of the Advisory Committee on Evidence Rules (Jan. 5, 2021) at 25, *in* ADVISORY COMMITTEE ON EVIDENCE RULES APRIL 2021 AGENDA BOOK 36 (2021) (emphasis added). *See also* Thomas D. Schroeder, *Toward a More Apparent Approach to Considering the Admission of Expert Testimony*, 95 NOTRE DAME L. REV. 2039 (2020) ("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-

The Reporter to the Advisory Committee on Evidence Rules recently lamented the frequency with which such erroneous statements appear in court decisions:

> Many opinions can be found with broad statements such as "challenges to the sufficiency of an expert's basis raise questions of weight and not admissibility"—a misstatement made by circuit courts and district courts in a disturbing number of cases.[5]

Rule 702, and not any other source of law, provides the standard that district courts must use to assess whether a proffered expert's opinions are admissible.[6] Rule 702(b) mandates that proffered opinions must be "based on sufficient facts or data;" and Rule 702(d) requires that the expert have "reliably applied the principles and methods to the facts of the case." Accordingly, Rule 702 directs that courts must decide the adequacy of an expert's factual foundation and methodological application as a matter of admissibility:

> In sum, the 2000 amendment [to Rule 702] 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.[7]

Therefore, unless the court concludes by a preponderance of proof that the opinions have sufficient factual support and involve a reliable application of the methodology, the expert's testimony is properly excluded.[8]

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examination and competing evidence.") (emphasis original). Notably, Judge Schroder is the Chair of the Advisory Committee on Evidence's Rule 702 Subcommittee.

[5] Memorandum from Daniel J. Capra, Reporter, Advisory Comm. on Evidence Rules, to Advisory Comm. on Evidence Rules, *Possible Amendment to Rule 702* (Apr. 1, 2021) at 11 *in* ADVISORY COMMITTEE ON EVIDENCE RULES APRIL 2021 AGENDA BOOK 90 (2021).

[6] *See Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2316–17 (2016) (addressing admissibility of expert testimony using Rule 702).

[7] 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 43 *in* ADVISORY COMMITTEE ON EVIDENCE RULES APRIL 2018 AGENDA BOOK 49 (2018) (emphasis added).

[8] *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*.")

Cases that erroneously describe an expert's factual basis or methodological application presents an issue of weight, not admissibility, usually are not interpretations of Rule 702 at all, but rather are recycled statements traceable to pre-Rule 702 law that the 2000 amendment rejected.[9] For example, in *NuTech Orchard Removal, LLC, v. DuraTech Indus. Int'l, Inc.*, No. 3:18-CV-00256, 2020 WL 6994246, at *5 (D.N.D. Oct. 14, 2020), referenced above, the court took the quoted statement that an expert's factual basis is a matter of weight and not admissibility from *Sappington v. Skyjack, Inc.*, 512 F.3d 440, 450 (8th Cir. 2008). But *Sappington* takes the quoted passage from *Triton Corp. v. Hardrives, Inc.*, 85 F.3d 343, 347 (8th Cir.1996), which in turn draws the language from *Loudermill v. Dow Chem. Co.*, 863 F.2d 566, 570 (8th Cir. 1988). Similar "DNA analysis" reveals that the phrases commonly repeated in cases to support this incorrect proposition stem from ancient cases decided years before current Rule 702 came into being.[10]

When courts apply an analysis that deviates from the directions set forth in Rule 702, they tread on thin ice. The Chair of the Advisory Committee's Rule 702

(emphasis added). *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) ("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).") (emphasis added).

[9] *See* 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) ("The proposed amendment and the Committee Note clearly envision a more rigorous and structured approach than some courts are currently employing.").

[10] *See, e.g., Trevelyn Enterprises*, 2021 WL 65689, at *2 (quotes *United States v. 14.38 Acres of Land*, 80 F.3d 1074, 1077 (5th Cir. 1996), which itself quotes *Viterbo v. Dow Chem. Co.*, 826 F.2d 420, 422 (5th Cir. 1987)). *See also Acevedo v. NCL (Bahamas) Ltd.*, 317 F. Supp. 3d 1188, 1197 (S.D. Fla. 2017)("Based upon a review of the report and Mr. Camuccio's observations which provide the basis for his conclusions, the report and testimony on the issues contained therein are admissible. As the Court of Appeals for the Eleventh Circuit has stated, '[a]ny weaknesses in the factual underpinnings of [the expert's] opinion go to the weight and credibility of his testimony, not to its admissibility.' *Sorrels*, 796 F.3d at 1285 (quoting *Hurst v. United States*, 882 F.2d 306, 311 (8th Cir. 1989).").

Subcommittee recently chided courts that do not center their gatekeeping analysis on Rule 702:

> a surprising number of cases start and end with *Daubert*[11] and its progeny and fail to mention Rule 702. 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.[12]

The misguided view that an expert's factual basis involves only the weight of the opinion testimony has become such a problem that the Advisory Committee on Evidence Rules at its April 30, 2021 conference voted to recommend a proposed amendment to Rule 702 that "would clarify that expert testimony should not be permitted unless the judge finds by a preponderance of the evidence that each of the prerequisites are met."[13] The Standing Committee on Practice and Procedure in June will decide whether the proposed amendment will be published for public comment. The Standing Committee's Chair, Judge John D. Bates, has indicated

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[11] *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

[12] Schroeder, 95 NOTRE DAME L. REV. at 2060. *See also Kansas City S. Ry. Co. v. Sny Island Levee Drainage Dist.*, 831 F.3d 892, 900 (7th Cir. 2016) (stating that the litigants "should have paid more attention to Federal Rule of Evidence 702, which superseded *Daubert* many years ago"); *United States v. Parra*, 402 F.3d 752, 758 (7th Cir. 2005) (recognizing that, "[a]t this point, Rule 702 has superseded *Daubert*").

[13] Minutes - Committee on Rules of Practice & Procedure, Report of the Advisory Committee on Evidence Rules (Jan. 5, 2021) at 25, *in* ADVISORY COMMITTEE ON EVIDENCE RULES APRIL 2021 AGENDA BOOK 36 (2021) (emphasis added). The Draft Committee Note that accompanies this proposed amendment explicitly rejects those cases that describe an expert's factual foundation as an issue of weight and not admissibility:

> 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)*[.]

Draft Committee Note to Proposed Amendment to Rule 702 (emphasis added), included in Capra, *supra* n.8, at 16.

he "anticipate[s] no resistance from the Standing Committee to such a proposal."[14]

2. Rule 702's Criteria Must Be Met by a Preponderance of the Evidence.

Courts must view the Rule 702 admissibility requirements through the lens of the Rule 104(a) burden of production. The Advisory Committee Note to the 2000 Amendment to Rule 702 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. *See Bourjaily v. United States*, 483 U.S. 171 (1987).

Despite this direction, the Advisory Committee finds that "many courts are ignoring that standard."[15]

Rather than hold the proponent to meeting the burden of production, a number of courts have examined opinion testimony using deferential approaches that assume admissibility. Some courts have declared there is a "presumption of admissibility"[16] or applied an understanding that exclusion is "the exception

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[14] Minutes - Advisory Committee on Evidence Rules (Nov. 13, 2020) at 6, *in* ADVISORY COMMITTEE ON EVIDENCE RULES APRIL 2021 AGENDA BOOK 15 (2021).

[15] Hon. Patrick J. Schiltz, Report of the Advisory Committee on Evidence Rules (Dec. 1, 2020) at 5, *in* COMMITTEE ON RULES OF PRACTICE & PROCEDURE JANUARY 2021 AGENDA BOOK 441 (2021). *See also* Schroeder, 95 NOTRE DAME L. REV. at 2060 ("In the vast majority of cases under question, while Rule 702 and relevant cases are cited, there is no acknowledgement 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.") (emphasis original).

[16] *See, e.g.*, *Price v. General Motors, LLC*, No. CIV-17-156-R, 2018 WL 8333415, at *1 (W.D. Okla. Oct. 3, 2018) ("The Federal Rules encourage the admission of expert testimony and there is a presumption under the Rules that expert testimony is admissible.") (quotations omitted); *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 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

rather than the rule."[17] Some other courts describe the admissibility hurdle as minimal, so that "[o]nly if the expert's opinion is so fundamentally unsupported that it can offer no assistance to the [trier of fact] must such testimony be excluded."[18]

These conceptions fundamentally misunderstand the burden of production applicable to Rule 702. It "is decidedly not the case" that expert testimony can be described as "presumptively admissible."[19] Rule 702 compels courts to look first to the burden of production and determine at the outset if the opinion testimony meets the standard:

> 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

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assuming this [gatekeeper] role, the Court applies a presumption of admissibility.").

[17] *See, e.g.*, *Trice v. Napoli Shkolnik PLLC*, No. CV 18-3367 ADM/KMM, 2020 WL 4816377, at *10 (D. Minn. Aug. 19, 2020)(quotation and citations omitted); *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).

[18] *Beebe v. Colorado*, No. 18-cv-01357-CMA-KMT, 2019 WL 6044742, at *6 (D. Colo. Nov. 15, 2019) (emphasis original) (quotation omitted). *See also Thompson v. APS of Okla., LLC*, No. CIV-16-1257-R, 2018 WL 4608505, at *5 n. 15 (W.D. Okla. Sept. 25, 2018); *Trice*, 2020 WL 4816377, at *10 (similar statements). Notably, the quoted description of an exceedingly low hurdle that expert testimony must overcome is taken from *Bonner v. ISP Tech., Inc.*, 259 F.3d 924, 929-30 (8th Cir. 2001). *Bonner*, however, draws that language from *Hose v. Chicago Nw. Transp. Co.*, 70 F.3d 968, 974 (8th Cir. 1996), which itself quotes the 1988 *Loudermill* opinion, 863 F.2d at 570. The statement therefore does not interpret or apply the current standard—it *pre-dates* Rule 702 and even *Daubert*, and constitutes a recycled approach to expert admissibility that courts should have discarded upon the adoption of Rule 702.

[19] *See* Capra, *supra* n.8 at 11, n.4. *See also* Lee Mickus, *Gatekeeping Reorientation: Amend Rule 702 to Correct Judicial Misunderstandings about Expert Evidence*, WLF Working Paper No. 217 at 17 (May 2020) ("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.").

> found, then any slight defect in either of these factors becomes a question of weight. But not before.[20]

In fact, the 2000 amendment to Rule 702 sought to reflect the Supreme Court's determination in *Daubert* "that cross-examination alone is ineffective in revealing nuanced defects in expert opinion testimony," and so "the trial judge must act as a gatekeeper to ensure that unreliable opinions don't get to the jury in the first place."[21] When courts fail to apply the preponderance of the evidence test and instead presume admissibility, they improperly shift the burden of production away from the proponent. The effect is to "relegate to the jury the very decisions that Rule 702 contemplates to be beyond jury consideration."[22]

To address the erroneous court practice of misapplying or overlooking the burden of production applicable to admissibility decisions, the proposed Rule 702 amendment will "explicitly add the preponderance of evidence standard" into the text of the rule.[23] The draft amendment recommended by the Advisory Committee on April 30, 2021 would change Rule 702 so it reads 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 has demonstrated 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;
> **(b)** the testimony is based on sufficient facts or data;
> **(c)** the testimony is the product of reliable principles and methods; and

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[20] Apr. 1, 2018 Memorandum from Daniel J. Capra, Reporter, *supra* n.7, at 43 (emphasis original).

[21] 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). *See also* Mickus, *supra* n.19, at 8 ("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] Schroeder, 95 NOTRE DAME L. REV. at 2043.

[23] Schiltz, *supra* n.15, at 5. *See also* Minutes - Advisory Committee on Evidence Rules, *supra* n.14, at 3-4 ("Twenty years later [after adoption of current Rule 702] – when it is clear that federal judges are not uniformly finding and following the preponderance standard – the justification for a clarifying amendment exists.").

> **(d)** the ~~expert witness's has reliably applied~~ **expert's opinion reflects a reliable application of** the principles and methods to the facts of the case.[24]

The Draft Committee Note explains that the change is intended "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."[25]

3. Rule 702 Limits Experts to Expressing Only Those Conclusions that the Methodology Can Reliably Produce.

Concerns about expert "overstatement" have focused on situations that occur in criminal cases, such as instances in which forensic experts testify to a "match."[26] Although perhaps less obvious, in civil cases experts' assertions of confidence in the veracity of their conclusions also carry the potential for abuse. The Reporter to the Advisory Committee noted:

> Experts in civil cases are essentially incentivized to exaggerate their opinions. And studies have shown that the more overstated the opinion, the more it has an effect on juries. . . . 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.[27]

Some case examples show that courts may have difficulty recognizing and excluding overstatement in civil cases. For example, in *Adams v. Toyota*, the Eighth Circuit affirmed the admission of an expert's conclusion that he had "ruled out" pedal misapplication as a potential cause of a sudden acceleration accident.[28] Similarly, the court in *In re Trasylol Prod. Liab. Litig*., improperly allowed the expert to testify, on the basis of a differential diagnosis, that the use of a drug "in all medical certainty" contributed to the occurrence of a kidney injury, despite

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[24] Language to be added appears in bold with underlining; text to be eliminated appears with double strike-through.

[25] Capra, *supra* n.5, at 16.

[26] *E.g.*, *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" despite the inability of the methodology to conclude that only the weapon at issue could produce the same marks).

[27] Capra, *supra* n. 5, at 5, 7. (citing Neal Vidmar, *Expert Evidence, the Adversary System, and the Jury*, 95 American J. of Pub. Health, S137 (2005)).

[28] 867 F.3d 903, 916 (8th Cir. 2017).

conceding "scientific unknowns."[29] These statements of certainty in the causation conclusion, 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.

The Advisory Committee on Evidence has recognized that opinions expressed from the witness stand create the potential for misleading juries and producing unjust results unless supported by a reliable methodology and limited by the established understanding of the field of expertise. The change to the text of Rule 702 in the proposed amendment recommended on April 30, 2021 aims to re-focus courts on the need to regulate expert overstatements. Further, the draft Committee Note also recommended to the Standard Committee will provide courts with further clarification:

> The amendment is especially pertinent to the testimony of forensic experts in both criminal and civil cases. Forensic experts should avoid assertions of absolute or one hundred percent certainty—or to a reasonable degree of scientific certainty—if the methodology is subjective and thus potentially prone to error. In deciding whether to admit such forensic expert testimony, the judge should (where possible) receive an estimate of the known or potential rate of error of the methodology employed, based (where appropriate) on studies that reflect how often the method produces accurate results. Expert opinion testimony regarding the weight of feature comparison evidence (i.e., evidence that a set of features corresponds between two examined items) must be limited to those inferences that can reasonably be drawn from a reliable application of the principles and methods.[30]

These revisions to the rule and Committee Note, if adopted, will establish useful authority for litigants who seek to convince courts that an expert should not be

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[29] Case No. 08-MDL-01928, 2010 WL 8354662 (S.D.Fla. Nov. 23, 2010). Additional examples are listed in Memorandum from Daniel J. Capra, Reporter, Advisory Comm. on Evidence Rules, to Advisory Comm. on Evidence Rules, *Possible Amendments to Rule 702* (Oct. 1, 2019) at 25 *in* ADVISORY COMMITTEE ON EVIDENCE RULES OCTOBER 2019 AGENDA BOOK 131 (2019).

[30] Memorandum from Daniel J. Capra, Reporter, Advisory Comm. on Evidence Rules, to Advisory Comm. on Evidence Rules, *Suggestions on the text of the proposed 702 amendment and the Committee Note* (Apr. 25, 2021) at 5, *in* ADVISORY COMMITTEE ON EVIDENCE RULES APRIL 2021 AGENDA BOOK 489 (2021).

allowed to claim a degree of confidence in an opinion that reflects an overstated expression of certainty in the veracity of the conclusion.

Conclusion

The decision of the Advisory Committee on Evidence to recommend an amendment and new Committee Note to the Standing Committee for approval and publication represents a major development. This action is undertaken because courts misunderstand the requirements of Rule 702 and have developed conceptions of the gatekeeping role that diverge from Rule 702's intent.