PROPOSED AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE*

Rule 103. Rulings on Evidence

(a) Effect of erroneous ruling. — Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) Objection. — In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

(2) Offer of proof. — In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

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* New matter is underlined; matter to be omitted is lined through.

Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal.

(b) Record of offer and ruling. — The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct the making of an offer in question and answer form.

(c) Hearing of jury. — In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.

(d) Plain error. — Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court.

COMMITTEE NOTE

The amendment applies to all rulings on evidence whether they occur at or before trial, including so-called "*in limine*" rulings. One of the most difficult questions arising from *in limine* and other evidentiary rulings is whether a losing party must renew an objection or offer of proof when the evidence is or would be offered at trial, in order to preserve a claim of error on appeal. Courts have taken differing approaches to this question. Some courts have held that a renewal at the time the evidence is to be offered at trial is always required. *See, e.g., Collins v. Wayne Corp.*, 621 F.2d 777 (5th Cir. 1980). Some courts have taken a more flexible approach, holding that renewal is not required if the issue decided is one that (1) was fairly presented to the trial court for an initial ruling, (2) may be decided as a final matter before the evidence is actually offered, and (3) was ruled on definitively by the trial judge. *See, e.g., Rosenfeld v. Basquiat,* 78 F.3d 84 (2d Cir. 1996) (admissibility of former testimony under the Dead Man's Statute; renewal not required). Other courts have distinguished between objections to evidence, which must be renewed when evidence is offered, and offers of proof, which need not be renewed after a definitive determination is made that the evidence is inadmissible. *See, e.g., Fusco v. General Motors Corp.*, 11 F.3d 259 (1st Cir. 1993). Another court, aware of this Committee's proposed amendment, has adopted its approach. *Wilson v. Williams,* _ F. 3d _ (7th Cir.1999) (en banc). Differing views on this question create uncertainty for litigants and unnecessary work for the appellate courts.

The amendment provides that a claim of error with respect to a definitive ruling is preserved for review when the party has otherwise satisfied the objection or offer of proof requirements of Rule 103(a). When the ruling is definitive, a renewed objection or offer of proof at the time the evidence is to be offered is more a formalism than a

necessity. *See* Fed.R.Civ.P. 46 (formal exceptions unnecessary); Fed.R.Cr.P. 51 (same)*; United States v. Mejia-Alarcon*, 995 F.2d 982, 986 (10th Cir. 1993) ("Requiring a party to renew an objection when the district court has issued a definitive ruling on a matter that can be fairly decided before trial would be in the nature of a formal exception and therefore unnecessary."). On the other hand, when the trial court appears to have reserved its ruling or to have indicated that the ruling is provisional, it makes sense to require the party to bring the issue to the court's attention subsequently. *See, e.g., United States v. Vest*, 116 F.3d 1179, 1188 (7th Cir. 1997) (where the trial court ruled *in limine* that testimony from defense witnesses could not be admitted, but allowed the defendant to seek leave at trial to call the witnesses should their testimony turn out to be relevant, the defendant's failure to seek such leave at trial meant that it was "too late to reopen the issue now on appeal"); *United States v. Valenti*, 60 F.3d 941 (2d Cir. 1995) (failure to proffer evidence at trial waives any claim of error where the trial judge had stated that he would reserve judgment on the *in limine* motion until he had heard the trial evidence).

The amendment imposes the obligation on counsel to clarify whether an *in limine* or other evidentiary ruling is definitive when there is doubt on that point. *See, e.g., Walden v. Georgia-Pacific Corp.*, 126 F.3d 506, 520 (3d Cir. 1997) (although "the district court told plaintiffs' counsel not to reargue every ruling, it did not countermand its clear opening statement that all of its rulings were tentative, and counsel never requested clarification, as he might have done.").

Even where the court's ruling is definitive, nothing in the amendment prohibits the court from revisiting its decision when the evidence is to be offered. If the court changes its initial ruling, or if the opposing party violates the terms of the initial ruling, objection

must be made when the evidence is offered to preserve the claim of error for appeal. The error, if any, in such a situation occurs only when the evidence is offered and admitted. *United States Aviation Underwriters, Inc. v. Olympia Wings, Inc.*, 896 F.2d 949, 956 (5th Cir. 1990) ("objection is required to preserve error when an opponent, or the court itself, violates a motion *in limine* that was granted"); *United States v. Roenigk*, 810 F.2d 809 (8th Cir. 1987) (claim of error was not preserved where the defendant failed to object at trial to secure the benefit of a favorable advance ruling).

A definitive advance ruling is reviewed in light of the facts and circumstances before the trial court at the time of the ruling. If the relevant facts and circumstances change materially after the advance ruling has been made, those facts and circumstances cannot be relied upon on appeal unless they have been brought to the attention of the trial court by way of a renewed, and timely, objection, offer of proof, or motion to strike. *See Old Chief v. United States*, 519 U.S. 172, 182, n.6 (1997) ("It is important that a reviewing court evaluate the trial court's decision from its perspective when it had to rule and not indulge in review by hindsight."). Similarly, if the court decides in an advance ruling that proffered evidence is admissible subject to the eventual introduction by the proponent of a foundation for the evidence, and that foundation is never provided, the opponent cannot claim error based on the failure to establish the foundation unless the opponent calls that failure to the court's attention by a timely motion to strike or other suitable motion. *See Huddleston v. United States*, 485 U.S. 681, 690, n.7 (1988) ("It is, of course, not the responsibility of the judge *sua sponte* to ensure that the foundation evidence is offered; the objector must move to strike the evidence if at the close of the trial the offeror has failed to satisfy the condition.").

Nothing in the amendment is intended to affect the provisions of Fed.R.Civ.P. 72(a) or 28 U.S.C. §636(b)(1) pertaining to

nondispositive pretrial rulings by magistrate judges in proceedings that are not before a magistrate judge by consent of the parties. Fed.R.Civ.P. 72(a) provides that a party who fails to file a written objection to a magistrate judge's nondispositive order within ten days of receiving a copy "may not thereafter assign as error a defect" in the order. 28 U.S.C. §636(b)(1) provides that any party "may serve and file written objections to such proposed findings and recommendations as provided by rules of court" within ten days of receiving a copy of the order. Several courts have held that a party must comply with this statutory provision in order to preserve a claim of error. *See, e.g., Wells v. Shriners Hospital*, 109 F.3d 198, 200 (4th Cir. 1997)("[i]n this circuit, as in others, a party 'may' file objections within ten days or he may not, as he chooses, but he 'shall' do so if he wishes further consideration."). When Fed.R.Civ.P. 72(a) or 28 U.S.C. §636(b)(1) is operative, its requirement must be satisfied in order for a party to preserve a claim of error on appeal, even where Evidence Rule 103(a) would not require a subsequent objection or offer of proof.

Nothing in the amendment is intended to affect the rule set forth in *Luce v. United States,* 469 U.S. 38 (1984), and its progeny. The amendment provides that an objection or offer of proof need not be renewed to preserve a claim of error with respect to a definitive pretrial ruling. *Luce* answers affirmatively a separate question: whether a criminal defendant must testify at trial in order to preserve a claim of error predicated upon a trial court's decision to admit the defendant's prior convictions for impeachment. The *Luce* principle has been extended by many lower courts to other situations. *See United States v. DiMatteo,* 759 F.2d 831 (11th Cir. 1985) (applying *Luce* where the defendant's witness would be impeached with evidence offered under Rule 608). *See also United States v. Goldman,* 41 F.3d 785, 788 (1st Cir. 1994) ("Although *Luce* involved impeachment by conviction under Rule 609, the reasons

given by the Supreme Court for requiring the defendant to testify apply with full force to the kind of Rule 403 and 404 objections that are advanced by Goldman in this case."); *Palmieri v. DeFaria*, 88 F.3d 136 (2d Cir. 1996) (where the plaintiff decided to take an adverse judgment rather than challenge an advance ruling by putting on evidence at trial, the *in limine* ruling would not be reviewed on appeal); *United States v. Ortiz*, 857 F.2d 900 (2d Cir. 1988) (where uncharged misconduct is ruled admissible if the defendant pursues a certain defense, the defendant must actually pursue that defense at trial in order to preserve a claim of error on appeal); *United States v. Bond*, 87 F.3d 695 (5th Cir. 1996) (where the trial court rules *in limine* that the defendant would waive his fifth amendment privilege were he to testify, the defendant must take the stand and testify in order to challenge that ruling on appeal).

The amendment does not purport to answer whether a party who objects to evidence that the court finds admissible in a definitive ruling, and who then offers the evidence to "remove the sting" of its anticipated prejudicial effect, thereby waives the right to appeal the trial court's ruling. *See, e.g., United States v. Fisher*, 106 F.3d 622 (5th Cir. 1997) (where the trial judge ruled *in limine* that the government could use a prior conviction to impeach the defendant if he testified, the defendant did not waive his right to appeal by introducing the conviction on direct examination); *Judd v. Rodman*, 105 F.3d 1339 (11th Cir. 1997) (an objection made *in limine* is sufficient to preserve a claim of error when the movant, as a matter of trial strategy, presents the objectionable evidence herself on direct examination to minimize its prejudicial effect); *Gill v. Thomas*, 83 F.3d 537, 540 (1st Cir. 1996) ("by offering the misdemeanor evidence himself, Gill waived his opportunity to object and thus did not preserve the issue for appeal"); *United States v. Williams*, 939 F.2d 721 (9th Cir. 1991) (objection to impeachment evidence was waived where the defendant was impeached on direct examination).

GAP Report — Proposed Amendment to Rule 103(a)

The Committee made the following changes to the published draft of the proposed amendment to Evidence Rule 103(a):

1. A minor stylistic change was made in the text, in accordance with the suggestion of the Style Subcommittee of the Standing Committee on Rules of Practice and Procedure.

2. The second sentence of the amended portion of the published draft was deleted, and the Committee Note was amended to reflect the fact that nothing in the amendment is intended to affect the rule of *Luce v. United States*.

3. The Committee Note was updated to include cases decided after the proposed amendment was issued for public comment.

4. The Committee Note was amended to include a reference to a Civil Rule and a statute requiring objections to certain Magistrate Judge rulings to be made to the District Court.

5. The Committee Note was revised to clarify that an advance ruling does not encompass subsequent developments at trial that might be the subject of an appeal.

Summary of Comments on the Proposed Amendment to Evidence Rule 103(a)

Professor James J. Duane (98-EV-005) states that the first sentence of the proposed amendment to Evidence Rule 103 "is an excellent proposal, and exactly the right response to a situation that is desperately in need of clarity and reform." He argues for some

changes in the Advisory Committee Note to more clearly reflect the import of the amendment. Professor Duane opposes the sentence in the proposed amendment that would codify the Supreme Court's decision in *Luce v. United States*, 469 U.S. 38 (1984). He suggests that the *Luce* rule violates the criminal defendant's constitutional right to testify. Professor Duane argues that if the reason for including *Luce* in the Rule is to avoid the perception that *Luce* was being overruled by negative implication, the less onerous alternative would be to mention in the Committee Note that there is no intent to overrule *Luce*.

Professor Richard Friedman (98-EV 007) agrees with the proposal excusing renewal of objection or offer of proof when the trial court has made a definitive advance ruling, subject to the proviso that when a party who makes the unsuccessful objection or offer of proof does not renew the matter at trial, then that party "should not be allowed to argue on appeal on the basis of information or changes of circumstances that arose after the initial objection or offer of proof." Professor Friedman opposes the language in the proposed amendment to Evidence Rule 103 that would codify the Supreme Court's decision in *Luce v. United States*. He argues that *Luce* is an unfair and controversial rule that should not be codified and, a fortiori, should not be extended beyond its fact situation.

Professor Laird Kirkpatrick (98-EV 011) agrees with the Committee's decision to excuse the requirement of a renewed objection or offer of proof when the trial court's advance ruling is definitive. He contends, however, that there will be "recurring disputes" about whether a particular advance ruling is definitive. He notes that the Advisory Committee Note is "wise" to place the burden on counsel to clarify whether the ruling is definitive, but argues that there may be a tension between how lawyers want to have a ruling

characterized and how judges may want it characterized.

James E. Garvey, Esq. and other Fellows of the American College of Trial Lawyers (98-EV-016) favor the proposed amendment.

Professor Lynn McLain (98-EV-030) supports the codification of *Luce* but opposes the first sentence of the proposed amendment to Evidence Rule 103. He argues that the proposal will create "grist for arguments as to whether a particular ruling was 'definitive'." He also states that a rule requiring renewal of objections or offers of proof at trial ensures that the trial judge, if wrong in the pretrial ruling, is given an opportunity to correct that ruling in the light of trial. Thus, Professor McLain would "far prefer" a rule that clearly required a renewal of the objection or proffer at trial.

Hon. Edward R. Becker (98-EV-065), Chief Judge of the United States Court of Appeals for the Third Circuit, supports the proposed amendment to Evidence Rule 103, noting that it is "extremely well justified by the Committee's accompanying commentary."

Prentice H. Marshall, Esq. (98-EV-071) states that "the amendment to Rule 103 encouraging the use of pre-trial evidence motions/rulings is long overdue."

The Federal Courts Committee of the Chicago Council of Lawyers (98-EV-074) notes the "laudable purposes" of the proposed amendment: "to clarify when and how often a party must object to evidentiary rulings to preserve them for appeal, to preclude distracting formal objections to evidence already disposed of pre-trial, and to prevent unintended waivers of objections." The Committee does not believe, however, that "the current draft achieves the desired

clarity." It objects that the term "definitive ruling" is undefined. The Committee also concludes that the "condition precedent" language in the second sentence of the proposal released for public comment "may force litigants into untenable choices at trial." Plaintiffs, for example, may be forced to forego a claim if an advance ruling provided that the pursuit of the claim would open the door to damaging evidence. The Committee believes that a plaintiff in such circumstances "should be allowed to attack the *in limine* ruling . . . without having to sabotage her trial."

The State Bar of Arizona (98-EV-075) supports the adoption of the proposed amendment to Evidence Rule 103.

The National Association of Railroad Trial Counsel (98-EV-077) supports the proposed change to Evidence Rule 103. The Association concludes that the proposal "will clear up the confusion about timely objections when dealing with motions *in limine*."

The Chicago Chapter of the Federal Bar Association (98-EV-078) states that the proposed change to Evidence Rule 103 "is an important and desirable amendment which would clarify a constant point of confusion and would eliminate a procedural trap."

The Federal Practice Section of the Connecticut Bar Association (98-EV-079) endorses the proposed amendment to Evidence Rule 103.

The Phoenix and Tucson Chapters of the Federal Bar Association (98-EV-080) support the proposed amendment to Evidence Rule 103.

The Pennsylvania Trial Lawyers Association (98-EV-081)

supports the first sentence of the proposal released for public comment, "since it provides litigants and the courts with some certainties as to when and under what circumstances a party must renew an objection." The Association opposes the second sentence of the proposal released for public comment "as being confusing in its application." The Association asserts that "the second sentence as written appears to permit testimony over an objection if the proponent promises to introduce subsequent testimony establishing the propriety of the testimony to which his opponent objects." In such a case, "if the proponent does not produce such testimony, the condition precedent is not satisfied, but the objector cannot rely on his objection unless he renews it. This is contrary to the salutary purpose of the first sentence" of the proposal, and "places an unfair burden on counsel who has made a timely objection when the burden should actually be placed on the proponent of the testimony to show that he did not make a misrepresentation to the court."

The Federal Rules of Evidence Committee of the American College of Trial Lawyers (98-EV-084) states that the proposed amendment to Evidence Rule 103 "would be a salutary addition to the Federal Rules of Evidence for two principal reasons. First, it would clarify existing law, which . . . varies among the Circuits. Second, it has the added virtue of establishing certainty by placing lawyers on notice of the circumstances under which it is necessary to renew pretrial objections. At present, counsel may place unwarranted reliance on a pretrial ruling, only to learn after the fact that the failure to renew an objection at trial has foreclosed appellate review." The Committee believes that "a major benefit of the proposed addition to Rule 103(a) is that it is likely to stimulate counsel to inquire of the Court — or stimulate the Court *sua sponte* to remark — on the record whether a pretrial ruling is final." The Committee considers this notice function of the proposal to be "quite valuable."

The Committee on Federal Courts of the Association of the Bar of the City of New York (98-EV-088) supports the proposed amendment to Evidence Rule 103, for a number of reasons. First, "there is a substantial interest in having a uniform rule to address the effect of *in limine* motions that will be applicable in all federal courts." Second, "the proposed amendment is a sensible resolution of the circuit split," because the requirement imposed by some Circuits that a litigant must always renew an objection to evidence at the time of trial "has resulted in the inadvertent sacrifice of substantial rights by parties who think they have done enough by raising the issue pretrial." Third, "the requirement that a party renew an objection or an offer of proof at the time of trial serves no real substantial purpose in those cases where the issue can be resolved pretrial and the court has made a definitive ruling. . . . Indeed, such a requirement may result in the unnecessary expenditure of resources both by the litigants and by the court." The Committee concludes that "the Rule would eliminate the wasteful and unnecessary practice of renewing objections and offers of proof as to issues that can be and have been definitively resolved. On the other hand, the requirement that the ruling be 'definitive' will give the district court flexibility to provide guidance to the litigants as to its initial view with respect to the admissibility of evidence in those cases where a definitive ruling cannot be made without depriving itself of the ability to reconsider the decision in the developed context of the trial." The Committee suggests "that the Advisory Committee consider adding some commentary further defining the term 'definitive.'"

Professors Bruce Comly French and Elizabeth Phillips Marsh (98-EV-103) reported on a meeting of some members of the Committee on Rules of Evidence and Criminal Procedure of the Criminal Justice Section of the American Bar Association. The professors noted that "there is no existing American Bar Association

policy known to us that addresses these changes." Nonetheless, the professors report that a "number of attendees" objected to the proposed amendment insofar as it would codify and extend the principles of *Luce v. United States*, 469 U.S. 38 (1984).

Professor Myrna Raeder (98-EV-106) opposes the second sentence of the proposed amendment to Evidence Rule 103, and argues that applying the *Luce* rule to civil cases "will have unintended consequences and provide another procedural weapon for litigators to avoid decisions on the merits."

Russell T. Golla, Esq. (98-EV-112) supports the proposed amendment to Evidence Rule 103.

The Philadelphia Bar Association (98-EV-118) supports the adoption of the first sentence of the proposed amendment to Evidence Rule 103 (concerning whether objections to advance rulings must be renewed when the evidence is to be introduced). The Association states that the proposal "seems to strike an appropriate balance between the need for a detailed factual record for the consideration of errors on appeal and the need to avoid overly formalistic procedures in the conduct of a trial." The Association objects, however, to the second sentence of the proposed amendment, which would codify the principles of *Luce v. United States*, 469 U.S. 38 (1984). It argues that the rule could be inconsistent with the decision in *New Jersey v. Portash*, 440 U.S. 450 (1979) (refusing to override a state rule of evidence permitting a defendant to preserve a fifth amendment objection to impeachment evidence without testifying at trial). The Association observes that if the second sentence of the proposal is deleted, the Committee Note to the Rule should be amended to indicate that there is no intent to overrule *Luce*.

The Court Rules and Administration Committee of the Minnesota State Bar Association (98-EV-126) recommends the adoption of the proposed amendment to Evidence Rule 103.

The International Academy of Trial Lawyers (98-EV-134) is in favor of the proposed amendment to Evidence Rule 103 "insofar as it eliminates the need for further objection or offer of proof once the court has made a definitive ruling on the record admitting or excluding evidence." The Academy is also in favor of the proposed amendment "insofar as it provides that where the court rules that there is a condition precedent to the admission or exclusion of the evidence, no claim of error may be predicated on the ruling unless the condition precedent is satisfied." However, the Academy suggests that language be added to the proposed amendment "to make it clear that if the court rules that evidence is admissible subject to the eventual introduction by the proponent of the evidence of a foundation for the evidence, the opponent of the evidence cannot claim error based on the failure of the proponent to establish the foundation unless the opponent calls that failure to the court's attention in a timely fashion in a motion to strike or other suitable motion."

Hon. Tommy E. Miller (98-EV-140), United States Magistrate Judge for the Eastern District of Virginia, is "in favor of the spirit of the proposed change" to Evidence Rule 103, but states that the proposal "does not take into consideration the procedures set forth in 28 U.S.C. 636(b)(1)(A) and F.R.Civ.P. 72(a) for objecting to rulings by Magistrate Judges." Under those provisions, if a Magistrate Judge makes a nondispositive ruling in a case not tried by the Magistrate Judge pursuant to the consent of the parties, the objecting party to preserve a claim of error on appeal must file an objection to that ruling within 10 days and have the ruling considered by a District

Judge. Judge Miller suggests that a cross-reference to these statutory and Rules provisions be included in Rule 103 "so that parties will be alerted to their duty to timely object."

The National Association of Independent Insurers (98-EV-141) supports the proposed amendment to Evidence Rule 103.

Jon B. Comstock, Esq. (98-EV-142) supports the proposed change to Evidence Rule 103. He has "always found it disconcerting how the rules have allowed parties and courts to be mired in so much uncertainty on this issue when a clarifying rule, such as the proposed amendment, could provide fair guidance to all parties."

M.R. Smith, Esq. (98-EV-169) supports the proposed amendment to Evidence Rule 103.

The Section on Courts, Lawyers and the Administration of Justice of the District of Columbia Bar (98-EV-172) agrees with the proposed change to Evidence Rule 103.

The Federal Magistrate Judges Association (98-EV-173) supports the proposed amendment to Evidence Rule 103 as a desirable means of establishing "a uniform practice regarding the finality of rulings on motions concerning the admissibility of evidence."

Nine members of the leadership of the Section of Litigation of the American Bar Association (98-EV-174) support the proposed amendment to Evidence Rule 103, on the grounds that the proposal "would clarify existing law and establish certainty by placing lawyers on notice of the circumstances under which it is necessary to renew pretrial objections" and "would likely encourage counsel to inquire

on the record whether a pretrial ruling is final."

Rule 404. Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes

(a) Character evidence generally. — Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) Character of accused. — Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same~~;~~, or if evidence of a trait of character of the alleged victim of the crime is offered by an accused and admitted under Rule 404 (a)(2), evidence of the same trait of character of the accused offered by the prosecution;

(2) Character of alleged victim. — Evidence of a pertinent trait of character of the alleged victim of the crime offered by an accused, or by the prosecution to

rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a homicide case to rebut evidence that the alleged victim was the first aggressor;

(3) Character of witness. — Evidence of the character of a witness, as provided in rules 607, 608, and 609.

(b) Other crimes, wrongs, or acts. — Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

COMMITTEE NOTE

Rule 404(a)(1) has been amended to provide that when the accused attacks the character of an alleged victim under subdivision (a)(2) of this Rule, the door is opened to an attack on the same character trait of the accused. Current law does not allow the government to introduce negative character evidence as to the accused unless the accused introduces evidence of good character. *See, e.g., United States v. Fountain,* 768 F.2d 790 (7th Cir. 1985) (when the accused offers proof of self-defense, this permits proof of the alleged victim's character trait for peacefulness, but it does not permit proof of the accused's character trait for violence).

The amendment makes clear that the accused cannot attack the alleged victim's character and yet remain shielded from the disclosure of equally relevant evidence concerning the same character trait of the accused. For example, in a murder case with a claim of self-defense, the accused, to bolster this defense, might offer evidence of the alleged victim's violent disposition. If the government has evidence that the accused has a violent character, but is not allowed to offer this evidence as part of its rebuttal, the jury has only part of the information it needs for an informed assessment of the probabilities as to who was the initial aggressor. This may be the case even if evidence of the accused's prior violent acts is admitted under Rule 404(b), because such evidence can be admitted only for limited purposes and not to show action in conformity with the accused's character on a specific occasion. Thus, the amendment is designed to permit a more balanced presentation of character evidence when an accused chooses to attack the character of the alleged victim.

The amendment does not affect the admissibility of evidence of specific acts of uncharged misconduct offered for a purpose other than proving character under Rule 404(b). Nor does it affect the

standards for proof of character by evidence of other sexual behavior or sexual offenses under Rules 412-415. By its placement in Rule 404(a)(1), the amendment covers only proof of character by way of reputation or opinion.

The amendment does not permit proof of the accused's character if the accused merely uses character evidence for a purpose other than to prove the alleged victim's propensity to act in a certain way. *See United States v. Burks*, 470 F.2d 432, 434-5 (D.C.Cir. 1972) (evidence of the alleged victim's violent character, when known by the accused, was admissible "on the issue of whether or not the defendant reasonably feared he was in danger of imminent great bodily harm"). Finally, the amendment does not permit proof of the accused's character when the accused attacks the alleged victim's character as a witness under Rule 608 or 609.

The term "alleged" is inserted before each reference to "victim" in the Rule, in order to provide consistency with Evidence Rule 412.

GAP Report — Proposed Amendment to Rule 404(a)

The Committee made the following changes to the published draft of the proposed amendment to Evidence Rule 404(a):

1. The term "a pertinent trait of character" was changed to "the same trait of character," in order to limit the scope of the government's rebuttal. The Committee Note was revised to accord with this change in the text.

2. The word "alleged" was added before each reference in the Rule to a "victim" in order to provide consistency with Evidence Rule 412. The Committee Note was amended to accord with this change in the text.

3. The Committee Note was amended to clarify that rebuttal is not permitted under this Rule if the accused proffers evidence of the alleged victim's character for a purpose other than to prove the alleged victim's propensity to act in a certain manner.

Summary of Comments on the Proposed Amendment to Evidence Rule 404(a)

Professor Richard Friedman (98-EV 007) states that the proposed amendment to Evidence Rule 404(a) "makes sense, at least up to a point." He believes that it should be "altered to make the evidence of defendant's character admissible only to the extent necessary to rebut an implication that may be drawn from the evidence of the alleged victim's character." He argues that allowing the defendant's character to be attacked is only justifiable when it is necessary to provide a balanced presentation after the defendant attacks the victim's character. This occurs only when the case is "symmetrical in nature," such as where there is a "mutually provocative altercation" and the defendant claims that the victim is the first aggressor.

Professor Laird Kirkpatrick (98-EV 011) states that a rule permitting the accused to be attacked on any "pertinent" character trait, after an attack on the victim's character, would be "overbroad." He argues that there is "no justification for opening the door to character traits of the defendant other than the one corresponding to the character trait of the victim about which the defendant offered evidence." He also urges that the Committee Note should provide that "if evidence of the victim's character is offered by the defendant for a non-propensity reason, such evidence is not being offered pursuant to FRE 404(a) and does not open the door to evidence of the defendant's character."

James E. Garvey, Esq. and other Fellows of the American College of Trial Lawyers (98-EV-016) favor the proposed amendment.

Hon. Edward R. Becker (98-EV-065), Chief Judge of the United States Court of Appeals for the Third Circuit, supports the proposed amendment to Evidence Rule 404(a), noting that it is "extremely well justified by the Committee's accompanying commentary."

Professor Douglas E. Beloof (98-EV-066) supports the proposed amendment to Evidence Rule 404(a). He states that the proposal promotes the interests that victims of crime have in the pursuit of truth. He concludes that the proposal rectifies the inequity in the current rule, which "permits the defendant to savage the character of the crime victim while assuring the defendant that he has complete immunity from even the possibility that his character can be put at issue."

Prentice H. Marshall, Esq. (98-EV-071) states that "the proposed amendment to Rule 404(a)(1) is reasonable."

The State Bar of Arizona (98-EV-075) supports the adoption of the proposed amendment to Evidence Rule 404(a).

The Phoenix and Tucson Chapters of the Federal Bar Association (98-EV-080) support the proposed amendment to Evidence Rule 404(a).

The Federal Rules of Evidence Committee of the American College of Trial Lawyers (98-EV-084) supports the proposed amendment to Evidence Rule 404(a), so long as it is limited to admitting the same character trait that the accused has raised with

respect to the victim. In the Committee's view, the current rule "unfairly tilts the 'playing field' in favor of the accused" and "may lead to unjust acquittals." The Committee concludes that it is not an impingement on any fundamental right to permit the prosecution to "complete the picture of what occurred" by proving the accused's violent disposition, "particularly when it is the accused who 'opens the door' to the issue of violent character."

The Committee on Federal Courts of the Association of the Bar of the City of New York (98-EV-088) believes "that evidence of the character trait of the accused should be admitted under the proposed rule *only* if there is a logical nexus between the character evidence with respect to the victim and the character evidence with respect to the accused, i.e., that the character evidence pertaining to the defendant is relevant to rebut the character evidence offered with respect to the victim." The Committee asserts that the proposed amendment "raises constitutional problems with respect to a defendant's rights under the confrontation clause of the Sixth Amendment" because the proposal "could be construed as imposing an unwarranted penalty upon the defendant for presenting a defense and offering evidence attacking the character of the victim."

Professor David P. Leonard (98-EV-092) opposes the proposed amendment to Evidence Rule 404(a). He argues that the "balance" sought by the proposed amendment is "illusory" and concludes that "[t]he effort to create a kind of symmetry between the rights of the defendant to foreclose inquiry into character and the rights of the government to respond to the defendant's choice actually upsets the delicate balance maintained by the current rule."

Professors Bruce Comly French and Elizabeth Phillips Marsh (98-EV-103) reported on a meeting of some members of the

Committee on Rules of Evidence and Criminal Procedure of the Criminal Justice Section of the American Bar Association. The professors noted that "there is no existing American Bar Association policy known to us that addresses these changes." Nonetheless, the professors report that the "overwhelming majority of those present at the Committee meeting expressed the view that the proposed changes to Federal Rule of Evidence 404(a)(1) should not be implemented."

A Number of Professors of Evidence and Others Interested in Evidentiary Policy (98-EV-104) "respectfully urge the Standing Committee not to adopt the proposed amendment to Federal rule [sic] of Evidence 404(a)(1)."

Russell T. Golla, Esq. (98-EV-112) supports the proposed amendment to Evidence Rule 404(a).

The Court Rules and Administration Committee of the Minnesota State Bar Association (98-EV-126) believes that the proposed amendment to Evidence Rule 404(a), as it was released for public comment, "raises issues of constitutional fairness to the Defendant." The Committee "would like clarification on whether the trait offered by the prosecution is limited to the same trait as offered by the Defendant. The concern is that without such clarification, the prosecution could try to introduce evidence of a *different* trait, thus opening the door to prejudicial testimony and chilling a Defendant's trial strategy."

The National Association of Independent Insurers (98-EV-141) supports the proposed amendment to Evidence Rule 404(a).

Hon. William J. Giovan (98-EV-160) Judge for the Circuit Court for the Third Judicial Circuit of Michigan, believes that "in order to remedy the problem perceived by the Committee, it is preferable, instead of significantly expanding an exception to a favored rule of exclusion, to cut Rule 404(a)(2) back to the limited scope of the common law exception as it related to the victim of homicide."

M.R. Smith, Esq. (98-EV-169) supports the proposed amendment to Evidence Rule 404(a).

The Section on Courts, Lawyers and the Administration of Justice of the District of Columbia Bar (98-EV-172) agrees with the proposed changes to Evidence Rule 404(a).

The Federal Magistrate Judges Association (98-EV-173) states that the proposed amendment to Evidence Rule 404(a) "would make the current practice more even handed, however, the impact of the potential to punish a defendant for pursuing highly relevant information can not be overlooked."

Nine members of the leadership of the Section of Litigation of the American Bar Association (98-EV-174) believe that the proposed amendment to Evidence Rule 404(a), as it was issued for public comment, should be revised to permit an attack on the defendant's character only if the character trait is the same trait that the defendant raised as to the victim, and then only if the character trait is pertinent to the case.

Rule 701. Opinion Testimony by Lay Witnesses

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, ~~and~~ (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue~~.~~, and (c) not based on scientific, technical or other specialized knowledge within the scope of Rule 702.

COMMITTEE NOTE

Rule 701 has been amended to eliminate the risk that the reliability requirements set forth in Rule 702 will be evaded through the simple expedient of proffering an expert in lay witness clothing. Under the amendment, a witness' testimony must be scrutinized under the rules regulating expert opinion to the extent that the witness is providing testimony based on scientific, technical, or other specialized knowledge within the scope of Rule 702. *See generally Asplundh Mfg. Div. v. Benton Harbor Eng'g*, 57 F.3d 1190 (3d Cir. 1995). By channeling testimony that is actually expert testimony to Rule 702, the amendment also ensures that a party will not evade the expert witness disclosure requirements set forth in Fed.R.Civ.P. 26 and Fed.R.Crim.P.16 by simply calling an expert witness in the guise of a layperson. *See* Joseph, *Emerging Expert Issues Under the 1993 Disclosure Amendments to the Federal Rules of Civil Procedure*, 164 F.R.D. 97, 108 (1996) (noting that "there is no good reason to allow

what is essentially surprise expert testimony," and that "the Court should be vigilant to preclude manipulative conduct designed to thwart the expert disclosure and discovery process"). *See also United States v. Figueroa-Lopez,* 125 F.3d 1241, 1246 (9th Cir. 1997) (law enforcement agents testifying that the defendant's conduct was consistent with that of a drug trafficker could not testify as lay witnesses; to permit such testimony under Rule 701 "subverts the requirements of Federal Rule of Criminal Procedure 16(a)(1)(E)").

The amendment does not distinguish between expert and lay *witnesses*, but rather between expert and lay *testimony*. Certainly it is possible for the same witness to provide both lay and expert testimony in a single case. *See, e.g, United States v. Figueroa-Lopez*, 125 F.3d 1241, 1246 (9th Cir. 1997) (law enforcement agents could testify that the defendant was acting suspiciously, without being qualified as experts; however, the rules on experts were applicable where the agents testified on the basis of extensive experience that the defendant was using code words to refer to drug quantities and prices). The amendment makes clear that any part of a witness' testimony that is based upon scientific, technical, or other specialized knowledge within the scope of Rule 702 is governed by the standards of Rule 702 and the corresponding disclosure requirements of the Civil and Criminal Rules.

The amendment is not intended to affect the "prototypical example[s] of the type of evidence contemplated by the adoption of Rule 701 relat[ing] to the appearance of persons or things, identity, the manner of conduct, competency of a person, degrees of light or darkness, sound, size, weight, distance, and an endless number of items that cannot be described factually in words apart from inferences." *Asplundh Mfg. Div. v. Benton Harbor Eng'g*, 57 F.3d 1190, 1196 (3d Cir. 1995).

For example, most courts have permitted the owner or officer of a business to testify to the value or projected profits of the business, without the necessity of qualifying the witness as an accountant, appraiser, or similar expert. *See, e.g., Lightning Lube, Inc. v. Witco Corp.* 4 F.3d 1153 (3d Cir. 1993) (no abuse of discretion in permitting the plaintiff's owner to give lay opinion testimony as to damages, as it was based on his knowledge and participation in the day-to-day affairs of the business). Such opinion testimony is admitted not because of experience, training or specialized knowledge within the realm of an expert, but because of the particularized knowledge that the witness has by virtue of his or her position in the business. The amendment does not purport to change this analysis. Similarly, courts have permitted lay witnesses to testify that a substance appeared to be a narcotic, so long as a foundation of familiarity with the substance is established. *See, e.g., United States v. Westbrook,* 896 F.2d 330 (8th Cir. 1990) (two lay witnesses who were heavy amphetamine users were properly permitted to testify that a substance was amphetamine; but it was error to permit another witness to make such an identification where she had no experience with amphetamines). Such testimony is not based on specialized knowledge within the scope of Rule 702, but rather is based upon a layperson's personal knowledge. If, however, that witness were to describe how a narcotic was manufactured, or to describe the intricate workings of a narcotic distribution network, then the witness would have to qualify as an expert under Rule 702. *United States v. Figueroa-Lopez, supra.*

The amendment incorporates the distinctions set forth in *State v. Brown*, 836 S.W.2d 530, 549 (1992), a case involving former Tennessee Rule of Evidence 701, a rule that precluded lay witness testimony based on "special knowledge." In *Brown*, the court declared that the distinction between lay and expert witness testimony is that lay testimony "results from a process of reasoning familiar in

everyday life", while expert testimony "results from a process of reasoning which can be mastered only by specialists in the field." The court in *Brown* noted that a lay witness with experience could testify that a substance appeared to be blood, but that a witness would have to qualify as an expert before he could testify that bruising around the eyes is indicative of skull trauma. That is the kind of distinction made by the amendment to this Rule.

GAP Report — Proposed Amendment to Rule 701

The Committee made the following changes to the published draft of the proposed amendment to Evidence Rule 701:

1. The words "within the scope of Rule 702" were added at the end of the proposed amendment, to emphasize that the Rule does not require witnesses to qualify as experts unless their testimony is of the type traditionally considered within the purview of Rule 702. The Committee Note was amended to accord with this textual change.

2. The Committee Note was revised to provide further examples of the kind of testimony that could and could not be proffered under the limitation imposed by the proposed amendment.

Summary of Comments on the Proposed Amendment to Evidence Rule 701

The Product Liability Advisory Council (98-EV-001) supports the proposed amendment to Evidence Rule 701 as necessary to prevent "surprise expert testimony or to thwart the expert disclosure rules." The Council concludes that "the proposed amendment is

consistent with the federal courts' interpretation of Rule 701" and that in the absence of specialized knowledge or training "no witness should be able to offer a personal opinion on scientific or technical subjects."

Peter B. Ellis, Esq. (98-EV-002) strongly supports the Advisory Committee's proposed amendment to Rule 701. He declares that the proposed amendment "has the virtue of substantially clarifying the ambiguous distinction between 'lay' and 'expert' testimony, and should tend to eliminate the markedly inconsistent rulings that have surrounded this issue . . ." He concludes that the amendment "should reduce the incidence of unfair surprise that results from both sharp practice and genuine misconception." Mr. Ellis notes that "unexpected expert opinion from a 'lay witness' can place the opposing party at a substantial disadvantage" and that the remedy of a deposition during the trial imposes a substantial burden on trial counsel and is often inadequate as well, "particularly where one's ability effectively to impeach the witness's opinion would require substantial additional document discovery or depositions of the witness's co-workers." Mr. Ellis disagrees with the contention that the proposed amendment works a major change in the law. He states that the proposed amendment "merely clarifies what I have always understood to be the appropriate line of demarcation between 'lay' and 'expert' opinion. In my experience, trial judges find the interplay between Rules 701 and 702 to be unclear and confusing, and the amendment would go a long way toward eliminating that confusion."

Professor Richard Friedman (98-EV 007) argues that the proposed amendment is "likely to be counterproductive." He contends that the proposal, as issued for public comment, draws "too sharp a dichotomy between testimony that is and is not based on specialized knowledge." He concludes that any possibility of

discovery abuse should be handled by amendment of the Civil and Criminal Rules, "not by a potentially restrictive and confusing limitation on the lay opinion rule."

Lawyers for Civil Justice (98-EV-009) support the proposed amendment to Evidence Rule 701 as necessary to eliminate a "growing and very troubling prospect: that expert testimony is being 'sneaked in' under the guise of a lay witness because of the lower threshold standards for lay witnesses."

Professor Laird Kirkpatrick (98-EV 011) opposes the proposed amendment, contending that many types of lay opinions that routinely have been admitted would be excluded under the proposal as issued for public comment — such as testimony of a lay witness that a certain substance was cocaine.

James E. Garvey, Esq. and other Fellows of the American College of Trial Lawyers (98-EV-016) favor the proposed amendment to Evidence Rule 701.

The Committee on Federal Procedure of the New York State Bar Association (98-EV-017) supports the proposed amendment to Evidence Rule 701, as being necessary to prevent an "end run" around the requirements for expert testimony imposed by Evidence Rule 702 and the discovery provisions of the Civil and Criminal Rules.

The Defense Research Institute (98-EV-020) states that the proposed amendment to Evidence Rule 701 "should help eliminate increasing attempts to present expert testimony through lay witnesses without subjecting the testimony to *Daubert* scrutiny or the disclosure requirements of Fed.R.Civ.P. 26."

E. Wayne Taff, Esq. (98-EV-021) states that the proposed amendment to Rule 701 is not only beneficial, but also "critical to ensuring the integrity of testimony presented in the United States District Courts."

Kevin J. Dunne, Esq. (98-EV-025) favors the proposed revision to Rule 701 because it "helps prevent expert testimony from inappropriately 'coming in the back door.'"

Diane R. Crowley, Esq. (98-EV-029) states that "[t]he changes to Rule 701 will prevent subterfuge involving experts who cannot meet the reliability test of Rule 702 and attempt to bring in their opinions as a lay witness not subject to such judicial scrutiny. Without the revised Rule 701 to prevent such conduct, the benefits to be derived from the revised Rule 702 will be greatly diminished."

Harold Lee Schwab, Esq. (98-EV-033) states that the Advisory Committee "properly notes the very real risk factor" that "expert witnesses might proffer opinions under the guise of lay testimony and thereby evade the reliability requirements of FRE 702 and the disclosure requirements of Fed.R.Civ.P. 26 and Fed.R.Crim.P. 16." He concludes that the proposed amendment "properly reinforces the original intent of [Evidence Rule] 701."

James A. Grutz, Esq. (98-EV-036) opposes the proposed amendment to Evidence Rule 701.

Thomas A. Conlin, Esq. (98-EV-037) is in favor of the proposed amendment. He states: "Under the changes proposed by the committee, there will be a bright line between opinion testimony which is coming in as expert testimony — and must therefore meet the expert foundational requirements — and that which is coming in

as a lay opinion."

Scott B. Elkind, Esq. (98-EV-038) opposes the proposed amendment to Evidence Rule 701, asserting that it would "impair the rights of aggrieved parties" by prohibiting lay witnesses from expressing opinions based on specialized knowledge.

Richard L. Duncan, Esq. (98-EV-044) is opposed to the proposed change to Evidence Rule 701.

The Chemical Manufacturers Association, the Defense Research Institute, the Federation of Insurance and Corporate Defense Counsel, the International Association of Defense Counsel, Lawyers for Civil Justice, the National Association of Manufacturers, and the Product Liability Advisory Council (98-EV-047) support the proposed amendment to Evidence Rule 701, noting that it is "designed to prevent lay witnesses from testifying as experts and thereby circumventing the reliability requirements of Rule 702 and the disclosure requirements relating to expert witnesses" and that these "salutary purposes fully justify the Proposed Amendment insofar as it would apply in civil litigation."

William B. Dodero, Esq. (98-EV-052) states that the proposed amendment to Evidence Rule 701 is part of "a much-needed revision which will finally allow trial courts to fulfill their role as gatekeeper for the admission of expert evidence."

Jay H. Tressler, Esq. (98-EV-055) favors the proposed amendment to Evidence Rule 701. He states that "all too often" a person described as a lay witness "is called upon to offer expert opinions never before disclosed under Rule 26." He concludes that "[t]estimony of lay witnesses should not be admitted under Rule 701

if the testimony is based upon 'scientific, technical, or other specialized knowledge.' Lay witnesses testimony on matters of common knowledge which have been traditionally admitted can and should be allowed under Rule 701."

The Committee on Civil Litigation of the United States District Court for the Eastern District of New York (98-EV-056) opposes the proposed amendment, because the proposal "would not enlighten the courts on the difference between lay and expert testimony."

The Minnesota Defense Lawyers Association (98-EV-057) "strongly supports" the proposed change to Evidence Rule 701. The Association has found "so-called 'expert' testimony routinely being offered, on both sides of the litigation, which is not based on scientific, technical, or other specialized knowledge." The Association concludes that the evidence rules "must require proper foundation before this 'evidence' finds its way to a jury."

Charles F. Preuss, Esq. (98-EV-062) states that the proposed amendment "would appropriately limit lay witness testimony to matters of common knowledge" and that this limitation would prevent "expert testimony from coming in the back door."

Professor Michael H. Graham (98-EV-063) supports the proposed amendment to Evidence Rule 701.

Hon. Edward R. Becker (98-EV-065), Chief Judge of the United States Court of Appeals for the Third Circuit, supports the proposed amendment to Evidence Rule 701, noting that it is "extremely well justified by the Committee's accompanying commentary." Judge Becker does not believe that the term "specialized knowledge" is

vague, and predicts that review of trial court rulings in this area "will be largely deferential."

Steven H. Howard, Esq. (98-EV-067) opposes the proposed amendment to Evidence Rule 701.

William A. Coates, Esq. (98-EV-068) states that the proposed amendment to Evidence Rule 701 "appropriately" limits lay witness testimony to opinions or inferences not based on scientific, technical or other specialized knowledge. He concludes that the proposal "is consistent with the federal court's interpretations of Rule 701 in which persons have been permitted to testify as a lay witness only if their opinions or inferences do not require any specialized knowledge and cannot be reached by any ordinary person."

Prentice H. Marshall, Esq. (98-EV-071) states that the proposed amendment to Evidence Rule 701 is "appropriate."

The Federal Courts Committee of the Chicago Council of Lawyers (98-EV-074) believes that the proposed amendment to Evidence Rule 701 responds to a "non-problem." The Committee would, in any event, "expect district courts to temper the revised rule with common sense. For instance, we would not expect that every treating physician would have to be qualified as an expert witness or that an auto mechanic who worked on a defective car would be barred from testifying about the repair record, even if the testimony is based partly on specialized knowledge."

The State Bar of Arizona (98-EV-075) supports the adoption of the proposed amendment to Evidence Rule 701.

The National Association of Railroad Trial Counsel (98-EV-

077) supports the proposed change to Evidence Rule 701. The Association concludes that the proposal would "eliminate the practice of proffering an expert as a lay witness thereby avoiding both the reliability requirements of Rule 702 and the disclosure requirements pertaining to expert testimony."

The Chicago Chapter of the Federal Bar Association (98-EV-078) supports the proposed amendment to Evidence Rule 701.

The Federal Practice Section of the Connecticut Bar Association (98-EV-079) endorses the proposed amendment to Evidence Rule 701, on the ground that it "would prevent the offering of expert testimony from a lay witness, which would otherwise circumvent the reliability requirements of Rule 702 and the corresponding disclosure requirements of expert testimony."

The Phoenix and Tucson Chapters of the Federal Bar Association (98-EV-080) support the proposed amendment to Evidence Rule 701.

The Pennsylvania Trial Lawyers Association (98-EV-081) supports the proposed amendment to Evidence Rule 701, "with the exception of the inclusion of the words 'specialized knowledge' which we contend should be eliminated." The Association expresses concern that the "specialized knowledge" limitation in the proposed amendment would require witnesses who would testify to the identity of handwriting or to the speed of a vehicle to be qualified as experts. The Association believes "that the words 'scientific' and 'technical' sufficiently demonstrate the type of testimony which should not be permitted by a lay witness."

The Federal Rules of Evidence Committee of the American

College of Trial Lawyers (98-EV-084) supports the proposed amendment to Evidence Rule 701, stating that it will help to prevent "the inappropriate admission of expert evidence under the guise of lay testimony, often to the surprise of adverse parties."

J. Ric Gass, Esq. (98-EV-090) states that the proposed amendment to Evidence Rule 701 is an "important and necessary and appropriate" revision.

J. Greg Allen, Esq. (98-EV-093) opposes the proposed amendment to Evidence Rule 701.

Alvin A. Wolff, Jr., Esq. (98-EV-095) opposes the proposed amendment to Evidence Rule 701.

Alan Voos, Esq. (98-EV-096) opposes the proposed amendment to Evidence Rule 701. He states that "individuals with hands-on, real-life experience are quite frequently more qualified to testify on scientific, technical or other specialized matters" and that they should be allowed to do so under Rule 701.

The Federal Bar Council Committee on Second Circuit Courts (98-EV-097) states that "the integrity of the amendments to FRE 702 calls likewise for the adoption of the proposed amendment to FRE 701 to avoid the possibility of 'end runs' around FRE 702."

Professors Bruce Comly French and Elizabeth Phillips Marsh (98-EV-103) reported on a meeting of some members of the Committee on Rules of Evidence and Criminal Procedure of the Criminal Justice Section of the American Bar Association. The professors noted that "there is no existing American Bar Association policy known to us that addresses these changes." Nonetheless, the

professors report that "[t]hose present at the meeting split evenly on the question of whether Rule 701 should be amended, particularly if Rule 702 is not changed."

The Association of American Trial Lawyers (98-EV-108) opposes the proposed amendment to Evidence Rule 701, on the ground that it would "extend the Rule 702 restrictions into yet another area." The Association also states that the "potential breadth of this proposal leads us to wonder if even high-school-level coursework used in developing an opinion could excluded [sic] on the ground that it is 'specialized'!"

The Board of Governors of the Oregon State Bar (98-EV-110) states that the proposed amendment to Evidence Rule 701 "appropriately distinguishes lay witnesses from experts whose testimony is based on scientific, technical, or other specialized knowledge."

The New Hampshire Trial Lawyers Association (98-EV-111) opposes the proposed change to Evidence Rule 701 as "a further effort to unreasonably restrict and constrain the trial as a search for truth."

Russell T. Golla, Esq. (98-EV-112) supports the proposed amendment to Evidence Rule 701.

James B. Ragan, Esq. (98-EV-113) objects to the proposed amendment because "[b]y making the addition proposed almost any lay witness opinions can be excluded through careful cross-examination."

The Ohio Academy of Trial Lawyers (98-EV-114) opposes the

proposed amendment to Evidence Rule 701.

Hon. Carl Barbier (98-EV-115), District Judge for the Eastern District of Louisiana, states that the proposed amendment to Evidence Rule 701 does "not seem objectionable."

Michael W. Day, Esq. (98-EV-116) opposes the proposed amendment to Evidence Rule 701.

The Philadelphia Bar Association (98-EV-118) supports the proposed amendment to Evidence Rule 701, but recommends that the Committee Note be revised to clarify the meaning of "specialized" knowledge "and should address directly whether the amendment would change the result in cases that have traditionally regarded certain opinions as nonexpert, even though based on knowledge that could be considered 'specialized' in some sense — e.g., the opinion of the owner of a business on its value or anticipated profits." The Association states that the amendment "appears to be a beneficial change to reestablish the distinction between lay and expert opinions. It would also discourage evasion of the requirement for pretrial disclosure of expert opinions through characterizing the opinions as 'lay' rather than 'expert'."

The Sturdevant Law Firm (98-EV-119) opposes the proposed amendment to Evidence Rule 701.

The Board of Governors of the Maryland Trial Lawyers Association (98-EV-120) opposes the proposed amendment to Evidence Rule 701.

The Lawyers' Committee for Civil Rights Under Law (98-EV-123) has "serious concerns" regarding the proposed amendment to

Evidence Rule 701.

The Arizona Trial Lawyers Association (98-EV-124) opposes the proposed amendment to Evidence Rule 701.

The Washington Legal Foundation (98-EV-125) states that "some courts have been too lenient in permitting lay witnesses to testify on complicated, technical subjects" and that the result of admitting such testimony "is to defeat Rule 702's carefully established limitations on use of testimony on technical subjects." The Foundation "wholeheartedly supports this proposed revision, which makes explicit what should have been clear (but apparently was not) from the current text of Rule 701: parties seeking to introduce opinion testimony of a technical nature may do so *only* if they can meet the requirements of Rule 702 regarding testimony by experts."

The Court Rules and Administration Committee of the Minnesota State Bar Association (98-EV-126) is concerned "that the Rule, as drafted, may actually preclude lay testimony based upon specialized knowledge, where the testimony does not rise to the level of expert testimony."

Nissan North America, Inc. (98-EV-130) supports the proposed amendment to Evidence Rule 701.

Michael A. Pohl, Esq. (98-EV-133) opposes the proposed amendment to Evidence Rule 701.

The International Academy of Trial Lawyers (98-EV-134) is in favor of the proposed amendment to Evidence Rule 701, contending that there is "no justifiable reason for not requiring that

testimony based on scientific, technical or other specialized knowledge should not be treated as expert opinion, subject to the requirements of Rule 702, and subject to the disclosure requirements of the Criminal and Civil Rules . . .”

Rod D. Squires, Esq. (98-EV-136) opposes the proposed amendment to Evidence Rule 701.

B. C. Cornish, Esq. (98-EV-137) opposes the proposed amendment to Evidence Rule 701.

The National Association of Independent Insurers (98-EV-141) supports the proposed amendment to Evidence Rule 701.

Jon B. Comstock, Esq. (98-EV-142) strongly supports the proposed change to Evidence Rule 701. He states that this “simple modification will have a significant and commendable effect on trial practice.”

Ken Baughman, Esq. (98-EV-146) opposes the proposed amendment to Evidence Rule 701.

Pamela O’Dwyer, Esq. (98-EV-147) opposes the proposed amendment to Evidence Rule 701.

Matthew B. Weber, Esq. (98-EV-152) opposes the proposed amendment to Evidence Rule 701, on the ground that it is “an unnecessary limit on the discretion of the court, which is well suited to control the presentation of this type of evidence.”

J. Michael Black, Esq. (98-EV-153) is opposed to the proposed amendment to Evidence Rule 701.

Norman E. Harned, Esq. (98-EV-155) opposes the proposed change to Evidence Rule 701.

P. James Rainey, Esq. (98-EV-156) opposes the proposed amendment to Evidence Rule 701.

Daniel W. Aherin, Esq. (98-EV-157) opposes the proposed amendment to Evidence Rule 701, on the ground that it is "geared towards preventing individual litigants from presenting reasonable expert testimony."

The Atlantic Legal Foundation (98-EV-158) supports the proposed amendment because it favors "improving the reliability of opinion evidence generally."

Paul T. Hoffman, Esq. (98-EV-159) opposes the proposed amendment to Evidence Rule 701.

Edward J. Carreiro, Jr., Esq. (98-EV-162) opposes the proposed amendment to Evidence Rule 701.

R. Gary Stephens, Esq. (98-EV-163) opposes the proposed amendment to Evidence Rule 701.

Anthony Tarricone, Esq. (98-EV-166) opposes the proposed amendment to Evidence Rule 701.

Annette Gonthier Kiely, Esq. (98-EV-167) opposes the proposed amendment to Evidence Rule 701, opining that "it effectively eliminates a whole sector of our society, those whose hands-on experience has given them a superior knowledge in a technical, skilled or other specialized area from giving an opinion

which is reliable, well-founded and of assistance to the trier-of-fact in determining the facts in issue."

M. R. Smith, Esq. (98-EV-169) supports the proposed amendment to Evidence Rule 701.

Navistar International Transportation Corp. (98-EV-171) supports the proposed amendment to Evidence Rule 701, stating that it "will allow the courts to determine which testimony needs to be scrutinized under the *Daubert* guidelines, thus precluding expert testimony from so-called lay witnesses to be 'back-doored' without the proper scrutiny."

The Section on Courts, Lawyers and the Administration of Justice of the District of Columbia Bar (98-EV-172) agrees with the proposed change to Evidence Rule 701.

The Federal Magistrate Judges Association (98-EV-173) supports the proposed amendment to Evidence Rule 701 as a helpful "loophole-closing change."

Nine members of the leadership of the Section of Litigation of the American Bar Association (98-EV-174) support the proposed amendment to Evidence Rule 701.

Brian T. Stern, Esq. (98-EV-177) opposes the proposed amendment to Evidence Rule 701, contending that the Advisory Committee "had no empirical evidence to support any claim of abuse" under the current Rule 701.

The National Employment Lawyers Association (98-EV-179) opposes the proposed amendment to Evidence Rule 701, contending

that the Advisory Committee "had no empirical evidence to support any claim of abuse" under the current Rule 701.

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 an opinion or otherwise~~.~~, if (1) the testimony is based upon sufficient 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 facts of the case.

COMMITTEE NOTE

Rule 702 has been amended in response to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and to the many cases applying *Daubert*, including *Kumho Tire Co. v. Carmichael*, 119 S.Ct. 1167 (1999). In *Daubert* the Court charged trial judges with the responsibility of acting as gatekeepers to exclude unreliable expert testimony, and the Court in *Kumho* clarified that this gatekeeper function applies to all expert testimony, not just testimony based in science. *See also Kumho*, 119 S.Ct. at 1178 (citing the

Committee Note to the proposed amendment to Rule 702, which had been released for public comment before the date of the *Kumho* decision). The amendment affirms the trial court's role as gatekeeper and provides some general standards that the trial court must use to assess the reliability and helpfulness of proffered expert testimony. Consistently with *Kumho,* the Rule as amended provides that all types of expert testimony present questions of admissibility for the trial court in deciding whether the evidence is reliable and helpful. Consequently, 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).

Daubert set forth a non-exclusive checklist for trial courts to use in assessing the reliability of scientific expert testimony. The specific factors explicated by the *Daubert* Court are (1) whether the expert's technique or theory can be or has been tested — that is, whether the expert's theory can be challenged in some objective sense, or whether it is instead simply a subjective, conclusory approach that cannot reasonably be assessed for reliability; (2) whether the technique or theory has been subject to peer review and publication; (3) the known or potential rate of error of the technique or theory when applied; (4) the existence and maintenance of standards and controls; and (5) whether the technique or theory has been generally accepted in the scientific community. The Court in *Kumho* held that these factors might also be applicable in assessing the reliability of non-scientific expert testimony, depending upon "the particular circumstances of the particular case at issue." 119 S.Ct. at 1175.

No attempt has been made to "codify" these specific factors. *Daubert* itself emphasized that the factors were neither exclusive nor dispositive. Other cases have recognized that not all of the specific

Daubert factors can apply to every type of expert testimony. In addition to *Kumho*, 119 S.Ct. at 1175, *see Tyus v. Urban Search Management*, 102 F.3d 256 (7th Cir. 1996) (noting that the factors mentioned by the Court in *Daubert* do not neatly apply to expert testimony from a sociologist). *See also Kannankeril v. Terminix Int'l, Inc.*, 128 F.3d 802, 809 (3d Cir. 1997) (holding that lack of peer review or publication was not dispositive where the expert's opinion was supported by "widely accepted scientific knowledge"). The standards set forth in the amendment are broad enough to require consideration of any or all of the specific *Daubert* factors where appropriate.

Courts both before and after *Daubert* have found other factors relevant in determining whether expert testimony is sufficiently reliable to be considered by the trier of fact. These factors include:

(1) Whether experts are "proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for purposes of testifying." *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1317 (9th Cir. 1995).

(2) Whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion. *See General Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997) (noting that in some cases a trial court "may conclude that there is simply too great an analytical gap between the data and the opinion proffered").

(3) Whether the expert has adequately accounted for obvious alternative explanations. *See Claar v. Burlington N.R.R.*, 29 F.3d 499 (9th Cir. 1994) (testimony excluded where the expert failed to consider other obvious causes for the plaintiff's condition).

Compare Ambrosini v. Labarraque, 101 F.3d 129 (D.C.Cir. 1996) (the possibility of some uneliminated causes presents a question of weight, so long as the most obvious causes have been considered and reasonably ruled out by the expert).

(4) Whether the expert "is being as careful as he would be in his regular professional work outside his paid litigation consulting." *Sheehan v. Daily Racing Form, Inc.*, 104 F.3d 940, 942 (7th Cir. 1997). *See Kumho Tire Co. v. Carmichael*, 119 S.Ct. 1167, 1176 (1999) (*Daubert* requires the trial court to assure itself that the expert "employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field").

(5) Whether the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would give. *See Kumho Tire Co. v. Carmichael*, 119 S.Ct.1167, 1175 (1999) (*Daubert's* general acceptance factor does not "help show that an expert's testimony is reliable where the discipline itself lacks reliability, as, for example, do theories grounded in any so-called generally accepted principles of astrology or necromancy."); *Moore v. Ashland Chemical, Inc.*, 151 F.3d 269 (5th Cir. 1998) (en banc) (clinical doctor was properly precluded from testifying to the toxicological cause of the plaintiff's respiratory problem, where the opinion was not sufficiently grounded in scientific methodology); *Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188 (6th Cir. 1988) (rejecting testimony based on "clinical ecology" as unfounded and unreliable).

All of these factors remain relevant to the determination of the reliability of expert testimony under the Rule as amended. Other factors may also be relevant. *See Kumho*, 119 S.Ct. 1167, 1176

("[W]e conclude that the trial judge must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable."). Yet no single factor is necessarily dispositive of the reliability of a particular expert's testimony. *See, e.g., Heller v. Shaw Industries, Inc.,* 167 F.3d 146, 155 (3d Cir. 1999) ("not only must each stage of the expert's testimony be reliable, but each stage must be evaluated practically and flexibly without bright-line exclusionary (or inclusionary) rules."); *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 43 F.3d 1311, 1317, n.5 (9th Cir. 1995) (noting that some expert disciplines "have the courtroom as a principal theatre of operations" and as to these disciplines "the fact that the expert has developed an expertise principally for purposes of litigation will obviously not be a substantial consideration.").

A review of the caselaw after *Daubert* shows that the rejection of expert testimony is the exception rather than the rule. *Daubert* did not work a "seachange over federal evidence law," and "the trial court's role as gatekeeper is not intended to serve as a replacement for the adversary system." *United States v. 14.38 Acres of Land Situated in Leflore County, Mississippi,* 80 F.3d 1074, 1078 (5th Cir. 1996). As the Court in *Daubert* stated: "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." 509 U.S. at 595. Likewise, this amendment is not intended to provide an excuse for an automatic challenge to the testimony of every expert. *See Kumho Tire Co. v. Carmichael,* 119 S.Ct.1167, 1176 (1999) (noting that the trial judge has the discretion "both to avoid unnecessary 'reliability' proceedings in ordinary cases where the reliability of an expert's methods is properly taken for granted, and to require appropriate proceedings in the less usual or more complex cases where cause for questioning the expert's reliability arises.").

When a trial court, applying this amendment, rules that an expert's testimony is reliable, this does not necessarily mean that contradictory expert testimony is unreliable. The amendment is broad enough to permit testimony that is the product of competing principles or methods in the same field of expertise. *See, e.g., Heller v. Shaw Industries, Inc.*, 167 F.3d 146, 160 (3d Cir. 1999) (expert testimony cannot be excluded simply because the expert uses one test rather than another, when both tests are accepted in the field and both reach reliable results). As the court stated in *In re Paoli R.R. Yard PCB Litigation*, 35 F.3d 717, 744 (3d Cir. 1994), proponents "do not have to demonstrate to the judge by a preponderance of the evidence that the assessments of their experts are correct, they only have to demonstrate by a preponderance of evidence that their opinions are reliable. . . . The evidentiary requirement of reliability is lower than the merits standard of correctness." *See also Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1318 (9th Cir. 1995) (scientific experts might be permitted to testify if they could show that the methods they used were also employed by "a recognized minority of scientists in their field."); *Ruiz-Troche v. Pepsi Cola*, 161 F.3d 77, 85 (1st Cir. 1998) ("*Daubert* neither requires nor empowers trial courts to determine which of several competing scientific theories has the best provenance.").

The Court in *Daubert* declared that the "focus, of course, must be solely on principles and methodology, not on the conclusions they generate." 509 U.S. at 595. Yet as the Court later recognized, "conclusions and methodology are not entirely distinct from one another." *General Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997). Under the amendment, as under *Daubert*, when an expert purports to apply principles and methods in accordance with professional standards, and yet reaches a conclusion that other experts in the field would not reach, the trial court may fairly suspect that the principles and methods have not been faithfully applied. *See Lust v. Merrell*

*Dow Pharmaceuticals, Inc.***,** 89 F.3d 594, 598 (9th Cir. 1996). The amendment specifically provides that the trial court must scrutinize not only the principles and methods used by the expert, but also whether those principles and methods have been properly applied to the facts of the case. As the court noted in *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 745 (3d Cir. 1994), "*any* step that renders the analysis unreliable . . . renders the expert's testimony inadmissible. *This is true whether the step completely changes a reliable methodology or merely misapplies that methodology*."

If the expert purports to apply principles and methods to the facts of the case, it is important that this application be conducted reliably. Yet it might also be important in some cases for an expert to educate the factfinder about general principles, without ever attempting to apply these principles to the specific facts of the case. For example, experts might instruct the factfinder on the principles of thermodynamics, or bloodclotting, or on how financial markets respond to corporate reports, without ever knowing about or trying to tie their testimony into the facts of the case. The amendment does not alter the venerable practice of using expert testimony to educate the factfinder on general principles. For this kind of generalized testimony, Rule 702 simply requires that: (1) the expert be qualified; (2) the testimony address a subject matter on which the factfinder can be assisted by an expert; (3) the testimony be reliable; and (4) the testimony "fit" the facts of the case.

As stated earlier, the amendment does not distinguish between scientific and other forms of expert testimony. The trial court's gatekeeping function applies to testimony by any expert. *See Kumho Tire Co. v. Carmichael*, 119 S.Ct. 1167, 1171 (1999) ("We conclude that *Daubert's* general holding — setting forth the trial judge's general 'gatekeeping' obligation — applies not only to testimony based on 'scientific' knowledge, but also to testimony based on

'technical' and 'other specialized' knowledge."). While the relevant factors for determining reliability will vary from expertise to expertise, the amendment rejects the premise that an expert's testimony should be treated more permissively simply because it is outside the realm of science. An opinion from an expert who is not a scientist should receive the same degree of scrutiny for reliability as an opinion from an expert who purports to be a scientist. *See Watkins v. Telsmith, Inc.*, 121 F.3d 984, 991 (5th Cir. 1997) ("[I]t seems exactly backwards that experts who purport to rely on general engineering principles and practical experience might escape screening by the district court simply by stating that their conclusions were not reached by any particular method or technique."). Some types of expert testimony will be more objectively verifiable, and subject to the expectations of falsifiability, peer review, and publication, than others. Some types of expert testimony will not rely on anything like a scientific method, and so will have to be evaluated by reference to other standard principles attendant to the particular area of expertise. 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. The expert's testimony must be grounded in an accepted body of learning or experience in the expert's field, and the expert must explain how the conclusion is so grounded. *See, e.g.*, American College of Trial Lawyers, *Standards and Procedures for Determining the Admissibility of Expert Testimony after Daubert*, 157 F.R.D. 571, 579 (1994) ("[W]hether the testimony concerns economic principles, accounting standards, property valuation or other non-scientific subjects, it should be evaluated by reference to the 'knowledge and experience' of that particular field.").

The amendment requires that the testimony must be the product of reliable principles and methods that are reliably applied to the facts of the case. While the terms "principles" and "methods" may

convey a certain impression when applied to scientific knowledge, they remain relevant when applied to testimony based on technical or other specialized knowledge. For example, when a law enforcement agent testifies regarding the use of code words in a drug transaction, the principle used by the agent is that participants in such transactions regularly use code words to conceal the nature of their activities. The method used by the agent is the application of extensive experience to analyze the meaning of the conversations. So long as the principles and methods are reliable and applied reliably to the facts of the case, this type of testimony should be admitted.

Nothing in this amendment is intended to suggest that experience alone — or experience in conjunction with other knowledge, skill, training or education — may not provide a sufficient foundation for expert testimony. To the contrary, the text of Rule 702 expressly contemplates that an expert may be qualified on the basis of experience. In certain fields, experience is the predominant, if not sole, basis for a great deal of reliable expert testimony. *See, e.g., United States v. Jones,* 107 F.3d 1147 (6th Cir. 1997) (no abuse of discretion in admitting the testimony of a handwriting examiner who had years of practical experience and extensive training, and who explained his methodology in detail); *Tassin v. Sears Roebuck,* 946 F.Supp. 1241, 1248 (M.D.La. 1996) (design engineer's testimony can be admissible when the expert's opinions "are based on facts, a reasonable investigation, and traditional technical/mechanical expertise, and he provides a reasonable link between the information and procedures he uses and the conclusions he reaches"). *See also Kumho Tire Co. v. Carmichael,* 119 S.Ct.1167, 1178 (1999) (stating that "no one denies that an expert might draw a conclusion from a set of observations based on extensive and specialized experience.").

If the witness is relying solely or primarily on experience, then the witness must explain how that experience leads to the conclusion

reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts. The trial court's gatekeeping function requires more than simply "taking the expert's word for it." *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1319 (9th Cir. 1995) ("We've been presented with only the experts' qualifications, their conclusions and their assurances of reliability. Under *Daubert*, that's not enough."). The more subjective and controversial the expert's inquiry, the more likely the testimony should be excluded as unreliable. *See O'Conner v. Commonwealth Edison Co.*, 13 F.3d 1090 (7th Cir. 1994) (expert testimony based on a completely subjective methodology held properly excluded). *See also Kumho Tire Co. v. Carmichael*, 119 S.Ct. 1167, 1176 (1999) ("[I]t will at times be useful to ask even of a witness whose expertise is based purely on experience, say, a perfume tester able to distinguish among 140 odors at a sniff, whether his preparation is of a kind that others in the field would recognize as acceptable.").

Subpart (1) of Rule 702 calls for a quantitative rather than qualitative analysis. The amendment requires that expert testimony be based on sufficient underlying "facts or data." The term "data" is intended to encompass the reliable opinions of other experts. See the original Advisory Committee Note to Rule 703. The language "facts or data" is broad enough to allow an expert to rely on hypothetical facts that are supported by the evidence. *Id*.

When facts are in dispute, experts sometimes reach different conclusions based on competing versions of the facts. The emphasis in the amendment on "sufficient facts or data" is not intended to authorize a trial court to exclude an expert's testimony on the ground that the court believes one version of the facts and not the other.

There has been some confusion over the relationship between Rules 702 and 703. The amendment makes clear that the sufficiency

of the basis of an expert's testimony is to be decided under Rule 702. Rule 702 sets forth the overarching requirement of reliability, and an analysis of the sufficiency of the expert's basis cannot be divorced from the ultimate reliability of the expert's opinion. In contrast, the "reasonable reliance" requirement of Rule 703 is a relatively narrow inquiry. When an expert relies on inadmissible information, Rule 703 requires the trial court to determine whether that information is of a type reasonably relied on by other experts in the field. If so, the expert can rely on the information in reaching an opinion. However, the question whether the expert is relying on a *sufficient* basis of information — whether admissible information or not — is governed by the requirements of Rule 702.

The amendment makes no attempt to set forth procedural requirements for exercising the trial court's gatekeeping function over expert testimony. *See* Daniel J. Capra, *The Daubert Puzzle*, 38 Ga.L.Rev. 699, 766 (1998) ("Trial courts should be allowed substantial discretion in dealing with *Daubert* questions; any attempt to codify procedures will likely give rise to unnecessary changes in practice and create difficult questions for appellate review."). Courts have shown considerable ingenuity and flexibility in considering challenges to expert testimony under *Daubert*, and it is contemplated that this will continue under the amended Rule. *See, e.g., Cortes-Irizarry v. Corporacion Insular*, 111 F.3d 184 (1st Cir. 1997) (discussing the application of *Daubert* in ruling on a motion for summary judgment); *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 736, 739 (3d Cir. 1994) (discussing the use of *in limine* hearings); *Claar v. Burlington N.R.R.*, 29 F.3d 499, 502-05 (9th Cir. 1994) (discussing the trial court's technique of ordering experts to submit serial affidavits explaining the reasoning and methods underlying their conclusions).

The amendment continues the practice of the original Rule in

referring to a qualified witness as an "expert." This was done to provide continuity and to minimize change. The use of the term "expert" in the Rule does not, however, mean that a jury should actually be informed that a qualified witness is testifying as an "expert." Indeed, there is much to be said for a practice that prohibits the use of the term "expert" by both the parties and the court at trial. Such a practice "ensures that trial courts do not inadvertently put their stamp of authority" on a witness's opinion, and protects against the jury's being "overwhelmed by the so-called 'experts'." Hon. Charles Richey, *Proposals to Eliminate the Prejudicial Effect of the Use of the Word "Expert" Under the Federal Rules of Evidence in Criminal and Civil Jury Trials*, 154 F.R.D. 537, 559 (1994) (setting forth limiting instructions and a standing order employed to prohibit the use of the term "expert" in jury trials).

GAP Report — Proposed Amendment to Rule 702

The Committee made the following changes to the published draft of the proposed amendment to Evidence Rule 702:

1. The word "reliable" was deleted from Subpart (1) of the proposed amendment, in order to avoid an overlap with Evidence Rule 703, and to clarify that an expert opinion need not be excluded simply because it is based on hypothetical facts. The Committee Note was amended to accord with this textual change.

2. The Committee Note was amended throughout to include pertinent references to the Supreme Court's decision in *Kumho Tire Co. v. Carmichael*, which was rendered after the proposed amendment was released for public comment. Other citations were updated as well.

3. The Committee Note was revised to emphasize that the

amendment is not intended to limit the right to jury trial, nor to permit a challenge to the testimony of every expert, nor to preclude the testimony of experience-based experts, nor to prohibit testimony based on competing methodologies within a field of expertise.

4. Language was added to the Committee Note to clarify that no single factor is necessarily dispositive of the reliability inquiry mandated by Evidence Rule 702.

Summary of Comments on the Proposed Amendment to Evidence Rule 702

The Product Liability Advisory Council (98-EV-001) supports the proposed amendment to Evidence Rule 702 "without reservation." The Council states: "As set forth in the Advisory Committee Notes to this proposed rule, these amendments would ensure that before expert testimony can be presented to a trier of fact, it has met a threshold test of its reliability, which precisely expresses the intent of the Supreme Court as set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 591, 594 (1993), and *General Electric Co. v. Joiner,* 118 S.Ct. 512 (1997)."

Bert Black, Esq., and Clifton T. Hutchinson, Esq. (98-EV-003) would prefer that no changes be made to Evidence Rule 702. To the extent the proposed amendments go forward, they suggest that the rule refer to an expert's "reasoning" rather than "principles or methods." They also argue that the proposal "misses what we believe is an important distinction between validity and reliability."

Professor Edward J. Imwinkelreid (98-EV-004) supports the proposed amendment to Evidence Rule 702 insofar as it requires that

expert testimony be the product of reliable principles and methods, and that the witness apply the principles and methods reliably to the fact of the case. He approves the proposal's requirement of "sound procedure" which is a "fundamental guarantee of the value of scientific testimony." Professor Imwinkelreid suggests, however, that the proposed subpart (1) of the rule be amended to require that "expert testimony is sufficiently based upon reliable case specific facts or data."

Professor Richard Friedman (98-EV-007) believes that the proposed amendment to Evidence Rule 702 is unnecessary. He also fears that "requiring a non-scientific expert to speak in terms of reliable principles and methods creates too rigorous a demand."

James D. Bartolini, Esq. (98-EV-008) fears that the proposed amendment "will result in expensive and protracted *Daubert* hearings before the case is reached for trial" and "will be primarily a hammer used against all claimants and all experts, however innocuous their expert opinions are."

Lawyers for Civil Justice (98-EV-009) state that the "proposed revisions to Rule 702 will strengthen judicial decision making by ensuring that scientific expert testimony will have a greater degree of reliability before it is presented to the jury. By enhancing the trial court's role as gatekeeper for the admission of expert evidence, the proposed revisions add emphasis to the principles articulated" in *Daubert* and *Joiner*. The group concludes that the proposed amendment "enforces the important principles of *Daubert*, clarifies ambiguities and conflicts in interpretations and wisely affirms the vital role of the trial judge as gatekeeper for all expert testimony."

The Evidence Project (98-EV-010) agrees that Rule 702 should

be amended but argues that the Advisory Committee's proposed amendment suffers from "a number of flaws" that are "both structural and substantive in nature." The perceived structural flaw is that Evidence 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." The perceived substantive flaw is that the amendment "does nothing to assist judges in discerning what is meant" by reliable expert testimony." Finally, the Evidence Project recommends that the preponderance of the evidence standard of admissibility should be placed explicitly in the Rule, rather than in the Committee Note.

Professor Laird Kirkpatrick (98-EV-011) states that the proposed amendment is likely to have a "problematic application" with respect to experts who rely mainly on experience. He states that a witness's "experience may not include much in the way of 'principles and methods' but may still be helpful to the jury if based on repeated observations of similar events."

The Association of Trial Lawyers of America (98-EV-012) is opposed to the proposed amendment to Evidence Rule 702. The Association states that the proposal "would render inadmissible the testimony of many experts who have testified without controversy since the inception of the Federal Rules of Evidence." Also, "it would massively increase the costs to the courts and the litigants, requiring interminable Rule 702 hearings."

Hon. Myron Bright (98-EV-013), Judge of the Eighth Circuit Court of Appeals, believes that the current Evidence Rule 702 is operating well and should not be amended. He argues that the proposed amendment unjustifiably shifts power from the jury to the judge, "without any true standards." The confusion in the courts over

the meaning of *Daubert* should, in Judge Bright's view, be handled by adjudication rather than by rulemaking.

James E. Garvey, Esq. and other Fellows of the American Coll. of Trial Lawyers (98-EV-016) favor the proposed amendment.

The Committee on Federal Procedure of the New York State Bar Association (98-EV-017) generally supports the proposed amendment to Evidence Rule 702, stating that the standard imposed "is sufficiently particular to provide guidance over the range of expert opinion testimony . . . While sufficiently general so that it does not impose a specific test obviously inapplicable to certain forms of expertise today, much less to those that may be invented in the next ten or twenty years." However, the Committee is opposed to subpart (1) of the proposed proviso to Rule 702 as it was issued for public comment (i.e., that the expert's testimony must be "sufficiently based on reliable facts or data"), on the ground that this standard "improperly impinges on the role of the trier of fact." The Committee concludes that "Courts addressing reliability issues should only examine the methodology and the application of the methodology to the facts, not the facts themselves."

Charles D. Weller, Esq. (98-EV-018) submitted an article that was useful to the Advisory Committee in its analysis of whether proposed expert testimony is the product of reliable principles and methods.

William Petrus, Esq. (98-EV-019) objects to the proposed amendment to Evidence Rule 702 insofar as it extends the *Daubert* analysis to mechanical engineering experts. He argues that the rule would work a particular "hardship" on plaintiffs in automobile product liability litigation because "the only people with the means

to design a new car, test that new car and crush its roof to determine roof strength would be employees of automobile manufacturers."

The Defense Research Institute (98-EV-020) states that the proposed amendment to Evidence Rule 702 "will add greater clarity regarding the duties of the trial judge and require a greater degree of reliability before the testimony is presented to the jury." The Institute states that "proper exercise by the court of its expert witness gatekeeper function on an early and continuing basis will facilitate earlier reasonable resolution of the court action, thereby reducing cost and delay rather than increasing it."

E. Wayne Taff, Esq. (98-EV-021) states that the proposed amendment to Evidence Rule 702 is not only beneficial, but also "critical to ensuring the integrity of testimony presented in the United States District Courts." He states that the proposal "will insure that the finder of fact has a reliable basis upon which to make a determination, without resort to conjecture or speculation."

Hon. D. Brock Hornby (98-EV-023), Chief Judge of the United States District Court for the District of Maine, argues that the proposed amendment to Evidence Rule 702 will impose substantial litigation costs due to "the proliferation of motions to preclude expert testimony and *voir dire* hearing held in advance of trial that the growing elaborateness of the gatekeeping rules entails." Judge Hornby asks: "Where is the evidence that lawyers are not able to cross-examine effectively and show whatever limitations there are on the bases for expert opinion testimony that is not scientific?"

Professor Eileen A. Scallen (98-EV-024), suggests that "the Committee explicitly make the admissibility of expert testimony an issue to be determined under Fed.R.Evid. 104(b) . . . as an issue of

relevancy conditioned on fact." She argues that "[g]iving the sole power to the judge to determine reliability usurps the jury's traditional role in evaluating the credibility of evidence." She concludes that "text, precedent, historical and constitutional concerns, as well as pragmatic considerations, suggest that the Advisory Committee should take the opportunity of amending the expert testimony rules to clarify that the admissibility of expert testimony is to be determined under Federal Rule of Evidence 104(b)."

Kevin J. Dunne, Esq. (98-EV-025) supports the proposal to amend Evidence Rule 702. In his view, complaints that the proposal deprives the jury of its role in assessing the weight of the evidence are unfounded. He states: "The phrase, 'it goes to the weight' has become synonymous with *laissez-faire* judging and a license for admissibility of junk science. Indeed, this . . . argument can be used to eliminate all rules of evidence . . ."

Thomas E. Carroll, Esq. (98-EV-027) opposes the proposed amendment insofar as it would embody the principles of *Daubert*. He contends that *Daubert* has "tripled the cost of litigation in matters involving significant issues of expert testimony." He concludes that the proposal overlooks "the ability of juries, good lawyers who subject testimony of experts to extensive cross-examination, and the ability of judges to rules under FRE 702 as it now stands."

Norman W. Edmund (98-EV-028) suggests that the proposed amendment make a more specific reference to, and explication of, the scientific method.

Diane R. Crowley, Esq. (98-EV-029) "wholeheartedly" supports the proposed amendment to Evidence Rule 702. She states that "[i]t is important to point out to the critics of change that the proposed

version of Rule 702 does not impose the full *Daubert* criteria on every opinion offered by every expert witness. . . . The proposed change asks for nothing more than indications of reliability . . ."

Professor Lynn McLain (98-EV-030) opposes the proposed amendment to Evidence Rule 702. He complains that the proposal "would make the court, in every case involving expert testimony, go through a time-consuming tripartite preliminary fact-finding exercise." He also objects that the proposal "seems to push the judge into a 104(a) role that impinges on the jury's fact-finding." Professor McLain claims that the sufficiency of an expert's basis should be decided under the conditional relevance standard of Evidence Rule 104(b).

Pamela F. Rochlin, Esq. (98-EV-032) objects to the proposed changes to Evidence Rule 702. She declares that the proposal would "allow judges, whose decisions will be reviewable on an abuse of discretion standard only, to eliminate plaintiff's experts and similarly dismiss plaintiff's cases." She also expresses concern that the proposed rule "will require a *Daubert* hearing in every case where experts are proffered" thus adding "another layer of time and expense to already crowded court dockets."

Harold Lee Schwab, Esq. (98-EV-033) states that the Advisory Committee "properly decided not to codify the *Daubert* guidelines in the [text] of the rule since it is obvious that one or more of the factors articulated in that case might not apply to some other expert and his/her discipline whereas other non-enumerated factors might be relevant. The standards set forth in the amendment are broad enough to encompass one or more of the *Daubert* factors but also other factors where appropriate." Mr. Schwab concludes that "[t]here can be no valid objection to this amendment."

Henry G. Miller, Esq. (98-EV-034) opposes the proposed change to Rule 702 on the ground that it is "autocratic and less than egalitarian to so distrust the jury's determination of which expert to believe."

Robert M. N. Palmer, Esq. (98-EV-035) opposes the proposed amendment's extension of the *Daubert* gatekeeping function to non-scientific expert testimony. He argues that application of "the *Daubert* principles to all expert opinion would work to the benefit of large corporations and to the very serious detriment of injured consumers even where the expert opinions and principles underlying them are not seriously disputed."

James A. Grutz, Esq. (98-EV-036) is opposed to the proposed amendment to Evidence Rule 702 on the ground that it places "far too much discretion in the trial court's hands" leaving the potential for "eroding away a litigant's right to trial by jury."

Thomas A. Conlin, Esq. (98-EV-037) opposes the proposed amendment to Evidence Rule 702, stating that the proposed amendatory language is "superfluous." He declares that courts can use existing rules to "weed out testimony which is — essentially — without *foundation*." Mr. Conlin encourages the Advisory Committee to "let cross-examination work its wonders, and let jurors, not judges, decide cases."

Scott B. Elkind, Esq. (98-EV-038) opposes the proposed amendment to Evidence Rule 702, asserting that it would "impair the rights of aggrieved parties" by applying the *Daubert* principles to non-scientific experts.

John Borman, Esq. (98-EV-039) opposes the proposed amendment to Evidence Rule 702 as an unwarranted expansion of the trial court's gatekeeping role. He concludes: "The proposed rule will permit trial judges to choose between opposing witnesses, exclude expert testimony where the judge disagrees, and infringe on the litigant's constitutional right to a jury trial."

Donald A. Shapiro, Esq. (98-EV-040) is opposed to the proposed amendment to Evidence Rule 702. He states that the proposal provides "too much discretion to the trial judges to exclude expert testimony" and might allow trial judges "to pick and choose which experts they dislike and to bar their testimony as opposed to letting juries decide the credibility and reliability of experts."

Michael J. Miller, Esq. (98-EV-042) is opposed to the proposed amendment, on the ground that it will empower federal judges to "arbitrarily" determine the admissibility of expert testimony. He concludes that the proposal "will ultimately add an enormous amount of litigation to the courts as defendants will assert every plaintiff's expert is outside of the perceived defense mainstream."

M. Robert Blanchard, Esq. (98-EV-043) states that "the proposed change to Rule 702 will permit trial judges to simply choose which side of the case they want to win, as happens too often already, and will infringe on the litigants' constitutional right to a jury trial."

Richard L. Duncan, Esq. (98-EV-044) is opposed to the proposed change to Evidence Rule 702. He argues that the proposed amendment would "infringe a litigant's constitutional right to a jury trial and create unequal justice" because it would "invite the wealthier litigant to raise the standards of proof to an impossibly high level which a poor litigant will be unable to afford and will encourage the

tendency of hourly paid attorneys to substitute Motions in Limine for a trial on the evidence."

The Chemical Manufacturers Association, the Defense Research Institute, the Federation of Insurance and Corporate Defense Counsel, the International Association of Defense Counsel, Lawyers for Civil Justice, the National Association of Manufacturers, and the Product Liability Advisory Council (98-EV-047) "fully support" the proposed amendment to Rule 702, on the grounds that it "clarifies the trial court's function as gatekeeper with respect to the admissibility of all types of expert testimony, not just scientific testimony, and sets some meaningful standards for determining the reliability and the admissibility of such testimony." These organizations suggest, however, "that the Committee consider adding language to the Note emphasizing the need for focus on the expert's reasoning; the need for a valid explanatory connection between the information relied upon and the conclusion reached; and the need to clarify the relationship between 'validity' and 'reliability.'"

The National Board of the American Board of Trial Advocates (98-EV-049) "opposes the proposed amendment to Evidence Rule 702 because it invades the province of the jury, adversely impacts and even preempts the fact-finding and decision-making powers of the jury, places an onerous burden on the judiciary, litigants and counsel and does not promote the efficient administration of justice."

The Lawyers' Club of San Francisco (98-EV-050) opposes the proposed amendment to Evidence Rule 702. It contends that "the proposed amendment is a dramatic enlargement of the power of the trial judge in controlling what is and what is not admissible expert

testimony." The Club concludes that under the amendment, the trial court could "choose between two opposing witnesses, and exclude the testimony of the witnesses with which they disagree, thereby taking away the right to a jury trial on the opinion governing the outcome of the case."

William B. Dodero, Esq. (98-EV-052) states that the proposed amendment to Evidence Rule 702 is part of "a much-needed revision which will finally allow trial courts to fulfill their role as gatekeeper for the admission of expert evidence." He observes that "[t]he uniformity in having all circuits apply the same threshold requirements prior to the admission of expert testimony will ensure at least some basic level of reliability prior to the admission of expert opinion," and that the proposed amendment "will allow the courts to embark on a simple three-part analysis prior to the admission of any expert testimony."

Jay H. Tressler, Esq. (98-EV-055) is in favor of the proposed amendment to Evidence Rule 702. He states that the proposal "offers a necessary extension of the gatekeeper function" that is needed to "avoid unreliable, untested opinions which have not been predicated upon reliable methodology or subjected to adequate peer review scrutiny."

The Committee on Civil Litigation of the United States District Court for the Eastern District of New York (98-EV-056) opposes the proposed amendment to Evidence Rule 702, on the ground that it is "unnecessary." The Committee states that the proposal "would not clarify the *Daubert* test; it merely changes the vocabulary that would be used."

Weldon S. Wood, Esq. (98-EV-058) supports the proposed

amendment to Evidence Rule 702.

Michael S. Allred, Esq. (98-EV-059) opposes the proposed amendment on the ground that it will "place the federal bench in a position that it can entertain or exclude evidence at a whim based upon a subjective appraisal of the testimony."

Russell W. Budd, Esq. (98-EV-061) opposes the proposed revision to Evidence Rule 702. He believes that the proposal "will license the trial judge to usurp the role of the jury."

Charles F. Preuss, Esq. (98-EV-062) supports the proposed amendment and observes that the Committee Note "appropriately acknowledges the relevance of the non-exclusive checklist of factors discussed in *Daubert* and other cases for assessing the reliability of scientific expert testimony, but no attempt is made to codify them as part of Rule 702."

Professor Michael H. Graham (98-EV-063) supports the proposed amendment to Evidence Rule 702. He states that the proposal "correctly asks whether *any* expert's explanative theory is 'the product of reliable principles and methods.' Thus the focus is switched from whether the explanative theory actually 'works' . . . to whether the explanative theory is the product of, i.e., is derived applying, reliable principles and methods . . . thereby providing the court with sufficient confidence that it 'may work.'" Professor Graham argues that the position taken by the proposal is consistent with the position taken by "many Courts of Appeals."

Frank Stainback, Esq. (98-EV-064) supports the proposed amendment to Evidence Rule 702 and states that it is "important that

an attempt be made to provide a more uniform interpretation of *Daubert* in the federal courts."

Hon. Edward R. Becker (98-EV-065), Chief Judge of the United States Court of Appeals for the Third Circuit, supports the proposed amendment to Evidence Rule 702, noting that it is "extremely well justified by the Committee's accompanying commentary."

Steven H. Howard, Esq. (98-EV-067) opposes the proposed amendment to Evidence Rule 702.

William A. Coates, Esq. (98-EV-068) supports the proposed amendment because it helps to "insure that scientific expert testimony must have some measure of reliability before it is presented to a jury."

William Petrus, Esq. (98-EV-070) opposes the proposed amendment to Evidence Rule 702. He contends that the proposal imposes unnecessarily strict limitations on the admissibility of expert testimony, under which "hundreds of thousands of dollars would be required to satisfy pedantic concerns."

Prentice H. Marshall, Esq. (98-EV-071) states that the proposed amendment to Evidence Rule 702 is "appropriate" although he wonders whether the proposal will "increase the proliferation of motions for summary judgment based upon a motion to strike under the *Daubert* case."

Trial Lawyers for Public Justice (98-EV-072) oppose the proposed amendment to Evidence Rule 702. They argue that the rule "will pose undue restrictions on the admissibility of expert testimony"; that it would "unwisely expand trial judges' gatekeeping role, by permitting them to substitute their judgments on reliability of

expert testimony for that of the experts' peers"; and that "the text of the rule and the Advisory Committee Note are unclear as to how courts should determine evidentiary reliability."

The Federal Courts Committee of the Chicago Council of Lawyers (98-EV-074) contends that the proposed amendment "raises the bar" on such "historically probative evidence" as police and mechanics' testimony.

The State Bar of Arizona (98-EV-075) supports the adoption of the proposed amendment to Evidence Rule 702.

The Seventh Circuit Bar Association (98-EV-076) believes that the proposed amendment to Evidence Rule 702 is "warranted" and "will bring greater rigor and uniformity to a trial judge's application of the Supreme Court's *Daubert* decision.

The National Association of Railroad Trial Counsel (98-EV-077) states that the proposed amendment to Evidence Rule 702 "would be a welcomed change considering the confusion in this area."

The Chicago Chapter of the Federal Bar Association (98-EV-078) supports the proposed amendment to Evidence Rule 702.

The Federal Practice Section of the Connecticut Bar Association (98-EV-079) endorses the proposed amendment to Evidence Rule 702.

The Phoenix and Tucson Chapters of the Federal Bar Association (98-EV-080) support the proposed amendment to Evidence Rule 702.

The Pennsylvania Trial Lawyers Association (98-EV-081) opposes the proposed amendment to Evidence Rule 702. It fears that under the proposal, "courts may feel compelled to evaluate expert testimony under a unitary, rigid standard that does not take into account the nature of the opinions being offered."

The Federal Rules of Evidence Committee of the American College of Trial Lawyers (98-EV-084) states that the proposed amendment to Evidence Rule 702 "accurately and clearly states the three-pronged reliability requirement for establishing admissibility of expert evidence under *Daubert, General Elec. v. Joiner,* 118 S.Ct. 512 (1997), and the better reasoned opinions of the lower federal courts." The Committee also "strongly supports the proposal to make explicit that the reliability premise of *Daubert* applies to all expert evidence." The Committee notes that "a number of difficult issues have and will arise with respect to the reliability of evidence proffered by 'experts by experience,' particularly in those instances in which there is adverse expert testimony based upon apparently reliable scientific or technical knowledge." The Committee concludes, however, that "the Advisory Committee is right to leave those issues for resolution by the courts over time."

Professor Adina Schwartz (98-EV-085) states that "[b]y allowing admissibility to be based not on stature among scientists but on judges' own scientific views or extra-scientific biases, proposed Rule 702 licenses unjustified encroachment on the jury's role."

Professor Victor Gold (98-EV-086) criticizes the proposed amendment as imposing "an enormous burden on trial judges to evaluate the reliability of expert testimony in all fields of knowledge." Such a burden "may encourage judicial resort to arbitrariness and bias on issues that can be outcome determinative but usually will be

rubberstamped by appellate courts under a toothless standard of harmless error."

John R. Lanza, Esq. (98-EV-087) states that the proposed amendment "now places the trial court not as 'a gatekeeper' but as a 'super juror.' This results in costly evidentiary hearings and in preclusion of case determinant expert testimony, based upon the trial judge's interpretation of facts."

Dr. Michael A. Centanni (98-EV-089) urges that the Committee Note to the proposed amendment to Rule 702 "include two basic questions that are fundamental to determining reliable science — 'Does the science work, and Why?'"

J. Ric Gass, Esq. (98-EV-090) states that the proposed amendment to Evidence Rule 702 is an "important and necessary and appropriate" revision.

The Oregon Trial Lawyers Association (98-EV-091) opposes the proposed amendment to Evidence Rule 702. The Association contends that "[t]his substantial change to Rule 702 would render inadmissible the testimony of many experts who have testified without controversy since the creation of the Federal Rules of Evidence." It concludes that the proposed amendment "would result in an additional layer of litigation, more complex than a summary judgment proceeding, where the court is to determine not only whether there are material facts in dispute, but also to make a determination regarding the reliability of those facts, a task which will prove expensive and time consuming for the litigants and the court."

J. Greg Allen, Esq. (98-EV-093) opposes the proposed amendment to Evidence Rule 702, arguing that "more discretion

given to the trial court judges on the allowance of expert testimony" will result in "inequitable treatment."

Shawn W. Carey, Esq. (98-EV-094) states that the proposed amendment "would be unduly burdensome and would prevent doctors whose diagnosis are based on years of training and experience to be second guessed unless they performed scientific experiments."

Alvin A. Wolff, Jr., Esq. (98-EV-095) opposes the proposed amendment to Evidence Rule 702 on the ground that it "would trample the rights of Plaintiffs who would be denied their day in Court."

Alan Voos, Esq. (98-EV-096) opposes the proposed amendment to Evidence Rule 702. He states that "[r]ather than codifying *Daubert* the Committee should formulate a rule which does away with *Daubert* and allows new, cutting edge, but reliable scientific expert testimony to assist triers of fact in civil trials."

The Federal Bar Council Committee on Second Circuit Courts (98-EV-097) states that "although the current Rule could remain 'as is' . . . it would be rather anomalous not to reflect the substance of the Supreme Court's decision in the very Rule that deals with the matter raised in *Daubert.* Accordingly, the Committee supports the proposed amendment's purpose to incorporate the gatekeeper function announced in *Daubert* into FRE 702." The Committee asserts that the proposed amendment "correctly focuses on the reliability of the facts, the principles or methods of analysis, and the application of such principles or methods to the facts." It believes that "it is impractical to seek more precise formulations." The Committee also asserts that the proposed amendment's application to non-scientific expert testimony "is highly desirable"

and that the gatekeeping function announced in *Daubert* is even more important in the 'soft' disciplines than in the hard sciences." The Committee notes that under *Daubert*, as under the proposed amendment, it is possible that more experienced-based expert testimony will be excluded than had previously been the case. However, where that testimony is in fact unreliable, "the exclusion of such testimony should be regarded as the desirable and intended consequence of a vigorous application of the *Daubert* principles."

The Montana Trial Lawyers Association (98-EV-098) opposes the proposed amendment to Evidence Rule 702, stating that the reliability requirements set forth in the proposal "go way beyond judicial gatekeeping and usurp the fact finder and jury roles." The Association states that "[t]he very term 'reliability' is inherently a credibility determination" and that the factors bearing on reliability set forth in the Committee Note should not be dispositive.

Kelly Elswick, Esq. (98-EV-099) objects to "the additional criteria in proposed Rule 702 as applied to non-scientific expert testimony. The problem with this rule is that a great deal of expertise, in fact most expertise, is based upon experience. . . . Therefore, there are no delineated formulas to follow."

The Trial Lawyers Association of Metropolitan Washington, DC (98-EV-100) strongly opposes the proposed change to Evidence Rule 702. The Association believes that the proposal "raises the bar of admissibility on expert opinions to a height that totally usurps the jury's traditional role as the fact-finder. By requiring that federal judges make 'reliability' findings about the facts and methods used by experts, the proposed rule would have judges become the real triers of fact concerning experts." The Association asserts that the proposal is based on a factual assumption that jurors are incompetent

— a reflection of "an elitist bias." It concludes that the proposed amendment also creates "a bias against experienced-based experts by trying to measure them against standards that have no bearing on their work."

The Michigan Trial Lawyers Association (98-EV-101) opines that the proposed amendment "does not adequately define 'reliable facts or data,' 'reliable principles and methods,' or the manner in which the judge is supposed to determine whether the expert has 'applied the principles and methods reliable [sic] to the facts of the case." The Association asserts that the "lack of clarity in the proposed amendment will spawn protracted litigation, creating a significant burden on litigants and the courts." It concludes that "[t]rial judges do not, and should not, have the authority to exclude experts merely because the expert, for example, represents the minority view in his or her field, or disagrees with the leading authority on a particular subject. The proposed amendment, however, would do just that."

Peter S. Everett, Esq. (98-EV-102) objects to the proposed amendment on the ground that it is "designed to apply the *Daubert* decision more broadly." Mr. Everett declares that *Daubert* is premised upon "an unhealthy disrespect for the abilities of jurors to sort out meritorious claims from those that lack merit."

Professors Bruce Comly French and Elizabeth Phillips Marsh (98-EV-103) reported on a meeting of some members of the Committee on Rules of Evidence and Criminal Procedure of the Criminal Justice Section of the American Bar Association. The professors noted that "there is no existing American Bar Association policy known to us that addresses these changes." Nonetheless, the professors report that some Committee members at the meeting expressed the view that "the attempt to codify the *Daubert* decision

. . . created more problems than it solved."

A Number of Professors of Evidence and Others Interested in Evidentiary Policy (98-EV-105) state that the "proposed changes to Federal Rule of Evidence 702 may upset settled practices and expectations, have unintended consequences and create more problems than they solve. The new rule will not increase the predictability of the outcome of challenges to the admissibility of expert testimony. Instead, the changes in the rule may incur high costs in the form of unintended consequences and increased litigation."

Professor Myrna Raeder (98-EV-106) opposes the proposed amendment as containing "amorphous language." She suggests instead that the Committee adopt a proposal that would employ the *Frye* test as a rebuttable presumption of admissibility.

Timothy W. Monsees, Esq. (98-EV-107) states that the proposed amendment to Rule 702 represents "a very bad change for plaintiffs."

The Association of American Trial Lawyers (98-EV-108) opposes the proposed amendment to Evidence Rule 702. It expresses concern with the factors bearing on reliability set forth in the Committee Note, and asserts that "all of them have the potential, if they are adopted by a court as a focus of expert testimony scrutiny, to become unfairly outcome-determinative."

Michigan Protection and Advocacy Service (98-EV-109) opposes the proposed amendment to Evidence Rule 702, on the ground that it will "invade the province of the jury, denying parties a fair opportunity to present a complete case or defense." The Service expresses concern that the proposal "affords greater likelihood that one party's expert might be barred simply because the other side's

expert followed a more conventional — albeit not necessarily more reliable — method to support the opinion."

The Board of Governors of the Oregon State Bar (98-EV-110) opposes the proposed change to Evidence Rule 702. The Board concludes that the proposed amendment "would result in a substantive change in the law without a sufficient analysis or justification having been demonstrated or consensus obtained to support the amendment." In the Board's view, the result of the proposal "would be that more experts would be excluded under the amendment than would ever have been excluded under *Frye*, a result inapposite to the Supreme Court's objectives when it held in favor of the proponents of the scientific evidence in *Daubert*." The Board's conclusion is word-for-word identical to the conclusion set forth by the Oregon Trial Lawyers Association (98-EV-071).

The New Hampshire Trial Lawyers Association (98-EV-111) believes that the proposed amendment to Evidence Rule 702 poses "a significant threat to the trial as a truth-finding process" and "will foster an extensive and extremely expensive practice of trying to limit or prevent outright the testimony of virtually any witness who has not submitted his or her opinions to some scientific journal or peer review."

Russell T. Golla, Esq. (98-EV-112) supports the proposed amendment to Evidence Rule 702.

James B. Ragan, Esq. (98-EV-113) objects to the part of the proposed amendment to Evidence Rule 702 that requires the trial judge to determine that the expert reliably applied the principles and methods to the facts of the case. This question, in his view, "is more appropriately decided by the jury."

The Ohio Academy of Trial Lawyers (98-EV-114) opposes the proposed amendment to Evidence Rule 702, arguing that the proposal "may extend the trial, as there will be a hearing within the trial to determine if the experts can testify."

Hon. Carl Barbier (98-EV-115), District Judge for the Eastern District of Louisiana, states that the proposed amendment to Evidence Rule 702 "would no doubt encourage litigants to file more *Daubert* motions."

Michael W. Day, Esq. (98-EV-116) opposes the proposed amendment to Evidence Rule 702, arguing that it would bar "much experience-based or specialized knowledge opinion evidence by non-scientists that is currently admitted routinely in the courts."

John P. Blackburn, Esq. (98-EV-117) opposes the proposed amendment to Evidence Rule 702. He is concerned that the proposal will make it more difficult for plaintiffs to "prove their cases."

The Sturdevant Law Firm (98-EV-119) opposes the proposed amendment to Evidence Rule 702, arguing that it is "a dramatic enlargement of the power of the trial judge in controlling what is and what is not admissible expert testimony" and that it "seriously alters the right of the litigants to a trial by jury."

The Board of Governors of the Maryland Trial Lawyers Association (98-EV-120), opposes the proposed amendment to Evidence Rule 702, on the ground that the Committee should adopt a "wait and see" attitude in light of the Supreme Court's recent consideration of expert evidence issues. The Board also declares that "[t]estimony of experts, that has always been admissible, both before and after the adoption of Rule 702 would be excluded by the

proposed changes adopting and applying the *Daubert* restrictions."

James B. McIver, Esq. (98-EV-121) opposes the proposed amendment to Evidence Rule 702, arguing that it is "a change not needed and would have adverse effects on obtaining truth and justice in America."

Stephen M. Vaughan, Esq. (98-EV-122) opposes the proposed amendment to Evidence Rule 702, arguing that it is "a change not needed and would have adverse effects on obtaining truth and justice in America."

The Lawyers' Committee for Civil Rights Under Law (98-EV-123) has "serious concerns" regarding the proposed amendment to Evidence Rule 702.

The Arizona Trial Lawyers Association (98-EV-124) opposes the proposed amendment to Evidence Rule 702 and believes that "the efforts to expand *Daubert* beyond the limits of scientific causation testimony is ill advised and contrary to the constitutional rights of citizens to a trial by *jury*." The Association declares that under the proposed amendment, "experts testifying based on their experience or knowledge are prohibited." It states that "perhaps" the Advisory Committee "thinks that it was appropriate that Galileo was blinded for his radical ideas."

The Washington Legal Foundation (98-EV-125) "applauds the proposed amendment to Rule 702; it will make clearer that the district court's gatekeeping function is as fully applicable to proposed nonscientific expert testimony as it is to proposed scientific expert testimony." As to experience-based experts, the Foundation agrees with the Advisory Committee's position that "[a]t the very least, any

expert ought to be able to explain his/her methodology, such that others could attempt to follow the same path . . . ."

The Court Rules and Administration Committee of the Minnesota State Bar Association (98-EV-126) has three concerns about the proposed amendment to Evidence Rule 702. First, "the Rule needs to address more specifically, in some fashion, the expert who is qualified through on-the-job training and experience (as opposed to formal schooling). Second, the Rule or the Committee Note should clarify that "trial testimony can include expert testimony based on contradictory principles used by different experts." Third, the words "the product of" in proposed subpart (2) should be changed to "based upon"; the concern is that the proposed language "would seem to suggest that some empirical studies have been made to support the expert testimony when, in fact, this may not be the case with specialized knowledge expert testimony, for example."

The Connecticut Trial Lawyers Association (98-EV-127) opposes the proposed amendment to Evidence Rule 702, on the ground that it would "massively expand the judge's 'gatekeeping' role beyond what the Supreme Court required in *Daubert*."

Eliot P. Tucker, Esq. (98-EV-128) opposes the proposed amendment to Evidence Rule 702, contending that it is "another erosion on the right to trial by jury that the federal courts seem hell-bent on fostering."

The Law Firm of Shernoff, Bidart, Darras & Arkin (98-EV-129) opposes the proposed amendment to Evidence Rule 702, arguing that the proposal "will expand the already-existing danger to consumer actions arising from *Daubert* itself and inappropriately limits the jury's power to make the very determination it was

designed and intended by the framers of the Constitution to make."

Nissan North America, Inc. (98-EV-130) supports the proposed amendment to Evidence Rule 702, on the ground that it "will help curtail 'junk science' testimony by unqualified experts."

Hon. Stanwood R. Duval, Jr. (98-EV-131), District Judge for the United States District Court of the Eastern District of Louisiana, is opposed to the proposed amendment to Evidence Rule 702. He contends that the proposal will encourage "*Daubert* motions in every case where there's an expert." Judge Duval states that "although the Advisory Committee notes are helpful, the text of the rule shall be law if passed."

George Chandler, Esq. (98-EV-132) believes that "the restriction of the right to call experts by making the *Daubert* case a rule of evidence would have a devastating effect on the right of a fair trial to individual claimants."

Michael A. Pohl, Esq. (98-EV-133) opposes the proposed amendment to Evidence Rule 702. He asserts that applying *Daubert* to the testimony of experts in cases such as those involving family physicians, securities issues or employment-related matters "would tend to stack the deck against the proponent of the evidence when issues of the credibility of the witnesses in those type cases should normally be left to the trier of fact."

The International Academy of Trial Lawyers (98-EV-134) is unable to reach a consensus with regard to "the wisdom of adopting the proposed amendment to Rule 702." Those in favor of the proposal assert that "it will remove any confusion over whether the principles of *Daubert* apply to all expert testimony rather than only scientific

testimony" and that there is "no reason why an engineer should not be subject to the same scrutiny as an epidemiologist although not all of the *Daubert* factors may apply to a particular expert." Those opposed to the proposal point out "that a substantial number of circuits have held that *Daubert* applies only to expert testimony based on scientific principles."

Barry J. Nace (98-EV-135) opposes the proposed amendment to Evidence Rule 702, concluding that "if we are going to have any opportunity for a jury to decide the credibility and the weight to be given to opinion testimony, then reliability should not be something decided by the trial court." He also asserts that the proposal's reliability requirements are in conflict with Rule 703, which "requires only that the experts use facts or data reasonably relied upon by experts."

Rod D. Squires, Esq. (98-EV-136) opposes the proposed amendment to Evidence Rule 702, on the ground that "extending *Daubert* any further will result in more injured people's claims being adversely affected and the cost of litigation unnecessarily increasing."

B.C. Cornish, Esq. (98-EV-137) opposes the proposed amendment to Evidence Rule 702, asserting that "the application of the *Daubert* ruling to all opinion testimony defies common sense." He claims that under the proposal, professional counselors could not testify to mental anguish, and treating physicians could not testify about what caused a patient's condition.

Tyrone P. Bujold, Esq. (98-EV-138) opposes the proposed amendment to Evidence Rule 702. He contends that the proposal rests on the unjustified premise that jurors "are frequently confused by charlatan experts." He concludes that "[w]e need not fear the jury

system. And we need not create pinched rules which give trial judges far more than they need, want, or is required."

Martin M. Meyers, Esq. (98-EV-139) opposes the proposed amendment to Evidence Rule 702 insofar as it purports to extend *Daubert* principles to nonscientific expert testimony. He asserts that a consequence of the proposed amendment "is that run of the mill professionals will be further discouraged from testifying because the burden upon them to justify their testimony at pre-trial *Daubert* hearings will be more that they can reasonably be expected to undertake and keep up with their other professional duties. This will drive both plaintiffs and defendants further into the hands of professional testifiers, something that the rules should discourage rather than encourage."

The National Association of Independent Insurers (98-EV-141) supports the proposed amendment to Evidence Rule 702.

Jon B. Comstock, Esq. (98-EV-142) strongly supports the proposed change to Evidence Rule 702. He states that "Courts need uniform direction as to how to be a gatekeeper for 'expert' testimony." He would go "one step further" and delete all references to "experts" in the text of the Rule.

Tony Laizure, Esq. (98-EV-143) opposes the proposed amendment to Evidence Rule 702, on the ground that it is "unnecessary" and "will put those challenging the status quo at a distinct disadvantage."

Edward D. Robinson, Jr. , Esq. (98-EV-144) "agrees with the Committee's concern that junk science should not form the basis of expert opinion." He opposes the proposed amendment, however, on

the ground that it does not provide "sufficient guidance for a district judge to determine whether an expert with a broad experiential base (as opposed to data driven base) should be permitted to offer an opinion."

Karl Protil, Esq. (98-EV-145) strongly opposes the proposed amendment to Evidence Rule 702, and states that "*Daubert* was never intended to apply to standard of care opinions — these are not subject to the scientific method." He concludes that the proposal usurps the role of the jury.

Ken Baughman, Esq. (98-EV-146) opposes the proposed amendment to Evidence Rule 702, arguing that its effect "will be to raise the cost of litigation to the average citizen and limit his or her access to the court system."

Pamela O'Dwyer, Esq. (98-EV-147) opposes the proposed amendment to Evidence Rule 702, arguing that it will "increase the costs to litigants."

Jesse Farr, Esq. (98-EV-148) opposes "evidentiary changes that would disallow experience based consideration and/or expert testimony."

The Prison Law Office (98-EV-149) opposes the proposed amendment to Evidence Rule 702.

Martha K. Wivell, Esq. (98-EV-150) opposes the proposed amendment because it "gives no guidance as to how trial judges should assess the adequacy of an expert who is relying principally on experience." She also concludes that the proposal "makes litigation in Federal courts more expensive because it would require a *Daubert*

hearing in virtually every case."

Jeffrey P. Foote, Esq. (98-EV-151) opposes the proposed amendment to Evidence Rule 702, and does not believe "that the gatekeeper function of *Daubert* should be extended to all expert testimony." He also takes issue with the Committee Note's reference to opinions developed expressly for the purposes of testifying, stating that if this reference is strictly construed, "it will eliminate a substantial amount of helpful expert testimony."

Matthew B. Weber, Esq. (98-EV-152) opposes the proposed amendment to Evidence Rule 702, on the ground that it is "unnecessary, overly restrictive, and will serve to bar much opinion evidence based on specialized knowledge or experience of non-scientists."

J. Michael Black, Esq. (98-EV-153) is opposed to the proposed amendment to Evidence Rule 702, declaring that "our form of government . . . has become a plutocracy and the proposed rules changes, if enacted, will only act to further the control of special interests over our government."

Anthony Z. Roisman, Esq. (98-EV-154) states that the proposed amendment to Evidence Rule 702 is "ill-advised and will cause substantial disruption to the orderly conduct of litigation or unfairly limit the rights of litigants." He concludes that the proposal increases "the likelihood that cases will be decided on the basis of who has the most resources, not who has the most justice, on their side."

Norman E. Harned, Esq. (98-EV-155) opposes the proposed change to Evidence Rule 702, on the ground that its effect "is to substitute trial of the facts by judges rather than by juries."

P. James Rainey, Esq. (98-EV-156) opposes the proposed amendment to Evidence Rule 702. He states that a "Wood Carver should not have to met [sic] the same standards that the Chemical Engineer would have to met [sic] in order to testify about his specialties."

Darrell W. Aherin, Esq. (98-EV-157) states that "some federal judges at the trial level are usurping the role of the jury. The current climate appears to be so probusiness I would hope that any proposed rules won't lead to further unfairness and deny access to the courts for individual litigants."

The Atlantic Legal Foundation (98-EV-158) generally supports the proposed amendment to Evidence Rule 702. It states that the proposal will "prevent miscarriages of justice resulting from misunderstanding by lay triers of fact concerning the validity of 'expert' opinions." It also notes that "[a]s *Daubert* recognized, the determination of whether expert opinion satisfies the standards for admissibility is to be decided by the judge under Rule 104(a), part of the court's longstanding 'gatekeeping' function with respect to expert opinion." The Foundation observes that while the reliability standards set forth in the proposal are "somewhat general, it probably cannot be made more detailed or explicit and still retain general applicability." However, the Foundation believes that Subpart (1) of the proposed proviso to Evidence Rule 702 (as it was issued for public comment) "goes too far in requiring courts to determine whether expert opinion is 'sufficiently based upon reliable facts or data.'" It states that courts addressing reliability issues "should only examine the methodology and the application of the methodology to the facts, not the facts themselves."

Paul T. Hoffman, Esq. (98-EV-159) opposes the proposed

amendment to Evidence Rule 702, asserting that it engrafts on non-scientific experts "the strict science-based *Daubert* rules."

Hon. Russell A. Eliason (98-EV-161), Magistrate Judge for the United States District Court of the District of North Carolina, proposes that Evidence Rule 702 be amended to subject expert testimony to the following restrictions: "The courts shall consider (1) the nature of the discipline and the degree to which it is capable of rendering valid, credible, or simply accepted conclusions, (2) whether the testimony is sufficiently based upon reliable facts or data, (3) whether the testimony must be given subject to restrictions, limitations or cautions because it cannot be demonstrated to be the product of reliable principles and methods, and (4) whether the principles and methods may be reliably applied to the facts of the case."

Edward J. Carreiro, Jr., Esq. (98-EV-162) opposes the proposed amendment to Evidence Rule 702.

R. Gary Stephens, Esq. (98-EV-163) opposes the proposed amendment to Evidence Rule 702 on the ground that it imposes unnecessarily rigid requirements on experts, and will increase the cost of litigation.

The Law Firm of Saltz, Mongeluzzi, Barrett and Bendesky (98-EV-164) opposes the proposed amendment to Evidence Rule 702, on the ground that it "will have a negative impact on a plaintiff's practice." The Firm asserts that there are "many reasons why the defense would be compelled to challenge each and every expert" under the proposed amendment.

Warren F. Fitzgerald, Esq. (98-EV-165) states that the proposed

amendment to Evidence Rule 702 is "unnecessary and will have a detrimental effect upon the fair evaluation of relevant opinion evidence from experts."

Anthony Tarricone, Esq. (98-EV-166) states that the proposed amendment to Evidence Rule 702 would "substitute the judge as finder of fact instead of the jury by removing from the jury consideration of the weight and credibility of evidence." He does not believe that there is "sufficient justification" for the proposed change.

Annette Gonthier Kiely, Esq. (98-EV-167) states that the proposed amendment to Evidence Rule 702 "threatens the traditional role of the jury as the finder of fact by empowering the judge to exclude evidence, whose weight and credibility has traditionally been and should continue to be assessed by the jury in determining the facts in issue."

David Dwork, Esq. (98-EV-168) opposes the proposed amendment to Evidence Rule 702, asserting that "an extension of the *Daubert* decision could have a restrictive impact on the presentation of relevant, credible, and material evidence merely because the expert does not meet rigid criteria which do not in all cases reflect on his or her expertise."

M. R. Smith, Esq. (98-EV-169) supports the proposed amendment to Evidence Rule 702.

Douglas K. Sheff, Esq. (98-EV-170) asserts that the proposed amendment to Evidence Rule 702 "would be an affront to the jury system and much of what the founding fathers intended when they created the finest means ever devised to determine disputes."

Navistar International Transportation Corp. (98-EV-171) supports the proposed amendment to Evidence Rule 702 stating that it will "properly clarify the gatekeeper function of *Daubert* and enhance the value of expert testimony by requiring that there is real substance behind the opinions proffered."

The Section on Courts, Lawyers and the Administration of Justice of the District of Columbia Bar (98-EV-172) agrees with the proposed change to Evidence Rule 702.

The Federal Magistrate Judges Association (98-EV-173) supports the proposed changes to Evidence Rule 702 "because they address and adequately resolve two problems frequently arising before trial judges as a result of the Supreme Court's decision in *Daubert*. First of all, it was not at all clear whether the Supreme Court intended *Daubert* to apply to only scientific testimony or should be applied to all expert testimony. . . . Second, the criteria set forth by the Supreme Court for evaluating scientific expert testimony frequently would be, either in whole or in part, inapplicable to the scientific testimony proffered in any given case. The standards set forth in the amendments are broad enough to require consideration of any or all of the specific *Daubert* factors and other relevant considerations as appropriate." The Association concludes that the standards set forth in the proposed amendment provide "the trial court, as a gatekeeper, with greater discretion and latitude to either admit or deny proffered expert testimony while at the same time providing the trial judge with greater guidance than was provided by the Supreme Court's limited decision in *Daubert*."

Nine members of the leadership of the Section of Litigation of the American Bar Association (98-EV-174) support the proposed amendment to Evidence Rule 702. They suggest, however, that

Subpart (3) of the proposal be revised to address the possibility that an expert might testify to general principles without attempting to apply those principles to the facts of the case.

Merl H. Wayman, Esq. (98-EV-175) opposes the proposed amendment to Evidence Rule 702.

Mary J. Hoeller, Esq. (98-EV-176) opposes the proposed amendment to Evidence Rule 702.

Brian T. Stern, Esq. (98-EV-177) opposes the proposed amendment to Evidence Rule 702 as "an unwarranted attempt to derive tests for non-scientific expert testimony from a Supreme Court decision concerned with scientific experts."

The National Employment Lawyers Association (98-EV-179) opposes the proposed amendment to Evidence Rule 702, stating that the "vague terms in the proposed amendment invite judges to go beyond their gatekeeping function to usurp the role of the jury in determining of the credibility and probative value of an expert's opinion."

Rule 703. Bases of Opinion Testimony by Experts

The facts or 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 in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

COMMITTEE NOTE

Rule 703 has been amended to emphasize that when an expert reasonably relies on inadmissible information to form an opinion or inference, the underlying information is not admissible simply because the opinion or inference is admitted. Courts have reached different results on how to treat inadmissible information when it is reasonably relied upon by an expert in forming an opinion or drawing an inference. *Compare United States v. Rollins*, 862 F.2d 1282 (7th Cir. 1988) (admitting, as part of the basis of an FBI agent's expert opinion on the meaning of code language, the hearsay statements of an informant), *with United States v. 0.59 Acres of Land*, 109 F.3d 1493 (9th Cir. 1997) (error to admit hearsay offered as the basis of an expert opinion, without a limiting instruction). Commentators have also taken differing views. *See, e.g.*, Ronald Carlson, *Policing the Bases of Modern Expert Testimony*, 39 Vand.L.Rev. 577 (1986) (advocating limits on the jury's

consideration of otherwise inadmissible evidence used as the basis for an expert opinion); Paul Rice, *Inadmissible Evidence as a Basis for Expert Testimony: A Response to Professor Carlson*, 40 Vand.L.Rev. 583 (1987) (advocating unrestricted use of information reasonably relied upon by an expert).

When information is reasonably relied upon by an expert and yet is admissible only for the purpose of assisting the jury in evaluating an expert's opinion, a trial court applying this Rule must consider the information's probative value in assisting the jury to weigh the expert's opinion on the one hand, and the risk of prejudice resulting from the jury's potential misuse of the information for substantive purposes on the other. The information may be disclosed to the jury, upon objection, only if the trial court finds that the probative value of the information in assisting the jury to evaluate the expert's opinion substantially outweighs its prejudicial effect. If the otherwise inadmissible information is admitted under this balancing test, the trial judge must give a limiting instruction upon request, informing the jury that the underlying information must not be used for substantive purposes. *See* Rule 105. In determining the appropriate course, the trial court should consider the probable effectiveness or lack of effectiveness of a limiting instruction under the particular circumstances.

The amendment governs only the disclosure to the jury of information that is reasonably relied on by an expert, when that information is not admissible for substantive purposes. It is not intended to affect the admissibility of an expert's testimony. Nor does the amendment prevent an expert from relying on information that is inadmissible for substantive purposes.

Nothing in this Rule restricts the presentation of underlying expert facts or data when offered by an adverse party. *See* Rule 705. Of

course, an adversary's attack on an expert's basis will often open the door to a proponent's rebuttal with information that was reasonably relied upon by the expert, even if that information would not have been discloseable initially under the balancing test provided by this amendment. Moreover, in some circumstances the proponent might wish to disclose information that is relied upon by the expert in order to "remove the sting" from the opponent's anticipated attack, and thereby prevent the jury from drawing an unfair negative inference. The trial court should take this consideration into account in applying the balancing test provided by this amendment.

This amendment covers facts or data that cannot be admitted for any purpose other than to assist the jury to evaluate the expert's opinion. The balancing test provided in this amendment is not applicable to facts or data that are admissible for any other purpose but have not yet been offered for such a purpose at the time the expert testifies.

The amendment provides a presumption against disclosure to the jury of information used as the basis of an expert's opinion and not admissible for any substantive purpose, when that information is offered by the proponent of the expert. In a multi-party case, where one party proffers an expert whose testimony is also beneficial to other parties, each such party should be deemed a "proponent" within the meaning of the amendment.

GAP Report — Proposed Amendment to Rule 703

The Committee made the following changes to the published draft of the proposed amendment to Evidence Rule 703:

1. A minor stylistic change was made in the text, in accordance with the suggestion of the Style Subcommittee of the

Standing Committee on Rules of Practice and Procedure.

2. The words "in assisting the jury to evaluate the expert's opinion" were added to the text, to specify the proper purpose for offering the otherwise inadmissible information relied on by an expert. The Committee Note was revised to accord with this change in the text.

3. Stylistic changes were made to the Committee Note.

4. The Committee Note was revised to emphasize that the balancing test set forth in the proposal should be used to determine whether an expert's basis may be disclosed to the jury either (1) in rebuttal or (2) on direct examination to "remove the sting" of an opponent's anticipated attack on an expert's basis.

Summary of Comments on the Proposed Amendment to Evidence Rule 703

Professor Richard Friedman (98-EV-007) believes that the proposed amendment to Evidence Rule 703 "is generally a good one, at least in criminal cases." He argues that the proposal should be amended, however, to make more explicit the point that otherwise inadmissible information relied upon by an expert, if admitted at all, is admitted for "the sole purpose of explaining the expert's testimony."

Lawyers for Civil Justice (98-EV-009) support the proposed amendment to Evidence Rule 703, "which would limit the disclosure to the jury of inadmissible information that is used as the basis of an expert's opinion." They argue, however that the Rule or Committee Note should provide more "guidance in applying the suggested

limiting instructions."

The Evidence Project (98-EV-010) asserts that the proposed amendment does not go far enough. The Project argues that the trial judge, in balancing under the amended Rule 703, would have to find the information highly reliable in order to allow its disclosure to the jury; if that is the case, the judicial determination of reliability "should make the evidence admissible for substantive use by the jury as well." The Project concludes that the problems in the current rule "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."

Professor Laird Kirkpatrick (98-EV-011) strongly supports the proposed amendment. He argues, however, that the reference in the text of the proposal to probative value and prejudicial effect should be made more specific. He states that the Committee Note "uses more apt language than the proposed amendment itself" and suggests that the language in the Note should be transferred to the Rule (as it was issued for public comment).

Thomas E. McCutchen, Esq. (98-EV-015) states that the proposed amendment "may result in greater expense because of the necessity of calling additional witnesses, such as medical malpractice cases, since the proposed amendment will exclude evidence which is now disclosed to the jury."

James E. Garvey, Esq. and other Fellows of the American Coll. of Trial Lawyers (98-EV-016) favor the proposed amendment.

The Committee on Federal Procedure of the New York State

Bar Association (98-EV-017) endorses the proposed amendment to Evidence Rule 703. The Committee states that "the balance in the proposed amendment appears to be right, since it is the proponent of the expert witness who has control over the information on which the expert will rely and who is most likely to be the party to try to sneak otherwise inadmissible information into evidence through an expert."

The Defense Research Institute (98-EV-020) urges the Committee to revise the proposed amendment to Evidence Rule 703 to completely prohibit disclosure to the jury of inadmissible information relied upon by an expert.

E. Wayne Taff, Esq. (98-EV-021) strongly supports "those portions of the proposed amendment to Rule 703 which would limit disclosure to the jury of inadmissible information used as the basis for an expert's opinion." He states that "the simple rules of logic support the amendment." He argues, however, that inadmissible information used as the basis of an expert's opinion should never be disclosed to the jury.

Hon. D. Brock Hornby (98-EV-023), Chief Judge of the United States District Court for the District of Maine, states that the proposed amendment to Evidence Rule 703 is "bad policy and unworkable." He argues that the proposal "will lead to expert *ipse dixits*, or opinions with disclosure of only some of the bases for the opinion, as well as battles over what is a disclosure and whether certain data are truly inadmissible bases or not." He also suggests that if a balancing test is to be established, "why not stick with Rule 403?"

Kevin J. Dunne, Esq. (98-EV-025) states that the use of inadmissible information by an expert, and the subsequent disclosure of that information to the jury in the guise of supporting the expert's

opinion, is "a game that should not be condoned, and the proposed amendments to Rule 703 should help to put a stop to it."

Diane R. Crowley, Esq. (98-EV-029) states that the proposed change to Evidence Rule 703 is a "step in the right direction" but that it needs "further refinement." She suggests that the proposed balancing test be deleted, or that "a requirement of judicial scrutiny along the lines set forth in the proposed Rule 702 be added before the otherwise inadmissible facts may be disclosed to the jury."

Professor Lynn McLain (98-EV-030) states that the proposed amendment to Evidence Rule 703, as issued for public comment, should be revised to clarify the probative value that the trial court should consider when an expert relies on inadmissible information.

Professor Ronald L. Carlson (98-EV-031) strongly supports the proposed amendment, stating that the current Rule 703 "might be abused by opportunistic counsel." Professor Carlson "vigorously" agrees with the proposal's "presumption against disclosure to the jury of otherwise inadmissible information used as the basis of an expert's opinion or inference."

Harold Lee Schwab, Esq. (98-EV-033) states that the proposed amendment provides "a valid test which should preclude end run attempts by ingenious counsel to avoid the exclusionary rules."

Thomas J. Conlin, Esq. (98-EV-037) believes that on balance "Rule 703 works just fine as it exists today."

Scott B. Elkind, Esq. (98-EV-038) opposes the proposed amendment to Evidence Rule 703.

The Chemical Manufacturers Association, the Defense Research Institute, the Federation of Insurance and Corporate Defense Counsel, the International Association of Defense Counsel, Lawyers for Civil Justice, the National Association of Manufacturers, and the Product Liability Advisory Council (98-EV-047) state that the proposed amendment to Evidence Rule 703 "creates a necessary and welcome presumption" against disclosure of otherwise inadmissible information that is used as the basis of an expert's opinion and that the proposal "should greatly assist in discouraging the admission of backdoor hearsay and other inadmissible information in the guise of reasonable, trustworthy and reliable data considered by the expert in forming an opinion." These organizations suggest, however, that the Committee Note might be revised "to provide further guidance as to whether or not otherwise inadmissible information should be disclosed to the jury." Such guidance might include criteria such as: "(1) Is the underlying data reasonable and trustworthy? (2) Is the information seriously disputed? (3) Is the data case specific? and (4) Will the opponent have a meaningful opportunity to rebut the information or is it of a type that cannot meaningfully be rebutted?"

The National Board of the American Board of Trial Advocates (98-EV-049) opposes the last sentence of the proposed amendment to Evidence Rule 703 "because it creates confusion in light of existing law and has significant potential for creating mischief by apparently inviting parties to proffer otherwise inadmissible evidence."

The Lawyers' Club of San Francisco (98-EV-050) opposes the proposed amendment to Evidence Rule 703, arguing that it "will have the effect of precluding the jury from knowing the reasons for an expert's opinion where the judge determines that the probative value

of the opinion or inference does not substantially outweigh its prejudicial effect."

William B. Dodero, Esq. (98-EV-052) states that the proposed amendment to Evidence Rule 703 is part of "a much-needed revision which will finally allow trial courts to fulfill their role as gatekeeper for the admission of expert evidence."

Jay H. Tressler, Esq. (98-EV-055) supports the proposed amendment, because "[a]ll too often, an expert will be fed self-serving information by counsel which would not be admissible at trial" and "the expert then gains permission to discuss the content of the otherwise inadmissible testimony."

The Committee on Civil Litigation of the United States District Court for the Eastern District of New York (98-EV-056) opposes the proposed amendment. The Committee believes "that Rule 703 is working" and is not persuaded by assertions that the Rule has been "misused to permit introduction of inadmissible evidence before the jury through the backdoor."

Michael S. Allred, Esq. (98-EV-059) opposes the proposed amendment on the ground that it will "place the federal bench in a position that it can entertain or exclude evidence at a whim based upon a subjective appraisal of the testimony."

Charles F. Preuss, Esq. (98-EV-062) supports the proposed amendment to Evidence Rule 703, but argues that "a potential troubling aspect of this amendment is the lack of criteria upon which the trial court is to weigh the probative value of the underlying inadmissible information against its prejudice." Mr. Preuss suggests that the Committee Note should "provide more guidance for the trial

courts who must decide this difficult balancing process."

Professor Michael H. Graham (98-EV-063) believes that the proposed amendment to Evidence Rule 703 is "ill-advised." He argues that there is "no problem in practice worth addressing" and questions how judges are to conduct the balancing required by the proposed amendment.

Frank Stainback, Esq. (98-EV-064) believes that the proposed amendment to Rule 703 will be a positive change, because it "will eliminate the proponent's ability to present otherwise inadmissible evidence to the jury under the guise of that evidence being the basis for an expert's opinion."

Hon. Edward R. Becker (98-EV-065), Chief Judge of the United States Court of Appeals for the Third Circuit, supports the proposed amendment to Evidence Rule 703, noting that it is "extremely well justified by the Committee's accompanying commentary."

Steven H. Howard, Esq. (98-EV-067) opposes the proposed amendment to Evidence Rule 703.

The Federal Courts Committee of the Chicago Council of Lawyers (98-EV-074) contends that the proposed amendment to Evidence Rule 703 "creates an apparent imbalance between the parties as they examine a witness." The Committee suggests that the Rule or the Committee Note "should reflect a door-opening presumption that once inadmissible evidence has been introduced on cross-examination, on redirect a witness would ordinarily be granted latitude to respond by completing the picture with other facts that would otherwise be inadmissible (that is, but for the cross-examination)."

The State Bar of Arizona (98-EV-075) supports the adoption of the proposed amendment to Evidence Rule 703.

The National Association of Railroad Trial Counsel (98-EV-077) supports the proposed amendment to Evidence Rule 703.

The Chicago Chapter of the Federal Bar Association (98-EV-078) states that the proposed amendment to Evidence Rule 703 is "an important and desirable change which clarifies another issue in dispute. The Chapter enthusiastically endorses the proposal."

The Federal Practice Section of the Connecticut Bar Association (98-EV-079) endorses the proposed amendment to Evidence Rule 703, noting that under the proposal the trial court "would have some discretion" to allow disclosure to the jury of inadmissible information reasonably relied upon by the expert.

The Phoenix and Tucson Chapters of the Federal Bar Association (98-EV-080) support the proposed amendment to Evidence Rule 703.

The Pennsylvania Trial Lawyers Association (98-EV-081) supports the proposed amendment to Evidence Rule 703, noting that it restates the existing rule of law in "many jurisdictions." The proposal also "serves the purpose of preventing inadmissible hearsay which, in many instances, would go beyond the relevant scientific or technical information upon which the expert witness relies. It precludes the possibility of admitting irrelevant or prejudicial factual information, as well."

Professor James P. Carey (98-EV-082) states that the proposed amendment to Rule 703 is a "laudable attempt" to clarify the

circumstances under which inadmissible information reasonably relied upon by the expert can be disclosed to the jury. He is concerned, however, about the general references in the proposal (as it was released for public comment) to probative value and prejudicial effect. Professor Carey concludes that allowing judges "to roam the fields of probativeness" creates a danger of more frequent disclosure of inadmissible underlying information. He suggests a complete prohibition on disclosure of inadmissible information relied upon by an expert, which would place "an incentive on the proponent of expert testimony to present witnesses to establish a basis (or resort to hearsay exceptions), which in itself would go some way toward meeting the various concerns which have resulted in our making judges gatekeepers."

The United States District Court of Oregon and its Local Rules Advisory Committee (98-EV-083) support the proposed amendment to Evidence Rule 703, asserting that it "will assist trial courts and parties by considering the probative value of the information and the risk of prejudice."

The Federal Rules of Evidence Committee of the American College of Trial Lawyers (98-EV-084) favors the proposed amendment to Evidence Rule 703, because "there has been far too much use of the current Rule as a 'back door' to bring otherwise inadmissible and highly prejudicial evidence to the attention of juries, sometimes resulting in unfair verdicts. The proposed amendment should substantially rein in this practice." The Committee concludes that the balancing test in the proposal is "an appropriate and fair process for decision-making by trial judges" and the Committee is "strongly of the view that the presumption against admissibility created by the amendment is essential to the achievement of the purpose of the revised Rule."

John R. Lanza, Esq. (98-EV-087) states that because the proposed amendment does not prohibit the opponent from eliciting inadmissible information used as the basis of the expert's testimony, the proposal is "unfair to the proponent of the expert, and the expert testimony." He contends that the Rule will make it appear as if "the proponent purposely hid facts and data from the jury." He also asserts that the proposal "would interfere with the flow of the expert's testimony and the corroboration of the expert, potentially resulting in conclusory testimony by the expert.

J. Ric Gass, Esq. (98-EV-090) states that the proposed amendment to Evidence Rule 703 is an "important and necessary and appropriate" revision.

J. Greg Allen, Esq. (98-EV-093) opposes the proposed amendment to Evidence Rule 703, arguing that "the trial court should not be given discretion in this area because they are not experts in the particular fields."

Alvin A. Wolff, Jr., Esq. (98-EV-095) opposes the proposed amendment to Evidence Rule 703, on the ground that it "would deprive the jury of an opportunity to understand the basis of the expert's opinions."

Alan Voos, Esq. (98-EV-096) opposes the proposed amendment to Evidence Rule 703 on the ground that it "will make it virtually impossible to properly elicit direct testimony from experts on all points of anticipated cross-examination."

The Federal Bar Council Committee on Second Circuit Courts (98-EV-097) supports the concept of the proposed amendment to Evidence Rule 703, but suggests that the version

released for public comment be amended in two respects. First, the reference to "probative value" should be changed to specify that the trial judge is to assess the value of the inadmissible information in helping the jury to evaluate the expert's opinion. Second, the "reasonable reliance" requirement that is currently in the Rule should be deleted, since the amendment to Rule 702 (as it was released for public comment) would require that the expert have a reliable basis of knowledge.

Professors Bruce Comly French and Elizabeth Phillips Marsh (98-EV-103) reported on a meeting of some members of the Committee on Rules of Evidence and Criminal Procedure of the Criminal Justice Section of the American Bar Association. The professors noted that "there is no existing American Bar Association policy known to us that addresses these changes." Nonetheless, the professors report that the proposed amendment "drew opposition from approximately two thirds of those present. Members who opposed the new form of the rule expressed the concern that the proposed changes will usurp the traditional role of the jury."

The Association of American Trial Lawyers (98-EV-108) opposes the proposed amendment to Evidence Rule 703 for four reasons: the proposal "would add language that is surplusage"; the proposal "appears likely to lead to more satellite litigation over what parts of the expert's basis for the opinion and the opinion itself will be admissible and which will not"; the proposal "does not take into account the common practice during trial of using expert testimony before the jury to describe and characterize documents (not yet in evidence) produced by an opponent, for the purpose of orienting the jury to the evidence that will be adduced;" and "the expert will often need to discuss the data (perhaps including inadmissible material) on which the opinion is based, lest the jury conclude that the opinion is

in fact nothing more than the expert's *ipse dixit*."

The New Hampshire Trial Lawyers Association (98-EV-111) does not believe that the proposed amendment to Evidence Rule 703 "provides any significant additional guidance to trial judges in determining how the jury should be instructed with respect to the information which the expert considered or relied upon."

Russell T. Golla, Esq. (98-EV-112) supports the proposed amendment to Evidence Rule 703.

The Ohio Academy of Trial Lawyers (98-EV-114) supports the proposed amendment to Evidence Rule 703.

Hon. Carl Barbier (98-EV-115), District Judge for the Eastern District of Louisiana, states that the proposed amendment to Evidence Rule 703 does "not seem objectionable."

Michael W. Day, Esq. (98-EV-116) opposes the proposed amendment to Rule 703, contending that the proposal "would often deprive the jury of an opportunity to understand the basis of the expert's opinion."

The Philadelphia Bar Association (98-EV-118) supports the proposed amendment to Evidence Rule 703, "insofar as it gives judges the power to exclude disclosure of underlying facts that would otherwise be inadmissible." The Association is "aware of instances in which an expert witness is retained primarily for the purpose of introducing the otherwise inadmissible underlying facts, with the opinion being merely the means to that end." The Association recommends "further study," however, of whether "the presumption should be for or against disclosure of the underlying facts." The

Association also recommends deletion of the phrase "to the jury" and "would avoid referring to the 'probative value' of the underlying facts and would instead refer to 'their value in assisting the trier of fact to understand the opinion or inference.'"

The Sturdevant Law Firm (98-EV-119) opposes the proposed amendment to Evidence Rule 703, on the grounds that it is too "restrictive" and that "the jury will not have the underlying facts or data that the expert relies upon, and therefore has no basis to consider the merits of the expert's opinion."

The Arizona Trial Lawyers Association (98-EV-124) is opposed to the proposed amendment to Evidence Rule 703.

The Court Rules and Administration Committee of the Minnesota State Bar Association (98-EV-126) recommends the adoption of the proposed amendment to Evidence Rule 703.

Nissan North America, Inc. (98-EV-130) supports the proposed amendment to Evidence Rule 703.

The International Academy of Trial Lawyers (98-EV-134) is unable to reach a consensus with regard to "the wisdom of adopting the proposed amendments to Rule 703." Those in favor of the proposal point out that "Rule 703 as it presently exists represents a loop hole exception to other exclusionary rules such as hearsay" and that one "can readily envision situations where a court permits hearsay evidence to be admissible under 703, concluding that the evidence passes Rule 403 muster, although clearly the evidence should not be received." Further, "the proposed amendment serves to better guarantee a correct judicial determination in each case and consistency throughout the circuits." Those opposed to the proposal

argue that the presumption against disclosure of inadmissible information relied upon by an expert is too "stringent" and that "[s]ufficient safeguards are now present in Rule 403."

B. C. Cornish, Esq. (98-EV-137) finds the proposed amendment to Evidence Rule 703 "troublesome" and states that "[t]he attempt to correct the occasional misuse of the rule as currently written will keep juries from understanding the basis of the expert's opinion."

Martin M. Meyers, Esq. (98-EV-139) opposes the proposed amendment to Evidence Rule 703. He asserts that under the proposal, property appraisers would not be permitted to disclose the comparable properties that they used in assessing value.

The National Association of Independent Insurers (98-EV-141) supports the proposed amendment to Evidence Rule 703.

Jon B. Comstock, Esq. (98-EV-142) supports the proposed change to Evidence Rule 703, stating that there has been "routine abuse" under the current Rule, and that "this rule change will produce fairness to all parties."

Karl Protil, Esq. (98-EV-145) strongly opposes the proposed amendment to Evidence Rule 703. He states that an expert "should be allowed to state the facts upon which he relied. If not, then you undermine that expert's credibility and allow the opponent to argue that the expert's opinion is not based on a proper foundation."

Ken Baughman, Esq. (98-EV-146) opposes the proposed amendment to Evidence Rule 703.

Pamela O'Dwyer, Esq. (98-EV-147) opposes the proposed

amendment to Evidence Rule 703.

The Prison Law Office (98-EV-149) opposes the proposed amendment to Evidence Rule 703.

Jeffrey P. Foote, Esq. (98-EV-151) opposes the proposed amendment to Evidence Rule 703.

Matthew B. Weber, Esq. (98-EV-152) opposes the proposed amendment to Evidence Rule 703, on the ground that it "will be obfuscating numerous issues which this rule is specifically designed to illuminate."

J. Michael Black, Esq. (98-EV-153) does not agree "with any proposal which would prevent experts from relying on hearsay, scientific data."

Norman E. Harned, Esq. (98-EV-155) opposes the proposed change to Evidence Rule 703.

Daniel W. Aherin, Esq. (98-EV-157) opposes the proposed amendment to Evidence Rule 703, on the ground that it is "geared towards preventing individual litigants from presenting reasonable expert testimony."

The Atlantic Legal Foundation (98-EV-158) supports the proposal's placement of the burden on the proponent to show that the otherwise inadmissible facts or data relied upon by an expert should be disclosed to the jury. The Foundation suggests, however, that criteria should be added to the Committee Note for "the court to use in deciding whether to admit the otherwise inadmissible evidence."

Paul T. Hoffman, Esq. (98-EV-159) opposes the proposed amendment to Evidence Rule 703, in the belief that the proposal would prohibit experts from relying on inadmissible facts or data.

Hon. William J. Giovan (98-EV-160) Judge for the Circuit Court for the Third Judicial Circuit of Michigan, states that the proposed amendment to Evidence Rule 703 "does not go far enough" and suggests that the Rule be amended "to restore the former requirement that expert opinion be based upon facts that are in evidence." He asserts that a return to the common-law rule is the only way to avoid "the practical obliteration of the hearsay rule."

Hon. Russell A. Eliason (98-EV-161), Magistrate Judge for the United States District Court of the District of North Carolina, proposes that Evidence Rule 703 be amended to delete the second sentence of the current Rule, and to replace it with the following language: "If the expert relies on facts or data which the court has ruled to be inadmissible evidence, but such evidence is of the type reasonably relied upon by experts in the particular field in formulating conclusions about the subject and the court finds the conclusions to be sufficiently helpful and reliable pursuant to Rule 702, then the court may permit the expert to testify and the evidence shall be disclosed to the jury under appropriate limiting instructions unless the prejudicial effect outweighs their probative value."

Edward J. Carreiro, Jr., Esq. (98-EV-162) opposes the proposed amendment to Evidence Rule 703.

R. Gary Stephens, Esq. (98-EV-163) opposes the proposed amendment to Evidence Rule 703, on the ground that it will force counsel to qualify for admissibility all evidence relied upon by an expert, thus unnecessarily increasing the cost of litigation.

Warren F. Fitzgerald, Esq. (98-EV-165) states that the proposed amendment to Evidence Rule 703 is "an undue restriction upon the ability of qualified experts to provide the sometimes necessary explanations of the foundations of their opinions."

Anthony Tarricone, Esq. (98-EV-166) opposes the proposed amendment to Evidence Rule 703 on the ground that it "would undoubtedly extend the length and complexity of discovery and trial by mandating the introduction in evidence of information and data that, while relied upon by the expert, are not necessary for the court's and jury's consideration."

Annette Gonthier Kiely, Esq. (98-EV-167) states that the proposed amendment to Evidence Rule 703 should not be adopted "since it is redundant and will open the door to needless and costly collateral evidentiary disputes."

David Dwork, Esq. (98-EV-168) states that the proposed amendment to Evidence Rule 703 "will merely invite lengthy disputes and voir dire examinations on issues that are more appropriately and effectively dealt with currently by cross-examination and the presentation of opposing evidence."

M. R. Smith, Esq. (98-EV-169) supports the proposed amendment to Evidence Rule 703.

Navistar International Transportation Corp. (98-EV-171) supports the proposed amendment to Evidence Rule 703, but suggests "that further guidelines need to be incorporated into the proposed change to Rule 703 if the change is to be meaningful."

The Section on Courts, Lawyers and the Administration of

Justice of the District of Columbia Bar (98-EV-172) agrees with the proposed change to Evidence Rule 703. It suggests, however, that the Committee Note should "clarify that a party need not seek a ruling of the Court if the other party agrees that the probative value of the otherwise inadmissible evidence substantially outweighs its prejudicial effect."

The Federal Magistrate Judges Association (98-EV-173) opposes the proposed amendment to Evidence Rule 703 on the ground that it is "unnecessary."

Nine members of the leadership of the Section of Litigation of the American Bar Association (98-EV-174) favor the proposed amendment to Evidence Rule 703. They argue that the current rule "has too often been used as a 'back door' for the admissibility of otherwise inadmissible and highly prejudicial evidence." They suggest, however, that the proposal be revised to address "the latitude to be given to the proponent on re-direct examination to fairly address the issues raised when the opponent of the evidence, during cross-examination pursuant to Rule 705, requires the expert to expose some or all of the underlying facts or data."

The Litigation Section of the District of Columbia Bar (98-EV-178) opposes the proposed amendment to Evidence Rule 703 on the ground that it is "unnecessary." The Section contends that the proposal "would have the practical effect of encouraging surprise objections to what may be the most critical part of a litigant's case."

Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial

1 The following are not excluded by the hearsay rule, even

though the declarant is available as a witness:

* * * * *

(6) Records of regularly conducted activity. — A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), Rule 902(12), or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this

paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

* * * * *

COMMITTEE NOTE

The amendment provides that the foundation requirements of Rule 803(6) can be satisfied under certain circumstances without the expense and inconvenience of producing time-consuming foundation witnesses. Under current law, courts have generally required foundation witnesses to testify. *See, e.g., Tongil Co., Ltd. v. Hyundai Merchant Marine Corp.*, 968 F.2d 999 (9th Cir. 1992) (reversing a judgment based on business records where a qualified person filed an affidavit but did not testify). Protections are provided by the authentication requirements of Rule 902(11) for domestic records, Rule 902(12) for foreign records in civil cases, and 18 U.S.C. § 3505 for foreign records in criminal cases.

GAP Report — Proposed Amendment to Rule 803(6)

The Committee made no changes to the published draft of the proposed amendment to Evidence Rule 803(6).

Summary of Comments on the Proposed Amendment to Evidence Rule 803(6)

Professor Richard Friedman (98-EV 007) states that the proposed amendment to Evidence Rule 803(6) is "generally salutary" and "may save some expense."

James E. Garvey, Esq. and other Fellows of the American College of Trial Lawyers (98-EV-016) favor the proposed amendment to Evidence Rule 803(6).

Professor Lynn McLain (98-EV-030) supports the proposed amendment to Evidence Rule 803(6), noting that Maryland adopted a similar rule in 1994.

Hon. Edward R. Becker (98-EV-065), Chief Judge of the United States Court of Appeals for the Third Circuit, supports the proposed amendment to Evidence Rule 803(6), noting that it is "extremely well justified by the Committee's accompanying commentary."

The Civil Justice Reform Act Advisory Group for the United States District Court of the Western District of Washington (98-EV-073) endorses the proposed amendment to Evidence Rule 803(6).

The State Bar of Arizona (98-EV-075) supports the adoption of the proposed amendment to Evidence Rule 803(6).

The National Association of Railroad Trial Counsel (98-EV-077) supports the proposed amendment to Evidence Rule 803(6).

The Chicago Chapter of the Federal Bar Association (98-EV-078) states that the proposed amendment to Evidence Rule 803(6) "makes sense and should be approved."

The Federal Practice Section of the Connecticut Bar Association (98-EV-079) endorses the proposed amendment to Evidence Rule 803(6).

The Phoenix and Tucson Chapters of the Federal Bar Association (98-EV-080) support the proposed amendment to Evidence Rule 803(6).

The Pennsylvania Trial Lawyers Association (98-EV-081) supports the proposed amendment to Evidence Rule 803(6).

The Federal Rules of Evidence Committee of the American College of Trial Lawyers (98-EV-084) believes that the proposed amendment to Evidence Rule 803(6) brings the Rule "into conformity with the increasingly common practice of the federal courts" and "appropriately" imposes "some of the burden with respect to the foundation requirements to the party challenging the evidence."

The Committee on Federal Courts of the Association of the Bar of the City of New York (98-EV-088) opposes the proposed amendment to Evidence Rule 803(6) as applied to criminal cases.

Professors Bruce Comly French and Elizabeth Phillips Marsh (98-EV-103) reported on a meeting of some members of the Committee on Rules of Evidence and Criminal Procedure of the Criminal Justice Section of the American Bar Association. The professors noted that "there is no existing American Bar Association policy known to us that addresses these changes." Nonetheless, the professors report that a "substantial majority" of those present "were concerned, as a matter of underlying policy to promote cross-examination and potentially, as a matter of confrontation rights, that this change might unduly impair a criminal defendant's ability to

cross-examine witnesses who would no longer take the stand to establish the foundation for business records."

Professor Myrna Raeder (98-EV-106) is "troubled by the elimination of a custodian from Rule 803(6)." She recognizes that under the proposed amendment 'the opponent can always raise the question of untrustworthiness, but the rule places the burden on the opponent to demonstrate untrustworthiness, which in criminal cases with limited discovery is harder to do than in civil cases."

Russell T. Golla, Esq. (98-EV-112) supports the proposed amendment to Evidence Rule 803(6).

The Philadelphia Bar Association (98-EV-118) supports the proposed amendment to Evidence Rule 803(6).

The Court Rules and Administration Committee of the Minnesota State Bar Association (98-EV-126) recommends the adoption of the proposed amendment to Evidence Rule 803(6).

The National Association of Independent Insurers (98-EV-141) supports the proposed amendment to Evidence Rule 803(6).

Jon B. Comstock, Esq. (98-EV-142) supports the proposed change to Evidence Rule 803(6).

M. R. Smith, Esq. (98-EV-169) supports the proposed amendment to Evidence Rule 803(6).

The Section on Courts, Lawyers and the Administration of Justice of the District of Columbia Bar (98-EV-172) agrees with the proposed change to Evidence Rule 803(6).

The Federal Magistrate Judges Association (98-EV-173) supports the proposed amendment to Evidence Rule 803(6).

Nine members of the leadership of the Section of Litigation of the American Bar Association (98-EV-174) support the proposed amendment to Evidence Rule 803(6).

Rule 902. Self-authentication

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

* * * * *

(11) Certified domestic records of regularly conducted activity. — The original or a duplicate of a domestic record of regularly conducted activity that would be admissible under Rule 803(6) if accompanied by a written declaration of its custodian or other qualified person, in a manner complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority, certifying that the record —

(A) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;

(B) was kept in the course of the regularly conducted activity; and

(C) was made by the regularly conducted activity as a regular practice.

A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them.

(12) Certified foreign records of regularly conducted activity. — In a civil case, the original or a duplicate of a foreign record of regularly conducted activity that would

be admissible under Rule 803(6) if accompanied by a written declaration by its custodian or other qualified person certifying that the record —

(A) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;

(B) was kept in the course of the regularly conducted activity; and

(C) was made by the regularly conducted activity as a regular practice.

The declaration must be signed in a manner that, if falsely made, would subject the maker to criminal penalty under the laws of the country where the declaration is signed. A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record

and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them.

COMMITTEE NOTE

The amendment adds two new paragraphs to the rule on self-authentication. It sets forth a procedure by which parties can authenticate certain records of regularly conducted activity, other than through the testimony of a foundation witness. See the amendment to Rule 803(6). 18 U.S.C. § 3505 currently provides a means for certifying foreign records of regularly conducted activity in criminal cases, and this amendment is intended to establish a similar procedure for domestic records, and for foreign records offered in civil cases.

A declaration that satisfies 28 U.S.C. § 1746 would satisfy the declaration requirement of Rule 902(11), as would any comparable certification under oath.

The notice requirement in Rules 902(11) and (12) is intended to give the opponent of the evidence a full opportunity to test the adequacy of the foundation set forth in the declaration.

GAP Report — Proposed Amendment to Rule 902

The Committee made the following changes to the published draft of the proposed amendment to Evidence Rule 902:

1. Minor stylistic changes were made in the text, in accordance with suggestions of the Style Subcommittee of the Standing Committee on Rules of Practice and Procedure.

2. The phrase "in a manner complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority" was added to proposed Rule 902(11), to provide consistency with Evidence Rule 902(4). The Committee Note was amended to accord with this textual change.

3. Minor stylistic changes were made in the text to provide a uniform construction of the terms "declaration" and "certifying."

4. The notice provisions in the text were revised to clarify that the proponent must make both the declaration and the underlying record available for inspection.

Summary of Comments on the Proposed Amendment to Evidence Rule 902

Professor Richard Friedman (98-EV-007) states that the proposed amendment to Evidence Rule 902 is "generally salutary" and "may save some expense." He suggests one change: that the proponent should not only make available the records sought to be admitted, but should also assure that the certifying witness be made available for a deposition on the subject matter of the certification.

Professor Dale A. Nance (98-EV-014) endorses the goal of the proposed amendment to Evidence Rule 902, however, he suggests certain revisions in the wording of the proposal as issued for public comment. He proposes that the reference to admissibility under Rule 803(6) should be deleted. He also suggests that the notice provisions should be modified to make clear that the opponent would have an opportunity to challenge the declaration signed by the custodian or other qualified witness.

James E. Garvey, Esq. and other Fellows of the American College of Trial Lawyers (98-EV-016) favor the proposed amendment to Evidence Rule 902.

Professor Lynn McLain (98-EV-030) supports the proposed amendment to Evidence Rule 902, noting that Maryland adopted a similar rule in 1994.

Hon. Edward R. Becker (98-EV-065), Chief Judge of the United States Court of Appeals for the Third Circuit, supports the proposed amendment to Evidence Rule 902, noting that it is "extremely well justified by the Committee's accompanying commentary."

The State Bar of Arizona (98-EV-075) supports the adoption of the proposed amendment to Evidence Rule 902.

The National Association of Railroad Trial Counsel (98-EV-077) supports the proposed amendment to Evidence Rule 902.

The Chicago Chapter of the Federal Bar Association (98-EV-078) supports the proposed amendment to Evidence Rule 902.

The Federal Practice Section of the Connecticut Bar Association (98-EV-079) endorses the proposed amendment to Evidence Rule 902.

The Phoenix and Tucson Chapters of the Federal Bar Association (98-EV-080) support the proposed amendment to Evidence Rule 902.

The Pennsylvania Trial Lawyers Association (98-EV-081) supports the proposed amendment to Evidence Rule 902. The

Association believes "that the procedures for admitting domestic records and foreign records should be similar."

The Federal Rules of Evidence Committee of the American College of Trial Lawyers (98-EV-084) supports the proposed amendment to Evidence Rule 902, declaring that it "appropriately" reallocates "some of the burden with respect to the foundation requirements to the party challenging the evidence." The Committee states that the proposal's notice requirement "ensures that the Rule will achieve the benefit of efficiency without undue risk of unfairness."

The Committee on Federal Courts of the Association of the Bar of the City of New York (98-EV-088) opposes the proposed amendment to Evidence Rule 902 as applied to criminal cases, "both because of Confrontation Clause concerns, and also because the Committee is concerned that, given the restricted scope of pretrial discovery available in criminal cases, the opponent of the evidence (which may be either the prosecution or the defense) may have insufficient information to weigh the need for the testimony of the custodian until the evidence is offered at trial." The Committee concludes that the proposed amendment "would prevent the opponent of the document from having any chance to challenge its authenticity or admissibility unless the opponent had the foresight and the knowledge to articulate a challenge to it in advance. While it may be reasonable to require such foresight in civil cases, the Committee is concerned that it may be unreasonable" in criminal cases.

Professors Bruce Comly French and Elizabeth Phillips Marsh (98-EV-103) reported on a meeting of some members of the Committee on Rules of Evidence and Criminal Procedure of the Criminal Justice Section of the American Bar Association. The

professors noted that "there is no existing American Bar Association policy known to us that addresses these changes." Nonetheless, the professors report that a "substantial majority" of those present "were concerned, as a matter of underlying policy to promote cross-examination and potentially, as a matter of confrontation rights, that this change might unduly impair a criminal defendant's ability to cross-examine witnesses who would no longer take the stand to establish the foundation for business records."

Russell T. Golla, Esq. (98-EV-112) supports the proposed amendment to Evidence Rule 902.

The Philadelphia Bar Association (98-EV-118) supports the proposed amendment to Evidence Rule 902, but suggests that the language of the proposal, as issued for public comment, be amended to more closely track the language of Evidence Rule 803(6). The Association also recommends that the Committee Note refer to statutory authority governing certifications and declarations under oath. Finally, the Association recommends that the notice provisions in the proposal should specify that the notice must be given in time to permit a pretrial deposition of the witness making the declaration.

The Court Rules and Administration Committee of the Minnesota State Bar Association (98-EV-126) recommends the adoption of the proposed amendment to Evidence Rule 902.

The National Association of Independent Insurers (98-EV-141) supports the proposed amendment to Evidence Rule 902.

Jon B. Comstock, Esq. (98-EV-142) supports the proposed change to Evidence Rule 902.

M. R. Smith, Esq. (98-EV-169) supports the proposed amendment to Evidence Rule 902.

The Section on Courts, Lawyers and the Administration of Justice of the District of Columbia Bar (98-EV-172) agrees with the proposed change to Evidence Rule 902.

The Federal Magistrate Judges Association (98-EV-173) supports the proposed amendment to Evidence Rule 902, because it "retains concepts of fairness for the parties, reduce[s] trial time, and minimize[s] the parties' expenses" and therefore it is "in the best interests of all concerned and of the system at large." The Association suggests, however, that paragraphs (11) and (12) of the proposal, as released for public comment, be reworded for consistency "so that both read as a certification under oath or on a written declaration to avoid confusion."

Nine members of the leadership of the Section of Litigation of the American Bar Association (98-EV-174) support the proposed amendment to Evidence Rule 902. They suggest, however, the addition of "a general requirement that the adverse party must provide notice of intent to challenge the admissibility of the evidence sufficiently in advance of trial to provide the proponent a fair opportunity to obtain and present live testimony."