



## **LCJ Expert Evidence Committee Chair: Courts Are Departing From The Intent Of Rule 702**

WASHINGTON, D.C. – May 6, 2020 – Lawyers for Civil Justice (LCJ), a national coalition of defense legal organizations, law firms, and corporations, today announced the publication of [“Gatekeeping Reorientation: Amend Rule 702 To Correct Judicial Misunderstandings About Expert Evidence,”](#) by Lee Mickus, co-chair of LCJ’s Expert Evidence Committee.

The new working paper, published by the Washington Legal Foundation (WLF), addresses how Federal Rule of Evidence 702 – which outlines the requirements for assessing and admitting expert testimony for litigation purposes – was intended to function, the misunderstandings courts have applied that depart from the Rule’s intent, and available avenues for clarifying the rule’s requirements to restore substance and consistency to court applications of Rule 702. The subject addressed by the paper is a hot legal topic, as expert testimony is required in many civil cases, including product liability cases which make up a substantial portion of the entire civil docket. Moreover, rulings on the admission of expert testimony can affect the outcome of these cases, which include some of the highest stakes civil litigation in the federal courts.

“Federal Rule of Evidence 702 needs attention,” Mickus writes in the [new paper](#).

“In light of the developed patterns of Rule 702 misunderstanding, maintaining the status quo amounts to resignation that the rule no longer demands what the 2000 amendments intended it to require. The lower courts need the Advisory Committee’s direction to understand that approaches commonly taken in the gatekeeping process rely on misunderstandings of Rule 702. Unless these patterns are displaced with a new amendment, courts will continue addressing the admissibility of opinion testimony in ways that depart from the intent of Rule 702.”

The paper identifies several ways in which courts have departed from the intent of Rule 702 over the past 20 years, including presuming admissibility rather than requiring the proponent to satisfy the burden of production and treating an expert’s factual basis and application of methodology as credibility considerations for the jury rather than admissibility questions for the court.

“Rulemaking action is necessary to re-orient courts to the expert admissibility standard envisioned for Rule 702,” Mickus concludes.

LCJ Executive Director Andrea Looney said the paper draws critical attention to the need for a new amendment that will provide much-needed clarity and uniformity in the application of Rule 702.

“‘Gatekeeping Reorientation’ exposes how regularly opinions masquerading as science have flooded into courtrooms across the country, affecting thousands of cases and misleading jurors,” said Looney.

“This paper further underscores an urgent need to clarify Rule 702 to ensure justice is served and that verdicts are not based on invalid data and unproven science.”

LCJ also released a new infographic today highlighting notable examples of Rule 702 misapplications by courts since the Rule was last amended in 2000. The infographic, [“Floodgates Not Gatekeeping: How FRE 702 Continues to be Misunderstood By Courts,”](#) identifies patterns over the last 20 years in which courts have misunderstood the sponsor’s burden of establishing admissibility of expert evidence, deferred determinations to the jury that the court must decide, and allowed presentation of ancillary opinions without subjecting them to scrutiny. This graphic can be viewed online here.

The white paper is also available online [here](#), courtesy of the Washington Legal Foundation, a public-interest law firm and legal-policy center dedicated to defending the economic freedoms that are the bedrock of America’s free-enterprise system and has been active on Rule 702, including filing numerous amicus briefs on the subject.

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*Lawyers for Civil Justice is a national coalition of defense trial lawyer organizations, law firms, and corporations that promotes excellence and fairness in the civil justice system to secure the just, speedy, and inexpensive determination of civil cases. For more information, please contact Andrea Looney at [alooney@lfcj.com](mailto:alooney@lfcj.com)*