

# COMMITTEE NEWS

## Pharmaceutical Medical Device & Biotechnology

### Is Daubert Now A Dirty Word?

In the 1990s, *Daubert* and its progeny ushered in a new day regarding the standard for expert admissibility in federal courts. Gone was the *Frye* “general acceptance” test for determining the admissibility of expert testimony. *Daubert* was hailed by many (though not all) as a more rigorous standard, which declared “[i]n a case involving scientific evidence, evidentiary reliability will be based upon scientific validity.”

Confusion arose quickly, however, about whether some of the language contained in *Daubert* should be interpreted as establishing a strict or lenient standard. As a result, **Rule 702** was amended in 2000 (the “2000 Amendments”), “for the express purpose of resolving conflicts in the courts about the meaning of *Daubert*.” The 2000 Amendments clarified (or so it was thought) that the trial judge is the gatekeeper of admissibility with respect to expert evidence. Moreover, the intent was that trial courts would “scrutinize the factual foundation of expert testimony and the reliability not only of the expert’s methodology but also of the expert’s application of that methodology to the facts at issue.”

Problem solved. Wrong again. Since the 2000 Amendments, there has been a lack of uniformity in the way federal courts evaluate the admissibility of expert testimony.

[Read more on page 9](#)



#### **Michelle M. Bufano,**

*Michelle M. Bufano is a partner in the litigation department of Patterson Belknap Webb & Tyler, where she represents companies in complex products liability, mass tort litigation and business disputes.*



#### **Rachel B. Sherman**

*Rachel B. Sherman is a partner in the litigation department of Patterson Belknap, where her practice focuses on false advertising, products liability, and complex commercial litigation.*



#### **Megha Hoon**

*Megha Hoon is an associate in the litigation department of Patterson Belknap, where her practice focuses on complex commercial litigation in state and federal court.*



### In This Issue

- Is Daubert Now A Dirty Word? 1
- Editor Message 2
- Navigating Expert Fee Disputes 3
- Human Body Meets Medical Device Material, Want To Play Matchmaker? Are We Biocompatible? 4



*Is Daubert... continued from page 1*

These inconsistencies have been fueled, in part, by a fundamental misunderstanding of *Daubert*. In retrospect, this development is not all that surprising given that *Daubert* was based on a version of Rule 702 that was significantly different from the 2000 Amendments, which are the current governing standard.

As a result, the inconsistent understanding and application of Rule 702 by federal courts has significantly undermined our civil justice system. How? Because even the slightest variation in the application of Rule 702 can profoundly impact the fairness and reliability of jury verdicts, with important ramifications outside the courtroom, such as multimillion-dollar verdicts predicated on unreliable or inadmissible expert testimony. This is especially true in products liability mass tort and toxic tort cases, which uniquely rely upon expert-driven science and medicine as proof of causation.

Aware of the problem, in 2017, the Judicial Conference Advisory Committee on Evidence Rules (the “Committee”) began what would become a four-year study of the inconsistent application of Rule 702. The Committee ultimately identified two significant issues to be addressed: (1) courts were applying a presumption of admissibility and not requiring proponents to demonstrate expert admissibility by a preponderance of the evidence (note that Rule 104 requires that “the court must decide any preliminary question about whether...evidence is admissible”); and (2) the closely related issue of courts incorrectly viewing the question of whether the expert has relied on “sufficient facts or data and has reliably applied a reliable methodology—are questions of weight and not admissibility.”

As a result, in May of 2021, the Committee proposed new amendments (the “Proposed Amendments”) to help clarify the rule’s requirements and encourage uniformity in application. These Proposed Amendments intend to: (1) clarify that the admissibility requirements set forth in the rule must be established to the court by a preponderance of the evidence; and (2) emphasize that as gatekeeper, a court must require that an expert’s conclusions be supported by the specific basis and methodology relied upon by the expert.

Further corroborating the Committee’s findings after the amendment were proposed, [Lawyers for Civil Justice published the results of its own comprehensive research study](#) examining all federal cases decided in 2020 that addressed the admissibility of expert testimony under Rule 702 (LCJ Study). Not surprisingly, the LCJ Study also found a lack of uniformity and predictability in the admissibility standard.

Specifically, the LCJ Study found that several federal courts are divided over whether to apply the preponderance standard when assessing the admissibility of expert testimony under Rule 702. In fact, in almost two-thirds of the cases studied, the trial court did not even mention the preponderance standard when deciding to admit or

---

***As a result, the inconsistent understanding and application of Rule 702 by federal courts has significantly undermined our civil justice system. How? Because even the slightest variation in the application of Rule 702 can profoundly impact the fairness and reliability of jury verdicts, with important ramifications outside the courtroom, such as multimillion-dollar verdicts predicated on unreliable or inadmissible expert testimony.***

---



exclude expert testimony. Moreover, in 13% of the cases, the court characterized Rule 702 as having a “liberal thrust,” “favor[ed] admission,” of expert testimony, or stated that “exclusion is the exception rather than the rule.”

The findings of the Committee and then the LCJ Study demonstrate that clarification of Rule 702 is warranted. The proposed amendments should assist courts in understanding and adhering to the rule’s standards, particularly in jurisdictions where courts apply a “presumption of admissibility.” The adoption of these amendments would help ensure that only reliable and relevant expert testimony is admitted, thereby ensuring greater fairness in our civil justice system. And if the Supreme Court approves the amendments by May 1, 2022, the amendments would become effective on December 1, 2022 (unless Congress enacts contrary legislation).

And finally, to answer the question raised in the title of this article: Is Daubert now a dirty word? Without a doubt. Please refer to Rule 702 instead! ➤

## DIVERSE SPEAKERS DIRECTORY

Open to both ABA and Non-ABA members.

The Directory allows you to create a customized Speaker Profile and market your experience and skillset to more than 3,500 ABA entities seeking speakers around the country and the world.

Please contact TIPS Staff **Norma Campos** if you are sourcing speakers or authors for your programs and publications

[norma.campos@americanbar.org](mailto:norma.campos@americanbar.org)



**Calendar**

March 25, 2022	<b>Business Litigation Conference</b> Contact: Danielle Daly – 312/988-5708	NCR Atlanta, GA
April 6-8, 2022	<b>Motor Vehicle Products Liability Conference</b> Contact: Janet Hummons – 312/988-5656 Danielle Daly – 312/988-5708	Omni Montelucia Scottsdale, AZ
April 7-9, 2022	<b>Toxic Torts &amp; Environmental Law Conference</b> Contact: Danielle Daly – 312/988-5708	Omni Montelucia Scottsdale, AZ
April 27-30, 2022	<b>TIPS Annual Section Conference</b> Contact: Janet Hummons – 312/988-5656 Danielle Daly – 312/988-5708	Hyatt Regency Baltimore, MD
May 5-7, 2022	<b>Fidelity &amp; Surety Law Spring Meeting</b> Contact: Janet Hummons – 312/988-5656 Theresa Beckom – 312/988-5672	Marriott Hilton Head Hilton Head, SC
August 3-9, 2022	<b>ABA Annual Meeting</b> Contact: Janet Hummons – 312/988-5656 Danielle Daly – 312/988-5708	Hyatt Regency Chicago, IL
August 17-19, 2022	<b>Fidelity &amp; Surety Law Midwinter Conference</b> Contact: Danielle Daly – 312/988-5708	Grand Hyatt Nashville, TN
August 18-20, 2022	<b>Life Health &amp; Disability &amp; ERISA Conference</b> Contact: Danielle Daly – 312/988-5708	Grand Hyatt Nashville, TN

Hypertext citation linking was created with [Drafting Assistant](#) from Thomson Reuters, a product that provides all the tools needed to draft and review – right within your word processor. Thomson Reuters Legal is a Premier Section Sponsor of the ABA Tort Trial & Insurance Practice Section, and this software usage is implemented in connection with the Section’s sponsorship and marketing agreements with Thomson Reuters. Neither the ABA nor ABA Sections endorse non-ABA products or services. Check if you have access to [Drafting Assistant](#) by contacting your Thomson Reuters representative.