PROPOSED REVISIONS
to the
FEDERAL RULES OF EVIDENCE

Standing Committee of Rules of Practice & Procedure
Advisory Committee on Evidence Rules

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Comments and Proposals

by

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PROPOSED REVISIONS TO RULE 702

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Introduction

At common law, courts generally allowed expert witnesses to testify in cases where the finder of fact needed specialized knowledge to determine a fact in issue.1 Courts disagreed, however, as to when the finder of fact needed such knowledge.2 Some courts refused to allow expert testimony in cases involving issues about which an average juror had a working knowledge.3 Other courts allowed expert testimony in all cases except those where the court thought such testimony superfluous and a waste of time.4 The drafters of Current Rule 702 attempted to codify the more liberal common law position by allowing the use of expert testimony whenever such testimony “would assist the trier of fact.”5

The Advisory Committee’s Note to Current Rule 702 indicates that the drafters intended it to govern the propriety of allowing expert testimony and the qualifications required of an expert.6 An expert may testify if such testimony will “assist the trier of fact.” A person is qualified to testify as an expert if the person has acquired a certain level of knowledge, skill, experience, training, or education. Since its adoption, however, Current Rule 702 has come to control concepts not provided for explicitly in the text of the rule.7

Current Rule 702, as interpreted by the federal judiciary, governs the concept of relevance in the context of expert opinion testimony.8 In addition, the Rule requires, although not explicitly, that all scientific evidence be “reliable.”9 The only important aspect

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2 McCormick, supra note 1, § 13.
3 Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923) (“when the question involved does not lie within the range of common experience or common knowledge, but requires special experience or special knowledge, then the opinions of witnesses skilled in that particular science, art, or trade to which the question relates are admissible in evidence”); see also Bridger v. Union Ry. Co., 355 F.2d 382, 387 (6th Cir. 1966) (“The subject matter must be closely related to a particular profession, business or science and not within the common knowledge of average laymen.”); McCormick, supra note 1, § 13.
6 Id.
8 Id. at 589, 113 S. Ct. at 2795; United States v. Downing, 753 F.2d 1224, 1242 (3d Cir. 1985); Weinstein, supra note 1, ¶ 13.02[02], at 13-7.
9 Daubert, 509 U.S. at 589, 113 S. Ct. at 2795.
of expert opinion testimony that Current Rule 702, as interpreted, does not control is the management of the case-specific facts that underlie expert opinion testimony. That is controlled by Current Rule 703.10

Current Rule 702 has proved inadequate in a major respect. The Rule fails to provide a standard for determining whether the principles and methodologies, when applied by an expert witness in forming opinions or conclusions, produce results reliable enough for presentation at a trial.11

This inadequacy appears to have resulted from omission. No rule in Article VII, or elsewhere in the Federal Rules of Evidence, provides a standard for determining whether the principles and methodologies, when applied in the way an expert has applied them, produce results that are reliable enough for presentation at a trial.12 This omission left the federal
courts without guidance whenever problems arose regarding the admissibility of novel scientific evidence.

Because the rules of evidence provided no standard for assessing the reliability of the principles, methodologies and applications employed by expert witnesses, most federal courts looked to the common law for guidance. The common law provided a standard that seemed acceptable, and the drafters of the federal rules had neither endorsed nor repudiated it. The common law standard originated in a 1923 case, Frye v. United States; 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 established to have gained general acceptance in the particular field in which it belongs.

Since the adoption of the federal rules in 1974, most federal courts used the above standard, known as the Frye test, to determine the admissibility of novel scientific evidence. Only the Second and Third Circuits refused to follow Frye after the adoption of the federal rules.

In applying the Frye test, courts looked to the relevant scientific community to make a decision on the admissibility of scientific techniques. The courts would review the relevant scientific literature to determine what the scientific community thought of the principles, methodologies and applications an expert witness wanted to employ. If the expert's use of science had gained acceptance in that community, the court would allow the

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13 Daubert, 509 U.S. at 583, 113 S. Ct. at 2792; Rice, Evidence, supra, note 11, § 8.03.
14 Downing, 753 F.2d at 1234.
15 293 F. 1013 (D.C. Cir. 1923).
16 Id. at 1014 (emphasis added).
18 Downing, 753 F.2d at 1237 (requiring "a preliminary inquiry focusing on (1) the soundness and reliability of the process or technique used in generating the evidence, (2) the possibility that admitting the evidence would overwhelm, confuse, or mislead the jury, and (3) the proffered connection between the scientific research or test result to be presented, and disputed factual issues in the case.") Williams, 583 F.2d at 1198 (1978) (requiring a balance of materiality and reliability against the tendency of the evidence to mislead the fact finder).
19 Christophersen v. Allied-Signal Corp., 939 F.2d, 1106, 111 (5th Cir. 1991); Downing, 753 F.2d at 1233; Mueller & Kirkpatrick, supra, note 11, § 7.8, at 744; Gianelli, supra note 11, at 1208-23.
expert's testimony. This method set a comparatively high standard for the admissibility of scientific evidence.

In contrast, courts allowed the use of non-scientific evidence based on a standard of "sufficient to support a finding." If a proponent could convince the court that the evidence was logically relevant, it was admissible unless excluded by another evidentiary rule. The Frye test dramatically raised the bar for the admissibility of scientific evidence because scientific acceptance often requires a very high level of reliability, much higher than the usual evidentiary standard.

The Frye test has been appealing to most courts for several reasons. First, the test is comparatively simple to apply; rather than delving deeply into the world of science, courts review the literature and defer judgment to those who specialize in such things. Second, the test sets a high standard for admitting scientific evidence and, therefore, assures that courts use only results from the most reliable techniques. Third, because of the great weight that juries give to expert testimony, the high standard of Frye protests the integrity of the process. There is, however, a persuasive response to the proponents of Frye.

Opponents argue that the Frye test constitutes an abdication of the decision-making responsibilities of the courts. Courts avoid responsibility for making determinations about the reliability of a particular science by deferring to the judgment of the scientific community. While this does place the responsibility in capable hands, the abdication of responsibility raises a number of other criticisms of the Frye test.

The high standards of the scientific community, in some cases requiring a reliability rate of over 99 percent, arguably sets an unjustifiably high burden for the admission of scientific evidence. This high burden is acceptable if one accepts the argument that juries,  

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20 See Fed. R. Evid. 104(b), 901(a); Imwinkelreid, supra note 11 at 600 (arguing that the standards for non-scientific evidence should apply to scientific evidence).
21 Mueller & Kirkpatrick supra note 11, § 7.8, at 743. In fact, an inquiry by science differs radically from the relevant legal inquiry. See, e.g., DeLuca v. Merrell Dow Pharmaceuticals, Inc., 911 F.2d 941 (3d Cir. 1990) (discussing, in detail, the much disputed methodology employed by doctor in forming testimony regarding Bendectin's effect on fetuses); Williams, 583 F.2d at 1198 ("We deal here with the admissibility or non-admissibility of a particular type of scientific evidence, not with the truth or falsity of an alleged scientific 'fact' or 'truth'."); Ronald J. Allen, Expertise and the Daubert Decision, 84 J. Crim. L. & Criminology 1157 (explaining the difference between the legal and scientific approaches to disputed issues).
23 DeLuca, 911 F.2d at 956 ("The fact that a scientific community may require a particular level of assurance for its own purposes before it will regard a null hypothesis as disproved does not necessarily mean that expert opinion with somewhat less assurance is not sufficiently reliable to be helpful in the contest of civil litigation."); see also Downing, 753 F.2d at 1236-1237; Williams, 583 F.2d at 1198; Rice, Evidence, supra note 11, § 8.03; Weinstein, supra note 1, ¶ 13.02[04]; Allen, supra note 21 (explaining how science skews results in favor of disproof where the law, at least in civil cases, does not favor either proof of disproof).
confused by complicated issues involved in scientific evidence, simply accept the conclusions drawn from the scientific evidence. This view, however, is flawed in a number of ways.

Empirical studies suggest that juries generally understand complicated evidence. Moreover, experts do not testify in a vacuum. The other party, in most cases, will cross-examine the expert and produce scientific evidence to rebut the expert's opinion. The jury, in all cases, may disregard the evidence presented by one or both sides.

The conservative Frye test bases admissibility on the orthodoxy of the science a party seeks to admit. While acceptance by the scientific community provides an assurance of validity and reliability, lack of acceptance, particularly in light of the high standards of accuracy many sciences insist upon, does not prove the converse.

Under Frye, novel science, or a novel application of an accepted science, remains inadmissible until the scientific community accepts the science or application as valid. This is a problem because cases sometimes present unique factual situations, and the scientific community may not consider the unique situation important enough to investigate. In such situations, the science necessary to resolve the issues never gains general acceptance, and legitimate claims that can be proven only with that evidence always fail. The test should be whether the science produces reliable results, not whether the scientific community has used, written about, and accepted the underlying principles, methodologies or applications. The Supreme Court recognized this in *Daubert v. Merrell Dow Pharmaceuticals* where it held that the Federal Rules of Evidence had moved beyond the Frye test.

In *Daubert*, the Supreme Court ruled that the Federal Rules of Evidence did not allow

24 R. Carlson, E. Imwinkelreid, & E. Kionka, Evidence in the Nineties 290 (3d ed. 1991) (citing four studies supporting the notion that proponents of Frye underestimate juror ability). But see, L. Timothy Perrin, Expert Witness Testimony: Back to the Future, 29 U. Rich. L. Rev. 1389, 1422-1433 (1995). One of the great disputes in the area of scientific evidence involved the admissibility of expert testimony supporting the hypothesis that the drug Bendectin causes birth defects. It is ironic that in all of the controversy surrounding the admissibility of such testimony, one of the few juries that heard the expert testimony unanimously decided that the evidence did not establish causation. In re Richardson-Merrell, Inc. "Bendectin" Products Liability Litigation, 624 F. Supp. 1212 (S.D. Oh. 1985) (deciding over 800 consolidated cases), aff'd in relevant part, 857 F.2d 290 (6th Cir. 1988), cert. denied, 488 U.S. 1006, 109 S. Ct. 788, 102 L.Ed.2d 779 (1989). The approach followed in In re Richardson, of hearing the issue of causation separately, provides a good example of how courts can avoid having the jury ignore the science in an effort to help a sympathetic plaintiffs.


26 Carlson, Imwinkelreid, & Kionka, supra note 24, at 289.

27 Gianelli, supra note 11, at 1223.

28 Id., Christophersen, 939 F.2d at 1128 (Reavley, J., dissenting) ("Indeed, the argument simply acknowledges the mandate of our legal system: to resolve conflicts, even seemingly intractable conflicts, from which we cannot retreat when parties invoke the machinery of the legal system. Let the experts settle the larger dispute in due time; we have cases to resolve.")

for use of the Frye test in determining the admissibility of scientific evidence.\textsuperscript{30} The Supreme Court replaced the Frye test with a test fashioned from the text of Current Rule 702.\textsuperscript{31} The new test, based on Current Rule 702's requirement that an expert testify to "scientific … knowledge," require federal courts to scrutinize the offered science and determine whether the science was "reliable."\textsuperscript{32}

In explaining the Daubert test, the Court provided several factors relevant to a determination of "reliability".\textsuperscript{33} Those factors include: 1) whether the science can be tested; 2) whether the science has been published and subjected to peer review; 3) the potential rate of error in the science; and 4) whether the science is generally accepted in the relevant scientific community.

The Daubert test gives courts more flexibility than the Frye test.\textsuperscript{34} Rather than complete dependence on the scientific community, courts applying Daubert can validate a science before the scientific community expresses approval. The main criticism of the new test, expressed in Chief Justice Rehnquist's dissent in Daubert, is that it cuts courts loose without guidance.\textsuperscript{35}

Daubert requires federal judges to make a determination about the "reliability" of the proffered science. Federal judges feel uncomfortable with this task.\textsuperscript{36} Reliability is a vague concept, and the Supreme Court provided no standard or structure for the inquiry.\textsuperscript{37} The guidelines in Daubert provide lower courts with little direction: Moreover, adherence to the guidelines leads courts back to the relevant scientific community that

\textsuperscript{30} Id. at 585, 113 S. Ct. at 2793.
\textsuperscript{31} Id. at 589, 113 S. Ct. at 2795.
\textsuperscript{32} Id. at 593, 113 S. Ct. at 2797.
\textsuperscript{33} Id. at 591-95, 113 S. Ct. at 2796-97.
\textsuperscript{35} Daubert, 509 U.S. at 599, 113 S. Ct. at 2800 (Rehnquist, C.J., dissenting).
\textsuperscript{36} Daubert v. Merrell Dow Pharmaceutical, 43 F.3d 1311, 1315 (9th Cir. 1995) (applying the Supreme Court's new standard on remand: 'Under Daubert we must engage in a difficult two part analysis. First, we must determine nothing less than whether the experts' testimony reflects 'scientific knowledge,' whether their findings are 'derived by the scientific method,' and whether their work product amounts to 'good science.' Second, we must ensure that the proposed expert testimony is 'relevant to the task at hand,' that it logically advances a material aspect of the proposing party's case. The first prong of Daubert puts federal judges in an uncomfortable position.').
\textsuperscript{37} Margaret Berger, Federal Judicial Center, Reference Manual on Scientific Evidence 49 (1994) [hereinafter Reference Manual on Scientific Evidence] ("The Daubert opinion did not address many of the complex issues that will have to be elucidated in order to reconcile the Supreme Court's recognition of the Federal Rules' liberal admissibility policy for expert proof with its endorsement of the trial judge's gatekeeping function."); Perrin, supra note 24, at 1409-10; Majmudar, supra note 11, at 205 ("The framework established by Daubert, because of its flexibility, does not offer much binding guidance regarding the parameters of the admissibility inquiry other than establishing that admissibility is broader than mere general acceptance.").
controlled under Frye.\(^{38}\) Two of the four factors--publication/peer review and general acceptance--merely restate the Frye test, albeit in noncompulsory form. The other two factors--whether the scientific principles, methodologies, and application can be tested and potential rate of error--are factors that require scientific investigation that only the relevant scientific community is qualified to make.\(^{39}\) In any scientific context, no one can know what tests or rates of error are appropriate without reference to the relevant science.\(^{40}\) While the Daubert decision freed lower courts from the absolute necessity of acceptance in the relevant scientific community, it did not free them from dependence upon the judgment of the same community.

**PROPOSED AMENDMENTS BEING CONSIDERED BY THE ADVISORY COMMITTEE**

The Advisory Committee is considering the following proposed amendment to Rule 702

**Rule 702. Testimony by Experts**

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 opinion or otherwise, provided that (1) the testimony is sufficiently based upon reliable facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the

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\(^{38}\) Rice, supra note 11, § 8.03 [B](1) ("In most cases judges will have no independent basis for evaluating the tests that have been applied to the scientific principles and methodologies; for understanding the results of those tests; for determining what an 'acceptable' rate of error is; or for measuring the adequacy of the controls that are in place to insure that the principles and methodologies produce accurate results. Consequently, when ascertainable, the prevailing opinion of those in the relevant science, viz., the general acceptance of those who know may continue to control under Daubert as it did under Frye."); Maliver, supra note 17, at 260 ("Close analysis of the Daubert opinion, however, shows that the Frye 'general acceptance' rule remains alive, albeit in attenuated form."); Majmudar, supra note 11, at 205 ("In making their decisions, judges will almost inevitably be influenced by their notions of the underlying validity of the scientific techniques and these notions will continue to play a crucial role in the admissibility of testimony even after Daubert.").

\(^{39}\) The following list contains cases applying the Daubert test and reaching the same result the courts reached when using the Frye test: Berry v. City of Detroit, 25 F.3d 1342, 1349-50 (6th Cir. 1994); Conde v. Velsicol Chem. Corp., 24 F.3d 809 (6th Cir. 1994); United States v. Muldrow, 19 F.3d 1332, 1337 (10th Cir. 1994); United States v. Quinn, 18 F.3d 1461, 1464-65 (9th Cir. 1994); United States v. Sepulveda, 15 F.3d 1161, 1183-1184 (1st Cir. 1993); O'Connor v. Commonwealth Edison Co., 13 F.3d 1090, 1106-07 (7th Cir. 1994); United States v. Bonds, 12 F.3d 540, 555 (6th Cir. 1993); Porter v. Whitehall Labs., Inc., 9 F.3d 607, 614 (7th Cir. 1993); United States v. Locascio, 6 F.3d 924, 938 (2d Cir. 1993); Wilson v. City of Chicago, 6 F.3d 1233, 1238 (7th Cir. 1993); United States v. Daccarett, 6 F.3d 37, 58 (2d Cir. 1993); Rosado v. Deters, 5 F.3d 119, 124 (5th Cir. 1993); United States v. Markum, 4 F.3d 891, 895-96 (10th Cir. 1993); United States v. Martinez, 3 F.3d 1191, 1196 (8th Cir. 1993); Cantrell v. GAF Corp., 999 F.2d 1007, 1013-14 (6th Cir. 1993).

\(^{40}\) Perrin, supra note 24, at 1409-10.
The survey report is attached hereto as Appendix A. The Evidence Project is currently in the process of formulating a survey of federal judges to inquire about their reactions to the amendments currently being considered by the Advisory Committee. Upon completion of that survey, its results will also be made available to the Advisory Committee.

While well intentioned, the proposed amendment still suffers from a number of flaws and hence does not effectively solve the problems presented by the current rule. These flaws are both structural and substantive in nature.

Structurally, proposed Rule 702 lumps two separate issues--qualifications of the testifying expert and the reliability of the principles underlying the testimony--under the rubric of a single rule. Failure to treat these two prerequisites to the admissibility of expert evidence separately, with discrete standards of admissibility for each, only serves to further confuse the issue. Indeed, in a recent judicial survey conducted by the Evidence Project, 83% of federal judges who responded to the survey agreed that the issues of expert qualifications and reliability of the underlying principles should be treated in two separate rules.41

Substantively, the proposed amendment, while parroting the “reliability” standard presented in Daubert, does nothing to assist judges in discerning what is meant by “reliable.” Merely indicating that the judge should determine whether the underlying facts or data are sufficiently “reliable”, whether the testimony is a product of “reliable” principles or methodologies, and whether these principles and methods have been applied “reliably”, does nothing to inform the trial judge by what standards he or she must make that finding of reliability that will ultimately lead to the admissibility of the evidence. Indeed, the circular reasoning of this proposed amendment is easily evidenced when one analyzes the premise of the proposed amendment. That premise can be represented by the formulaic equation that expert evidence is reliable enough to warrant its admission into evidence if the trial judge finds that it is reliable enough. Without any standards for making such a finding, the proposed amendment to Rule 702 is doomed to lead to the same difficulties and problems, if not larger ones, that have resulted from the current rule.

Absent a legally cognizable standard for a finding of reliability, courts will all too often find themselves resorting to reliance on scientific standards of reliability. Where these scientific standards are particularly onerous, as in epidemiological cases for example, which require a confidence showing in the order of 98% before a finding is deemed to be “scientifically reliable”, a showing of admissibility would effectively turn into a determination of the merits of the proponent’s entire case. Yet there is no immediate justification for requiring such an overwhelming showing of reliability in instances where ultimate culpability is determined, for example, by a preponderance of the evidence standard. A preferred approach would be to graft directly onto the rule, a legal standard, such as “preponderance of the evidence” or “sufficient to support a finding,” that the proponent must show as to the authenticity of the evidence, prior to it being allowed into evidence.

41 The survey report is attached hereto as Appendix A. The Evidence Project is currently in the process of formulating a survey of federal judges to inquire about their reactions to the amendments currently being considered by the Advisory Committee. Upon completion of that survey, its results will also be made available to the Advisory Committee.
Reasonable minds may differ over what standard should govern, but the point is that in the absence of a legally recognizable standard that is textually and unambiguously made part of the rule, trial judges will be operating in dark and unfamiliar territory when attempting to pass on the reliability of technical, scientific, or other expert evidence.

Tellingly, the Committee Note following the proposed amendment indicates that “the admissibility of 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.” 42 While this advisory note portends to graft a legal standard (preponderance of the evidence) into the Rule 702 finding, that key requirement was inexplicably never incorporated into the actual text of the proposed amendment. Moreover, because the proposed amendment is being presented in the aftermath of Daubert, and because the link to Rule 104(a) was expressed in Daubert, it does not necessarily follow that, in the absence of a standard included in the actual text of the rule, courts will consistently interpret the proposed rule to indeed require a preponderance of the evidence standard. Put succinctly, if the Committee is of the opinion that the preponderance of the evidence standard should govern Rule 702 findings into the admissibility of expert testimony, it should so state unambiguously within the text of the rule—a feature that the current proposed amendment does not do.

**REVISIONS SUGGESTED BY THE EVIDENCE PROJECT**

Revised Rules 702 and 703 attempt to remedy the problems that continue to exist under Current Rule 702 and the Daubert interpretation of that Rule. Revised Rule 702 controls only the qualification of expert witnesses. Revised Rule 703 controls all other aspects of expert testimony. Revised Rule 703(a) allows for the admission of expert testimony when such testimony helps the factfinder and complies with the requirements of subsections (b) and (c). Revised Rule 703(b) contains a test for screening the scientific principles, methodologies, and applications employed by experts in forming opinions and conclusions relating to the case at trial. Revised Rule 703(c), discussed later, controls the treatment of case-specific data relied on by experts in forming opinion and conclusions.

**Revised Rule 702. Testimony by Qualification of Experts Witnesses** [changes highlighted]

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 is qualified as an expert by if the witness has acquired, by any means, substantial knowledge of scientific, technical, or other specialized areas, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

**Revised Rule 702. Qualification of Expert Witnesses** [clean copy]

A witness is qualified as an expert if the witness has acquired, by any means,

42 Advisory Committee Note to Proposed Amendment to Federal Rule of Evid. 702 (citations omitted).
substantial knowledge of scientific, technical or other specialized areas.

Commentary

Revised Rule 702 sets forth a standard for qualifying an expert witness. The portion of Current Rule 702 that requires the testimony to assist the trier of fact and, as interpreted, imposes a reliability requirement on all scientific evidence, survives in altered form in Revised Rule 703.

Revised Rule 702 makes no change in the level of knowledge required to be an expert. The wording of Current Rule 702 requires no specific level of knowledge. It appears to imply that a standard exists somewhere else in the Rules. No other rule, however, mentions the level of knowledge required of an expert witness. Revised Rule 702 contains the admittedly somewhat vague standard of "substantial." A more definite standard would not accommodate the great variety of expert testimony and the varied means by which experts acquire the requisite knowledge. Revised Rule 702 leaves to the discretion of the courts the question of whether a witness has the requisite "substantial knowledge."

Revised Rule 702 no longer contains a laundry list of ways in which an expert witness can obtain specialized knowledge. As long as the witness has substantial knowledge about the subject matter, the witness can qualify as an expert under Revised Rule 702. Revised Rule 702 contains only technical wording changes and effects no change from the practice of qualifying experts under Current Rule 702.

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44 Current Rule 702 provides in relevant part: "a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

45 See, e.g. Trademark Research Corp. v. Maxwell Online, 995 F.2d 326 (2d Cir. 1993); Knight v. Otis Elevator Co., 596 F.2d 84 (3d Cir. 1979); Reno-West Coast Distribution Co. v. Mead Co., 613 F.2d 722 (9th Cir. 1979); N.V. Maatschappij Voor Industriele Waarden v. A.O. Smith Corp., 590 F.2d 415 (2d Cir. 1978); Weinstein, supra note 1, ¶ 13.02.[02].

46 See Fed. R. Evid. 702 (listing knowledge, skill, experience, training, or education as methods through which one can become qualified as an expert.)

47 56 F.R.D. 183, 282. Payton v. Abbott Labs, 780 F.2d 147 (1st Cir. 1985); United States v. Bilson, 648 F.2d 1238 (9th Cir. 1981); United States v. Baker, 553 F.2d 1013 (6th Cir. 1977); Soo L. R. Co. v. Fruehauf Corp., 547 F.2d 1365 (8th Cir. 1977); In Re “Agent Orange” Prod. Liab. Litig., 611 F. Supp 1223 (E.D.N.Y. 1985); Mueller & Kirkpatrick, supra note 11, § 7.6 at 723.
Revised Rule 703. Bases of Opinion Testimony by Experts [changes highlighted]

(a) **General rule.** Subject to subsections (b) and (c), if expert testimony will help the trier of fact understand the evidence or determine a fact in issue, a qualified witness may testify to specialized knowledge, as well as opinions and inferences drawn therefrom, without personal knowledge of the underlying data.

(b) **Principles, methodologies, and applications employed.** A proponent of expert testimony must demonstrate, by a preponderance of the evidence, that the scientific, technical, or other bases of the testimony, including all principles, methodologies, and applications employed by the witness in forming opinions and inferences, produce credible results.

(c) **Factual basis of opinion.** The facts or case specific data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence. A proponent of expert testimony must make a demonstration of reliability, pursuant to Rule 803(5), for all otherwise inadmissible hearsay data relied upon by the expert. An expert may not rely upon data that is inadmissible.

Revised Rule 703. Opinion Testimony by Experts [clean copy]

(a) **General rule.** Subject to subsections (b) and (c), if expert testimony will help the trier of fact understand the evidence or determine a fact in issue, a qualified witness may testify to specialized knowledge, as well as opinions and inferences drawn therefrom, without personal knowledge of the underlying data.

(b) **Principles, methodologies and applications employed.** A proponent of expert testimony must demonstrate, by a preponderance of the evidence, that the scientific, technical, or other bases of the testimony, including all principles, methodologies, and applications employed by the witness in forming opinions or inferences, produce credible results.

(c) **Factual basis of opinion.** The case specific data upon which an expert bases an opinion or inference may be perceived by or made known to the expert at or before the hearing. A proponent of expert testimony must make a demonstration of reliability, pursuant to Rule 803(5), for all otherwise inadmissible hearsay data relied upon by the expert. An expert may not rely upon data that is inadmissible.

Revised Rule 703. Opinion Testimony by Experts [clean copy]

(a) **General rule.** Subject to subsections (b) and (c), if expert testimony will help the trier of fact understand the evidence or determine a fact in issue, a qualified witness may testify to specialized knowledge, as well as opinions and inferences drawn therefrom, without personal knowledge of the underlying data.
Commentary

Revised Rule 703 allows for the use of expert testimony. Under the Rule, experts may testify to specialized knowledge, and opinions or conclusions drawn from specialized knowledge, if expert testimony will help the trier of facts and the bases of the testimony comply with subsections (b) and (c).

Subsection (a) controls the form of expert testimony. Current Rule 702 allows an expert to testify to "knowledge, skill, experience, training, or education . . . in the form of opinion or otherwise." Taken literally, Current Rule 702 permits an expert to testify, in opinion form, to specialized knowledge and not to the results reached by applying specialized knowledge to the facts of the case. Revised Rule 703(a) allows an expert to testify to "specialized knowledge, as well as opinions and conclusions drawn therefrom." This makes explicit what has been implicit in Current Rule 702.

Although Current Rule 402 already makes relevance a prerequisite to admissibility, the concept of relevance under the expert opinion operates somewhat differently. Revised Rule 703(a) requires a special relationship between the specialized knowledge, the opinions and conclusions of the expert, and the issues under consideration by the court. Courts sometimes refer to this relation as the “fit” between the process used in formulating the testimony and the issues under consideration.

“Helpful,” under Revised Rule 703(a) also incorporates the guidelines of Current Rule 403. If proposed expert testimony would prejudice or confuse the factfinder, or waste time, courts should not allow use of the testimony.

The liberal standard has not changed. Revised Rule 703(a), like Current Rule 703, does not require that the finder of facts need expert assistance. Revised Rule 703(a) allows a party to use expert testimony whenever the testimony is relevant and not superfluous, overly prejudicial, or unduly confusing.

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48 See Fed. Rule Evid. 702: "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 opinion or otherwise." (Emphasis added).
50 Daubert, 113 S. Ct. at 2798; Downing, 753 F.2d at 1239; Reference Manual on Scientific Evidence, supra note 43, at 113-17; Weinstein, supra note 1, ¶ 13.02, at 13-14; Mueller & Kirkpatrick, supra note 13, § 7.6 at 723.
Revised Rule 703. Opinion Testimony by Experts [clean copy]

(b) Principles, methodologies, and applications employed. A proponent of expert testimony must demonstrate, by a preponderance of the evidence, that the scientific, technical, or other bases of the testimony, including all principles, methodologies, and applications employed by the witness in forming opinions or inferences, produce credible results. 51

Commentary

Revised Rule 703(b) provided an explicit test for examining the principles, methodologies, and applications employed by an expert in forming his or her testimony. The test provided by subsection (b) applies to all forms of expert testimony. The test is designed to move the courts away from complete dependence on the scientific community without cutting them loose in unfamiliar territory. 52 The test requires “a proponent of expert testimony to demonstrate, by a preponderance of the evidence, that the scientific, technical, or other bases of the testimony . . . produce credible results.”

Applying a legal standard, while explicitly placing the burden of persuasion on those seeking to use expert testimony, puts the courts in familiar territory. 53 The new test represents something akin to a heightened standard of authentication. 54

When considering any evidence, a court must determine whether there are facts sufficient to support a finding that the evidence is what the proponent claims. 55 This familiar determination now applies to the validity of the techniques underlying scientific, technical,

51 Previously, some commentators have advocated similar approaches to determine the admissibility of novel expert testimony. E.g., Gianelli, supra note 11, at 1248 (recommending that admissibility of novel science turn on whether a civil litigant or criminal defendant seeking to use the technique can demonstrate the validity of the technique by a preponderance of the evidence). Professor Gianelli would require the prosecution in a criminal case to demonstrate validity beyond a reasonable doubt. Id. Professor Imwinkelreid, however, disagrees with this approach, and suggests that the rules allow for an interpretation under which the judge would decide the issue of validity under the standards used by the jury to decide simple issues of conditional relevance and authentication. Imwinkelreid, supra note 11, at 606-18 (suggesting that the Federal Rules of Evidence make the validity of a technique a question of authentication and conditional relevance for the jury to decide).

52 In this way, subsection (b) cures the problems caused by the Daubert decision. See Daubert, 509 U.S. at 597-99, 113 S. Ct. at 2799 (Rehnquist, C.J., dissenting); Rice, supra note 11, ¶ 8.03; Reference Manual on Scientific Evidence, supra note 37, at 49.

53 See Gianelli, supra note 11, at 248-50.

54 Authenticity and validity represent distinct determinations. Downing, 753 F.2d at 1240 n.21 (distinguishing the question of whether a particular machine works as intended from the question of general authentication of a process).

and other specialized testimony. 56 Revised Rules 702 and 703 require a court to apply the “preponderance of the evidence” standard in the place of the “evidence sufficient to support a finding” standard. 57 This heightened standard protects the trial process from confusing and misleading junk science while not screening out relevant evidence unnecessarily.

A proponent of expert testimony will need to make a preliminary showing, by a preponderance of the evidence, that the bases of the testimony produce credible results. 58 A proponent may use any available means to make this showing. For example, the proponent can, if she wishes, show that the principles, methodologies, and applications employed by the expert have the approval of the relevant scientific community. The proponent, alternatively, may make her showing by demonstrating that the bases of the testimony, although novel, are grounded in reason, logic, and science.

The standard should apply only to the scientific, technical, or other bases of the testimony. In applying the test, courts should avoid making any case-specific factual determinations. The distinction is between theory and specific application to the facts at issue. The relevant preliminary question under Revised Rule 703(b) is whether, accepting all the facts favorable to the proponent as true, application of the principles and methodologies underlying the expert’s testimony produce results that the court can believe are more likely than not.

The new standard may seem unreasonably forgiving. The standard for admission of expert testimony, however, provides merely a threshold. After this threshold, other obstacles remain. First, the rules governing relevance, prejudice, and confusion still apply. 59 Second, vigorous cross-examination by the opponent can reveal any weaknesses in the techniques applied. Third, the opponent of the evidence remains free to introduce contradictory expert testimony.

The new standard, like other preceding standards, has limitations. In some cases, only the scientific community will have the ability to discern whether the bases of an expert’s testimony produce credible results. This is an unavoidable reality of scientific evidence. The new standard does, however, free the law from complete dependence on publication and peer review. It also provides the courts with a familiar structure for making determinations on complicated questions.

56 Actually, the inquiry applies twice: courts should assess the validity of a technique under the standard provided by Revised Rule 703(b) and assess the authenticity of a technique under the standard provided by Federal Rule of Evidence 901.
57 Revised R. 703(b); Fed. R. Evid. 901.
58 Fed. R. Evid. 104.
59 See Fed. R. Evid. art. IV.
PROPOSED REVISIONS TO RULE 703(c)

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Existing Problems Under Current Rule 703 - The basis of the expert's testimony

Current Rule 703 has changed the role of expert witnesses at trial dramatically. It permits an expert to testify to opinions based on facts "reasonably relied upon by experts in the particular field in forming opinions or inferences," casting aside the hearsay rule and, in some cases, all other rules excluding evidence. Current Rule 703 also permits an expert to testify to opinions based on inadmissible evidence and, as interpreted by the majority of courts, to testify to this inadmissible basis. In such cases, the expert becomes a powerful tool for offering opinions based on inadmissible evidence and presenting otherwise inadmissible evidence to the jury. In cases where courts allow an expert to voice an opinion based on inadmissible evidence, but do not permit the expert to mention the inadmissible basis, the expert becomes a super-thirteenth juror with regard to the issues about which she has spoken. Either way, the expert witness serves as more than merely an advisor to the finder of facts.

61 See Williams v. WalMart Stores, Inc., 922 F.2d 1357, 1363 (8th Cir. 1990); United States v. Affleck, 776 F.2d 1451 (10th Cir. 1985); Lewis v. Rego Co., 757 F.2d 66, 73-74 (3d Cir. 1985); Paddack v. Dave Christensen, Inc., 745 F.2d 1254, 1262-63 (9th Cir. 1984); United States v. Ramos, 725 F.2d 1322 (11th Cir. 1984); Baumholser v. Amax Coal Co., 630 F.2d 550, 552-53 (7th Cir. 1980); Bryan v. John Bean Div., 566 F.2d 541 (5th Cir. 1978).
63 Paul R. Rice, Evidence: Common Law and Federal Rules of Evidence, § 8:02 at 940-41 (3d ed. 1996) (“If the expert's opinion is to assist the finder of facts, they must have before them sufficient evidence to allow them to reach the same conclusion that the expert advocates in his testimony. If independent evidence supporting the expert's opinion is not otherwise in the record, thereby precluding the jury from developing their own opinions based on their assessments of the underlying data, Rule 703 will have drastically altered the witness' role. The expert will have become a substitute for, rather than an assistant to, the jury. He will have become a super-thirteenth juror whose conclusions the other twelve are asked to accept for face value because there is no independent factual basis.”).
64 Id; see also Ronald J. Allen and Joseph S. Miller, The Common Law Theory of Experts: Deference or Education?, 87 Nw. U. L. Rev. 1131, 1131-35 (1993). The authors describe the common law concept of a trial (the education model) and relate the
Current Rule 703 does not explicitly allow an expert to relay that inadmissible basis to the jury. In fact, the federal rules have no provision addressing the admissibility of the factual basis of expert testimony. The courts have three possible approaches to handling the factual basis: first, they can allow experts to offer opinions based on inadmissible evidence while forbidding any mention of the inadmissible part of the basis; second, courts can allow the jury to hear the otherwise inadmissible basis in evidence for the limited purpose of explaining the opinion of an expert; or third, the courts can allow the basis in as substantive evidence. None of these approaches is without difficulties.

concept to the idea that the factfinder must receive education on a topic and draw an independent conclusion in order for the common law concept of a trial to remain intact. The authors then assess a system where the expert decides the fact issues and simply tells the jury what to decide (the deference model). Under the deference model, the jury, instead of learning from the expert and arriving at its own conclusion, simply defers to the expert's conclusion.

65 Gong v. Hirsch, 913 F.2d 1269, 1272 (7th Cir. 1990); Marsee v. United States Tobacco Co., 866 F.2d 319, 323 (10th Cir. 1989).
66 Rule 705 governs the disclosure of the facts underlying expert testimony. Rule 705 allows experts to testify to opinions with or without disclosing the underlying facts. Rule 705, however, makes no mention of the inadmissible part of an expert's bases or the evidentiary status of the inadmissible part of an expert's bases.
67 See, e.g., South Central Petroleum v. Long Bros. Oil Co., 974 F.2d 1015 (8th Cir. 1992); Gong v. Hirsch, 913 F.2d 1269 (7th Cir. 1990); Nachtsheim v. Beech Aircraft Corp., 847 F.2d 1261 (7th Cir. 1988).
68 See, e.g., Engebretsen v. Fairchild Aircraft Corp., 21 F.3d 721(6th Cir. 1994); United States v. Affleck, 776 F.2d 1451 (10th Cir. 1985); Lewis v. Rego, 757 F.2d 66, 74 (3d Cir. 1984); Paddack v. Dave Christensen, Inc., 745 F.2d 1254, 1261 (9th Cir. 1984); United States v. Remos, 725 F.2d 1322 (11th Cir. 1984); United States v. Arias, 678 F.2d 1202 (4th Cir. 1982); Bryan v. John Bean Div., 566 F.2d 541 (5th Cir. 1978); Carlson, Ronald L. Carlson, Policing the Bases of Modern Expert Testimony, 39 Vand. L. Rev. 577, 580 (1986) (explaining why this is the proper treatment of the inadmissible evidence underlying expert testimony).
69 See, e.g., United States v. Farley, 992 F.2d 1122, 1125 (10th Cir. 1993) (allowing into evidence a physician's account of what of a child victim's said to the physician about an alleged sexual assault); United States v. Rollins, 862 F.2d 1282, 1292 (7th Cir. 1988) (admitting statements of an informant relied on by an F.B.I. agent in developing an opinion about the proper interpretation of a code); United States v. 0.161 Acres of Land, 837 F.2d 1036 (11th Cir. 1988) (admitting statements about the sale price of neighboring land into evidence under Rule 703); Stevens v. Cessna Aircraft Co., 634 F. Supp, 142-43 (E.D. Pa.), aff'd, 806 F.2d 254 (3d Cir. 1986) (allowing an expert to repeat statements of people who knew a deceased pilot to establish that the pilot suffered from stress.); Rice, supra note 4, at 588-89 (explaining that this is the proper approach provided courts scrutinize an expert's reasons for relying on the basis).
The first option under Rule 703 is to allow an expert to rely on inadmissible evidence while prohibiting the expert from mentioning the inadmissible evidence to the jury. This system would give effect to the evidentiary rules of exclusion, but presents distinct problems. A rule forbidding any mention of the inadmissible part of an expert's basis eviscerates the rules and procedures of our adjudicatory system in which the jury is the independent finder of facts.\(^{70}\) Allowing an expert to offer an opinion based on inadmissible evidence, while forbidding the expert to mention that inadmissible basis, effectively makes the expert the super-thirteenth juror on the basis of his opinion.\(^{71}\)

The second option--allowing an expert to relay inadmissible evidence to the jury for the limited purpose of explaining an opinion--is unworkable. When Courts have allowed the expert witness to identify the inadmissible underlying facts, a limiting instruction is always given to the jury, warning its members that the information being heard is not admissible, and may not be used for substantive purposes but only for the purpose of assessing the value of the expert's opinion. The jury simply cannot ignore the basis as evidence. The jury wants to reach the right decision and, if the jury believes in the truth of the expert's basis, the jury will use that truth in whatever way appears just. In addition, asking the jury to accept the truth of the expert's opinion without accepting the truth of the expert's basis makes no sense.

The third option--allowing the expert to testify fully to the basis for his opinion and to allow that basis to come in for substantive proof--is no less problematic. If the fact that the expert relied on the statements made them admissible, then all a litigant would need, to circumvent the hearsay rule, is a compliant expert witness.\(^{72}\) In effect, such a "back door" mechanism of admitting hearsay evidence would serve to thwart one of the main purposes of the hearsay rule--to keep out unreliable evidence which cannot be cross-examined.

The problems posed by Current Rule 703 existed in a practice that preceded the Evidence Code. Under the common law a medical doctor was permitted to rely on a patient's statements of medical history and causation, if either was crucial to diagnosis or treatment, to testify to the conclusions that he had formed in reliance on the truth of those statements, and to repeat the statements in his testimony along with his opinions. Yet the jurors were instructed that they could only accept for truth the doctor's opinions, and not the statements that the doctor had relied on to reach that opinion. The court instructed the jury that it could only use those statements to assess the value of the doctor's opinions. It was never explained how it was logical for the jurors to accept the doctor's opinion for truth without also accepting the truth of the statements on which it had been based.

When the Federal Rules of Evidence were promulgated, this practice was eliminated in Rule 803(4), Statements for Purpose of Medical Diagnosis and Treatment. That rule made the patient's statements of medical causation and medical history admissible for truth through

\(^{70}\) See Rice, Evidence, supra note 4, § 8.02 at 940-41.

\(^{71}\) Id.

\(^{72}\) Carlson, supra note 9; Graham, supra note 3, at 74-78; Rice, supra note 4, at 591.
the medical expert witness's testimony if such statements were reasonably pertinent to the doctor's diagnosis or treatment. Inexplicably, however, as this problem was being solved for medical doctors, the same problem was created for all other expert witnesses in Rule 703.

The Advisory Committee's Proposed Solution

The Advisory Committee has proposed a revision to this rule in an attempt to unify its application. The Evidence Project respectfully submits, however, that the proposal does not go far enough. Rather than resolving this problem through a solution similar to Rule 803(4), the Advisory Committee proposes a standard for deciding when the expert witness should be permitted to delineate these inadmissible facts (keeping in mind that the jurors still cannot accept the truth of what they are permitted to hear). It proposes adding a sentence to Rule 703: "If the facts or data are otherwise inadmissible, they shall not be disclosed to the jury by the proponent of the opinion or inference unless their probative value substantially outweighs their prejudicial effect."

In applying the Advisory Committee's proposed balancing test to determine whether inadmissible evidence can be disclosed, the presiding judge must examine the inherent reliability of the underlying facts. If those facts have a value so high that it "substantially" outweighs the danger of unfair prejudice, that judicial determination should make the evidence admissible for the substantive use by the jury as well. Admitting the evidence in this context is particularly compelling because the expert witness is present and presumably able to explain how she evaluated the evidence and why she determined that it was sufficiently trustworthy to use for her conclusions.

The Evidence Project's Solution

The problems in Current Rule 703 can be resolved only by precluding the expert from relying on inadmissible evidence or admitting the otherwise inadmissible evidence because the expert has assessed its reliability and concluded it is trustworthy. The fact that experts rely on certain information in forming opinions does lend support to the idea that such information is reliable. 73 Experts usually have reasons to believe in the truth of the data employed in forming opinions. Courts should not, however, simply accept such information.74 Centuries of practice and experience have led to the development of a complex system of accepting and rejecting information as evidence. Expert reliance should not allow information to avoid judicial screening. Such a system would provide for an easy end run around the rules of evidence.

73 Fed. R. Evid. 803(4), Advisory Committee's Note, 56 F.R.D. 183, 306 (1972); McCormick, supra note 1, § 15; Weinstein, supra note 1, § 13.03[01]; Rice, supra note 4, at 587-590.
In the judicial survey conducted by the Evidence Project, 75 60 per cent of the responding judges expressed the view that experts should not be permitted to rely on evidence different than that being heard by the finder of facts. 76 Of the 25 per cent who expressed the view that experts should continue to be permitted to rely on evidence that the finder of facts will not be permitted to consider for its truth, tradition and increased burdens for the court were the prevailing reasons. One judge commented that “This [practice] is justifiable simply because we have always done things that way.” Tradition, however, is not enough. Logic demands that experts not be permitted to advocate conclusions that they would not reach if they were the finder of facts denied the use of the additional inadmissible evidence.

The Evidence Project advocates a return of the common law. The Revised Rule 703 would explicitly preclude experts from relying upon inadmissible evidence. This would avoid the substantive conflicts that currently exist because conclusions could no longer be advocated that are not completely supported by admissible evidence. The Project's proposal, however, would not preclude the use of all hearsay information that is not admissible under the current rules. Revised Rule 703(c) works in conjunction with a new hearsay exception. 77 The hearsay exception, Revised Rule 803(5), excepts statements relied on by expert witnesses from the hearsay rule, provided the expert can present reasons for believing in the truth of the statements. 78 Together, Revised Rules 703 and 803(5) allow the case-specific factual data used by expert witnesses to be admitted into evidence for any purpose.

Revised Rule 803(5) merely requires a demonstration of how the witness' special expertise has been used to conclude that the particular inadmissible evidence employed was sufficiently reliable to be used as a basis for an opinion. Revised Rule 803(5) places the burden on the proponent--through the expert--to demonstrate to the court that the otherwise inadmissible hearsay relied upon contains a "substantial guarantee of trustworthiness." This standard will develop through case-by-case adjudication; it is clear, however, that

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75 See Appendix A.
76 Id.
77 The Advisory Committee essentially put forth the grounds for the new hearsay exception the notes that accompany Current Rule 703 of the Federal Rules of Evidence:

Thus a physician in his own practice bases his diagnosis on information from numerous sources and of considerable variety, including statements by patients and relatives, reports and opinions from nurses, technicians and other doctors, hospital records, and X rays. Most of them are admissible in evidence, but only with the expenditure of substantial time in producing and examining various authenticating witnesses. The physician makes life and death decisions in reliance upon them. His validation, expertly performed and subject to cross-examination, ought to suffice for judicial purposes.


Revised Rule 803(5). Statements Employed in Expert Testimony. Statements employed by experts in developing testimony for trial, to the extent that such statements are (1) personally observed by the expert, or (2) if not personally observed by the expert, of the type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, and, in both instances, the expert has demonstrated to the presiding judge a basis for concluding that the statements possess substantial guarantees of trustworthiness.

78 Under Revised Rule 803(5) an expert must justify her reliance on otherwise inadmissible evidence.
"substantial guarantees of trustworthiness" is at least as high a standard as "circumstantial guarantees of trustworthiness" set forth in Revised Rule 804(5), the residual exception. Once the evidence clears the judicial screen, (which is not significantly different than the balancing test being proposed by the Advisory Committee), the evidence is admissible for any relevant purpose. An expert, however, may not rely on evidence made inadmissible by any other rule. For example, an expert may not rely on unduly prejudicial evidence excluded under Rule 403. With this specific demonstration of reliability to the presiding judge, and then ultimately to the jury if the evidence is admitted, there is little justification for limiting the jury's use of the evidence.

In conclusion, the Evidence Project agrees with the Advisory Committee that Rule 703 must be revised to clarify the permissible basis for an expert's opinion and the use of such basis at trial. The Project criticizes this proposed rule because it merely allows the jury to use evidence for the purpose of explaining an expert's opinion. The Project would similarly disagree with a revision that allows the expert to supercede the role of the independent finder of fact by merely testifying to a conclusion. Instead, the Project proposes that the Advisory Committee adopt a rule that limits the use of inadmissible evidence by imposing a tightened judicial screen on such evidence. The finder of fact would be permitted to hear and consider the statements in the same way as the expert. As a result, conflicts and inconsistencies currently within Rule 703, and perpetuated in the Committee's proposal, would be avoided.

80 Nachtsheim v. Beech Aircraft Corp., 847 F.2d 1261 (7th Cir. 1988) (upholding trial court's decision not to allow expert to testify about prior accident involving the same aircraft even though expert relied on previous accident in forming an opinion about the accident under consideration); Mueller & Kirkpatrick, supra note 1, § 7.12.
Supplemental Submission

On October 22, 1998, representatives of the Evidence Project presented comments about the Advisory Committee’s proposed revisions to Rules 702 and 703, and offered alternative proposals. In this presentation several substantive and procedural questions were raised about the Evidence Project’s proposals and about the value of the judicial survey that accompanied them. In response, the Evidence Project offers the following additional comments.

The Burden Placed on Judges by the Evidence Project’s Proposal: Would the Evidence Project’s proposed judicial screening of inadmissible evidence relied upon by expert witnesses increase the burden on trial judges?

- The screening being proposed by the Evidence Project does not differ from the additional screening the Advisory Committee is proposing as a condition for delineating the inadmissible evidence relied upon under Rule 703.
- Before the inadmissible evidence forming the basis of the expert’s testimony can be presented to the jury, the Advisory Committee wants the trial judge to determine that its “probative value substantially outweighs [its] prejudicial effect.” If the proponent of the expert witness wants to delineate the inadmissible basis for an opinion, the Advisory Committee proposes that the presiding judge make a determination that necessarily requires an assessment of the reliability of the evidence.
- No additional burden would be placed on judges under the Evidence Project’s proposal that the judge assess whether the evidence “possesses substantial guarantees of trustworthiness,” and therefore, appropriately admitted into evidence for its truth.
- Only when the expert relies on inadmissible evidence and the proponent does not ask to delineate the inadmissible basis would an additional burden be imposed by the Evidence Project’s proposal because that proposal would always require that the basis be in the record before the opinion could be offered.
- After the expert has demonstrated the reliability of the inadmissible evidence that has been relied upon, the Evidence Project’s proposal simply takes the next logical step and uses the expertise of the witness to give the jury an understanding of the reliability of the evidence, and because of that demonstrated reliability, gives the jury the opportunity to use the evidence in the same way it has been used by the expert witness.

Timing: When would the court make the determination under the Evidence Project’s proposal?

- The timing of this screening would be the same as it was under the common law when the expert could not testify to an opinion that was not supported by
evidence that was of record. Therefore, as under the common law, the screening could occur before trial, or before the expert testifies during the trial, if a motion in limine is made by either party, or, if not raised beforehand, during the direct examination of the expert witness when the basis is being delineated prior to the opinion being offered.

- If the judicial screening were during the trial, it probably should be conducted outside the presence of the jury. If the otherwise inadmissible evidence were found to be sufficiently trustworthy, the opinion would be received into evidence along with the previously inadmissible basis and the expert’s explanation of why she found that basis to be sufficiently trustworthy to be relied upon.

**Evidence Relied Upon By Experts that is Inadmissible on Grounds Other than Hearsay:** How would the proposed changes of the Evidence Project effect the admissibility of expert witness testimony that is inadmissible on grounds other than hearsay?

- It must be understood that all inadmissible evidence supplied to the expert and upon which she relies, will, at the very minimum, give rise to hearsay problems.
- The only thing that the Project’s proposal is designed to do is accommodate both the reality and the needs of expert witnesses in this regard—it permits such reliance if a foundation of reliability, and therefore admissibility, is established.
- If there are other evidentiary principles that exclude the evidence, those principles should prevail, and in prevailing, should exclude the expert opinions that rely on such evidence. The Project never intended the expert opinion rules to override the entire evidence code.
- Unfortunately, this is precisely what happens under current Rule 703. If the expert relies on such things as character evidence or subsequent remedial measures (examples raised at the hearing by Professor Capra) and it is presented to the jurors for explanatory purposes, they cannot help being prejudiced by such evidence and considering it in the same way the expert has used it. If the inadmissible evidence is not presented to the jurors, and they are being asked to accept the expert’s conclusions without an adequate basis for evaluating them, the jurors are not only impliedly relying on the inadmissible evidence, the practice changes the role of the jury as the sole, independent finder of facts and makes the expert something equivalent to a super-thirteenth juror advocating the truth as only she has been permitted to see it. By accepting the expert’s conclusion the jury also is accepting the inadmissible (and unheard) basis. Therefore, the Evidence Project proposal is designed not only to provide the assurances of reliability that the Advisory Committee’s proposal addresses, but also to eliminate the illogic of the current practice and the changing roles of the trial participants that it creates.
- If the experts’ role is only to assist the finder of facts, experts should not be permitted to rely on any case-specific evidence excluded by the evidence rules. The Project’s proposal only gives experts a limited ability to make
otherwise inadmissible evidence admissible through their abilities to evaluate and explain why that evidence should be considered.

**Consequences of Delineating the Preponderance Standard in Rule 703:** Is it appropriate to delineate a preponderance standard in Rule 703 when the preponderance standard announced in Rule 104 applies to all admissibility questions? Would the delineation of the standard in one rule create confusion for all other rules where it is not mentioned?

- Delineating the preponderance standard of Rule 104(a) in Rule 703 would create no more confusion than the Advisory Committee’s incorporation of a reference to Rule 403 (another rule that generally modifies all other rules) in Rule 609. Without this reference in Rule 609 the Supreme Court misinterpreted that rule in the same way many judges are confused about the proper standard to be applied in Rules 702 and 703. In contrast to the incorporation of a reference to Rule 403 in Rule 609, however, the delineation of the preponderance standard in Rule 703 would not be for the purpose of clarifying its application to that Rule (although it would serve that purpose) but to clarify what the preponderance standard modifies--that the scientific evidence must be shown to be “credible” rather than “reliable” (a standard that has a distinctly different scientific meaning than that which was controlling for so many decades under the *Frye* test and from which the Advisory Committee wants to move away).

- Fundamental principles addressed in separate rules are often delineated in other rules when experience has proven such a delineation to be necessary for clarity and consistency. That has not proven to be problematic for Rule 403 and comparable rules and it should not be a problem here. For example, Rule 602 requires all witnesses to testify on the basis of personal knowledge. Nevertheless, the business records exception delineates the requirement that the information must be transmitted by a person “with knowledge.” The past recollection recorded requires that the record concern a matter about which a witness “once had knowledge.” Theoretically, this is unnecessary because all witnesses must speak on the basis of personal knowledge in order to avoid the dangers of hearsay. Rules 401 and 402 require that evidence be logically relevant--to have “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable.” It modifies all other rules. Nevertheless, the residual exception in Rule 807 specifically requires that the evidence be offered as evidence of a “material fact.” The term “material” is interpreted by many as synonymous with relevant. Also in Rule 807 subsection (C) explicitly requires that “the interests of justice will best be served,” which, of course, is redundant of Rule 102 which states that all of the rules “shall be construed to secure fairness,” “truth” and just determinations. The confrontation principle of the Sixth Amendment has also been selectively incorporated into provisions in Rule 803(8)(B) & (C) and Rule 804(b)(1) but that has not affected the application...
of the same basic concept to other forms of hearsay (it has, however, created inconsistencies because the confrontation right has been inconsistently codified).

Evidence of Judicial Misunderstanding About Burden of Persuasion: Where is it explicitly demonstrated that judges are confused about the burden of persuasion?

- There is no explicit evidence that judges are not applying the preponderance of the evidence standard. This is not available because judges generally don’t discuss burdens of persuasion, particularly when they are unsure of what is appropriate. One of the fundamental lessons of judicial decision-making, and particularly opinion writing, is that less is often more—what is left unsaid about burdens is presumed to have been understood and correctly applied.
- The preponderance of evidence burden relative to scientific evidence is inherently confusing because scientific standards of reliability have controlled such determinations, and the scientific standard can require a rate of accuracy as high as 98%. Consequently, many judges appear to be requiring that the foundation for such evidence be established by a preponderance of the evidence that the scientific community has accepted the evidence by the equivalent of a beyond a reasonable doubt standard. If this is happening, it is radically changing the probable outcomes in civil actions, like toxic tort litigation, where scientific evidence controls the issue of causation. This must be corrected.
- If the Advisory Committee wants to determine the level of misunderstanding, it might cooperate with the Evidence Project in its efforts to survey trial judges (encouraging all members of the judiciary to respond) or conduct their own survey.

Statistical Significance of Judicial Survey: What is the statistical significance of the Evidence Project’s judicial survey in which more than 80% of those responding expressed a desire to separately address the question of expertise of the individual and the adequacy of the expert’s basis, and 60% did not believe that experts should be permitted to consider evidence that the finders of fact are not permitted to consider?

- The responses of the thirty judges who responded to the survey are not presented to the Advisory Committee as a scientific study of the attitudes of the federal trial judiciary. The results, however, do reflect a different attitude being held by a much larger number of federal trial judges than are represented in the membership of the Advisory Committee.
- Whether statistically significant or not, the input from this survey must be seen as being more significant than the individual submissions that are being heard by the Committee.
- While the 3-5% response rate may not be statistically significant, it represents an attempt to gauge the needs of the judiciary that the Advisory Committee
has not attempted to measure in the same fashion.

- With the support and cooperation of the Advisory Committee the response rate to the Evidence Project’s surveys could be far greater.