

SURVEY

THE FIRST TWENTY YEARS OF RULE OF EVIDENCE 702 AND THE CURRENT STATE OF EXPERT TESTIMONY IN INDIANA

THE HONORABLE CALE J. BRADFORD*

INTRODUCTION

On January 1, 1994, the Indiana Rules of Evidence became effective, including Rule 702, “Testimony by Experts.”¹ As I write, just over twenty years have passed, and the appellate courts in Indiana have had the opportunity to weigh in on Rule 702 almost 200 times. My goal in this Article is to look back on these decisions and see what they have to teach us about the current state of Rule 702 jurisprudence, with particular emphasis on how those teachings can aid the sophisticated practicing attorney.

I. BACKGROUND

A. *Prior to Rule 702*

Indiana law has long recognized that persons of special qualifications may be allowed to offer opinions in evidence as experts.² As for expert testimony based on scientific principles, it appears that the first case to formulate some sort of special, extra requirement was *Frye v. United States*.³ The *Frye* court first restated the general rule for expert opinion testimony:

* Judge, Court of Appeals of Indiana. I was admitted to the practice of law in Indiana in 1986. Since that time I have spent my entire career in state and federal litigation at one level or another. Given my background, I am keenly aware of the busy litigator’s and trial judge’s need for an accurate and digestible summary of law relating to the admission of expert evidence. It is my hope that this Article will enable readers to quickly refresh their knowledge base as to the admission of expert testimony in Indiana. I would like to extend my deep appreciation to my Senior Law Clerk Matthew Fisher for his energy, research assistance, and intellect, upon which I relied in the preparation of this Article.

1. IND. R. EVID. 702.

2. *See, e.g.,* *Evansville, I. & C. Straight Line R. Co. v. Fitzpatrick*, 10 Ind. 120, 122 (1858) (“For instance on questions of science, skill or trade, persons of science or skill, sometimes called experts, may not only testify to facts, but are permitted to give their opinions in evidence.”).

3. 293 F. 1013 (D.C. Cir. 1923).

The rule is that the opinions of experts or skilled witnesses are admissible in evidence in those cases in which the matter of inquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it, for the reason that the subject-matter so far partakes of a science, art, or trade as to require a previous habit or experience or study in it, in order to acquire a knowledge of it. When the question involved does not lie within the range of common experience or common knowledge, but requires special experience or special knowledge, then the opinions of witnesses skilled in that particular science, art, or trade to which the question relates are admissible in evidence.⁴

The court continued, adding the following regarding that subset of expert opinion evidence based on scientific principles:

Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.⁵

Eventually, the *Frye* “general acceptance” test was widely adopted nationwide as a foundational requirement for the admission of scientific expert testimony.⁶ The Indiana Supreme Court effectively adopted the *Frye* test in 1983, with its decisions in *Peterson v. State*⁷ and *Cornett v. State*.⁸ The *Frye* general acceptance rule was applied or cited with favor seven more times by Indiana

4. *Id.* at 1014.

5. *Id.*

6. This adoption was far from immediate. *Frye* was not cited in any federal or state court for nearly a decade, the first court being the Wisconsin Supreme Court in *State v. Bohner*. *State v. Bohner*, 246 N.W. 314, 317 (Wis. 1933). Even then, it seems that the Wisconsin Supreme Court was only embracing the concept of general acceptance insofar as it applied to the same systolic blood pressure deception test that was at issue in *Frye*. No court explicitly applied the general acceptance rule to anything other than “lie detectors” until 1946, when the D.C. Circuit applied it to the then relatively new method of spectroscopy. *See Medley v. United States*, 155 F.2d 857, 860 (D.C. Cir. 1946).

7. 448 N.E.2d 673 (Ind. 1983). In *Peterson*, the court determined that the concept of hypnotically-assisted recall had not attained general acceptance in the relevant scientific community. *Id.* at 678-79.

8. 450 N.E.2d 498 (Ind. 1983). In *Cornett*, the court determined that evidence generated by the technique of voice spectrography was not admissible due to a lack of general acceptance of the technique. *Id.* at 503.

appellate courts before Rule 702 took effect.⁹

B. RULE 702

Rule 702, as adopted and as currently worded,¹⁰ provides as follows:

(a) A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.

(b) Expert scientific testimony is admissible only if the court is satisfied that the expert testimony rests upon reliable scientific principles.¹¹

Upon adoption, subsection (a) was identical to Federal Rule of Evidence 702.¹²

9. In chronological order, the cases are *Henson v. State*, 535 N.E.2d 1189, 1193-94 (Ind. 1989); *In re Paternity of Bratcher*, 551 N.E.2d 1160, 1162 (Ind. Ct. App. 1990); *Hopkins v. State*, 579 N.E.2d 1297, 1301-02 (Ind. 1991); *Regan v. State*, 590 N.E.2d 640, 648 n.5 (Ind. Ct. App. 1992); *Byrd v. State*, 593 N.E.2d 1183, 1186 (Ind. 1992); *K-Mart Corp. v. Morrison*, 609 N.E.2d 17, 26 (Ind. Ct. App. 1993), *trans. denied*; and *Penrod v. State*, 611 N.E.2d 653, 654 (Ind. Ct. App. 1993), *trans. denied*.

Indiana's seeming acceptance of *Frye* was not unquestioned. In *Hopkins*, Justice Dickson dissented, noting the *Peterson* and *Cornett* decisions while identifying other Indiana cases in which *Frye* was not applied. *Hopkins*, 579 N.E.2d at 1305-07 (Dickson, J., dissenting). Justice Dickson also noted academic and judicial criticism and/or rejection of *Frye*'s general acceptance test. *Id.* at 1306. As we shall see, the debate essentially became moot not too long after *Hopkins* was decided, at least in Indiana.

10. The current Rule 702 took effect on January 1, 2014. Previously, the rule read as follows:

(a) 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.

(b) Expert scientific testimony is admissible only if the court is satisfied that the scientific principles upon which the expert testimony rests are reliable.

11. IND. R. EVID. 702.

12. Federal Rule 702, effective January 2, 1975, was amended in 2000 and again in 2011, and currently provides as follows:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

(b) the testimony is based on sufficient facts or data;

(c) the testimony is the product of reliable principles and methods; and

(d) the expert has reliably applied the principles and methods to the facts of the case.

FED. R. EVID. 702.

Subsection (b), however, had no counterpart in the federal rule.¹³ Coincidentally, the United States Supreme Court decided the landmark Federal Rule 702 case of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, approximately six months before Indiana Rule 702 became effective.¹⁴

In *Daubert*, the United States Supreme Court determined that the *Frye* “general acceptance” standard for scientific expert testimony had been superseded by the adoption of the Federal Rules of Evidence.¹⁵ After noting that Federal Rule 702 said nothing about “general acceptance,” the *Daubert* Court concluded that:

Faced with a proffer of expert scientific testimony, then, the trial judge must determine at the outset . . . whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue. This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue.¹⁶

The *Daubert* Court then listed several “general observations,” or non-exclusive factors that might bear on the inquiry: (1) “a key question to be answered in determining whether a theory or technique is scientific knowledge that will assist the trier of fact will be whether it can be (and has been) tested[.]”¹⁷ (2) “whether the theory or technique has been subjected to peer review and publication[.]”¹⁸ (3) “the known or potential rate of error,” and, finally,¹⁹ (4) “general acceptance[.]”²⁰

Back in Indiana, the Indiana Supreme Court first took notice of *Daubert* in *Harrison v. State*,²¹ handed down on January 4, 1995.²² In *Harrison*, the court cited to *Daubert*’s general observation on the potential power of expert testimony both to persuade and mislead, although it did not explicitly embrace the *Daubert* framework for evaluating scientific expert evidence.²³ On June 25, 1995, less than six months after *Harrison* was handed down, the Indiana Supreme Court issued *Steward v. Indiana*.²⁴ The *Steward* court, while noting that *Daubert* was not binding on issues arising pursuant to the Indiana Rules of Evidence,

13. *Id.*

14. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993).

15. *Id.* at 587.

16. *Id.* at 592-93 (footnote omitted).

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.* at 593-94.

21. 644 N.E.2d 1243 (Ind. 1995). *Harrison* was later superseded on other grounds, as recognized in *Ward v. State*, 903 N.E.2d 946, 951 (Ind. 2009).

22. *Harrison*, 644 N.E.2d 1243.

23. *Id.* at 1252.

24. 652 N.E.2d 490 (1995).

acknowledged that “[t]he concerns driving *Daubert* coincide with the express requirement of Indiana Rule of Evidence 702(b) that the trial court be satisfied of the reliability of the scientific principles involved.”²⁵ The *Steward* court concluded that “the federal evidence law of *Daubert* and its progeny is helpful to the bench and bar in applying Indiana Rule of Evidence 702(b).”²⁶

The next important United States Supreme Court decision in the area was *General Electric Co. v. Joiner*, which clarified the standard of review in expert testimony cases.²⁷ The *Joiner* Court held that review of decisions to admit or exclude expert testimony will be for an abuse of discretion.²⁸ Indiana courts have neither explicitly adopted nor rejected *Joiner*’s holding in this regard, and frankly, there seems little point in doing either, as Indiana employs the same standard of review in any event.²⁹ As the Indiana Supreme Court has clarified, “As with admission of other evidence, ‘the trial court’s determination regarding the admissibility of expert testimony under Rule 702 is a matter within its broad discretion, and will be reversed only for abuse of that discretion.’”³⁰

The third case in the so-called “*Daubert* Trilogy” was *Kumho Tire Co. v. Carmichael*, which answered the question of whether *Daubert*’s reliability requirement applied to expert testimony based on “technical” and “other specialized” knowledge as well as that based on scientific principles.³¹ The Court answered the question in the affirmative, holding that a trial judge’s obligation to ensure that scientific testimony is not only relevant but also reliable extends to “all expert testimony.”³²

The Indiana Supreme Court tackled the same question, in the context of Indiana Rule 702, four years later.³³ In *Malinski v. State*, Malinski argued that certain non-scientific evidence was admitted against him erroneously because it did not satisfy the requirements of *Daubert*, which he contended were made applicable to all expert evidence by *Kumho Tire*.³⁴ The *Malinski* court, however, declined to adopt *Kumho*’s reasoning, noting that Indiana Rule 702 required only that scientific expert testimony be found reliable and, again, that federal law regarding the Federal Rules of Evidence are not binding on the states.³⁵

Overall, however, the effect of all of this, at least as far as the Indiana Supreme Court is concerned, is to allow in more expert testimony rather than

25. *Id.* at 498.

26. *Id.*

27. *General Elec. Co. v. Joiner*, 522 U.S. 136 (1997).

28. *Id.* at 146.

29. *Turner v. State*, 953 N.E.2d 1039, 1049 (Ind. 2011) (quoting *Carter v. State*, 766 N.E.2d 377, 380 (Ind. 2002) and noting that it was in accord with *Joiner*).

30. *Id.*

31. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141 (1999).

32. *Id.* at 147.

33. *Malinski v. State*, 794 N.E.2d 1071 (Ind. 2003).

34. *Id.* at 1084.

35. *Id.*

less.³⁶ In its most recent Rule 702 case, the Indiana Supreme Court stated:

Indiana's Rule 702 is not intended to interpose an unnecessarily burdensome procedure or methodology for trial courts. *Sears Roebuck & Co. v. Manuilov*, 742 N.E.2d 453, 460 (Ind. 2001). "[T]he adoption of Rule 702 reflected an intent to liberalize, rather than to constrict, the admission of reliable scientific evidence." *Id.* As the Supreme Court instructed in *Daubert*, "[v]igorous 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 596, 113 S.Ct. 2786. Evidence need not be conclusive to be admissible. "The weakness of the connection of the item [of evidence] to the defendant goes toward its weight and not its admissibility." *Owensby v. State*, 467 N.E.2d 702, 708 (Ind. 1984). Cross-examination permits the opposing party to expose dissimilarities between the actual evidence and the scientific theory. The dissimilarities go to the weight rather than to the admissibility of the evidence. See *Lytle v. Ford Motor Co.*, 696 N.E.2d 465, 476 (Ind. Ct. App. 1998), *trans. denied*.³⁷

To summarize, since the advent of Indiana Rule 702, the Indiana Supreme Court has rejected the *Frye* general acceptance test and noted that the concerns underlying *Daubert* were the same as explicitly laid out in rule 702(b) regarding scientific testimony, i.e., that "the reasoning or methodology underlying the testimony is scientifically valid[.]"³⁸ Consequently, the court has recognized the *Daubert* factors as helpful, if not binding, at least as far as scientific testimony goes.³⁹ The court, however, has declined to extend *Daubert*'s helpfulness to cover non-scientific expert testimony, as *Kumho Tire* did in the federal realm.⁴⁰ The Indiana Supreme Court has also made it clear that the adoption of Rule 702 was intended to liberalize the admission of expert testimony.⁴¹ Broadly speaking, this is where we stand as of August of 2014. In Section II, I present an overview of Rule 702 appellate jurisdiction and see if there is anything we can learn.

36. *Turner v. State*, 953 N.E.2d 1039, 1050-51 (Ind. 2011).

37. *Id.*

38. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 593 (1993).

39. *Id.* Because the *Daubert* factors were not listed as mandatory, arguably the only part of *Daubert* that was *truly* binding was the overall requirement that the science be found reliable, not just generally accepted, which at the time was soon to be a requirement in Indiana pursuant to Rule 702(b). Under the circumstances, it would make little difference if Indiana were to fully embrace the *Daubert* factors, because even in *Daubert* they are merely "helpful."

40. *Malinski v. State*, 749 N.E.2d 1071 (Ind. 2003).

41. *Id.* at 1071.

II. STATISTICS AND TRENDS IN RULE 702 APPELLATE JURISPRUDENCE

A. *The Numbers*

My research has revealed that the Indiana appellate courts have addressed Rule 702's application 201 times since it became effective on January 1, 1994.⁴² The Indiana Supreme Court has addressed Rule 702 claims twenty-eight times, the Court of Appeals of Indiana ("the Court of Appeals") 172 times,⁴³ and the Indiana Tax Court one time.⁴⁴ The following table and chart show the yearly aggregate totals from all three courts.

Year	Number of Rule 702 Decisions, all Courts
2014 ⁴⁵	11
2013	15
2012	24
2011	15
2010	16
2009	13
2008	12
2007	8
2006	7

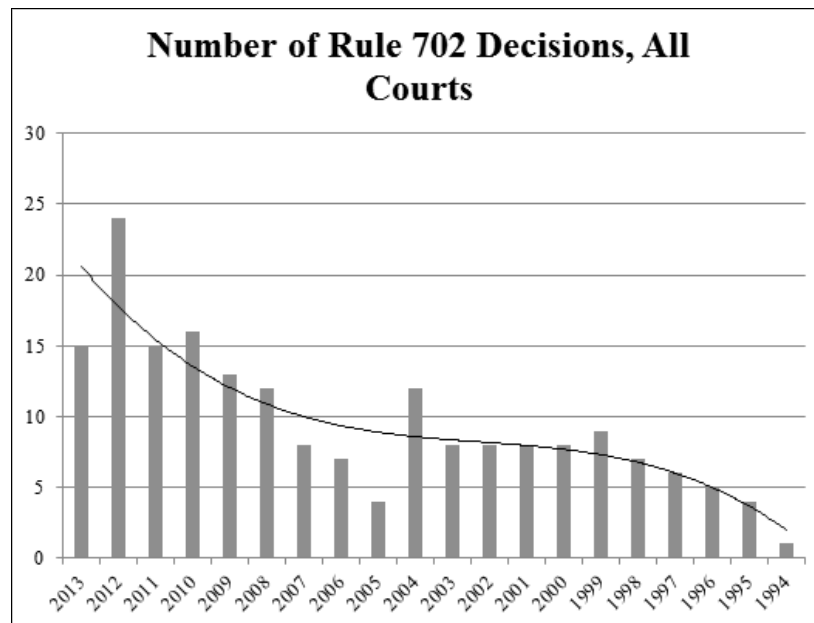
42. As of November 5, 2014. In an attempt to uncover every case that evaluated the merits of a Rule 702 claim, I employed Westlaw.com searches "evidence /p 702" and "evid. /p 702" and also cross-referenced those results with the Rule 702 annotations [hereinafter Westlaw search]. While there were several hundred cases fitting those search criteria that had nothing at all to do with Rule 702, I think it would have to be a fairly remarkable Rule 702 case that was *not* uncovered by my searches.

43. I have included unpublished decisions from the Court of Appeals, as well as published opinions, in this total. While of no precedential value, I believe that the inclusion of unpublished decisions is essential to an understanding of how the Court of Appeals might view a particular claim, which is of obvious value to the practitioner. I have not, however, included in this total the Court of Appeals' unpublished disposition on rehearing in *Easley v. State*, even though the decision addressed a Rule 702 claim. *Easley v. State*, No. 49A02-0707-CR-638, slip op. at 1-2 (Ind. Ct. App. Sept. 18, 2008). The rehearing opinion merely restated the court's earlier disposition of the Rule 702 claim. *See Easley v. State*, No. 49A02-0707-CR-638, slip op. at 3 (Ind. Ct. App. June 30, 2008).

44. Westlaw search, *supra* note 42.

45. As of November 5, 2014, eleven decisions addressing Rule 702 claims have been handed down by the appellate courts of Indiana. If the rate for 2014 so far holds for the rest of the year, this translates to approximately thirteen decisions. There is, of course, no way to know if this will be the case. As such, I have included figures for 2014 in this first table only and in none of the charts.

Year	Number of Rule 702 Decisions, all Courts
2005	4
2004	12
2003	8
2002	8
2001	8
2000	8
1999	9
1998	7
1997	6
1996	5
1995	4
1994	1
Total	201



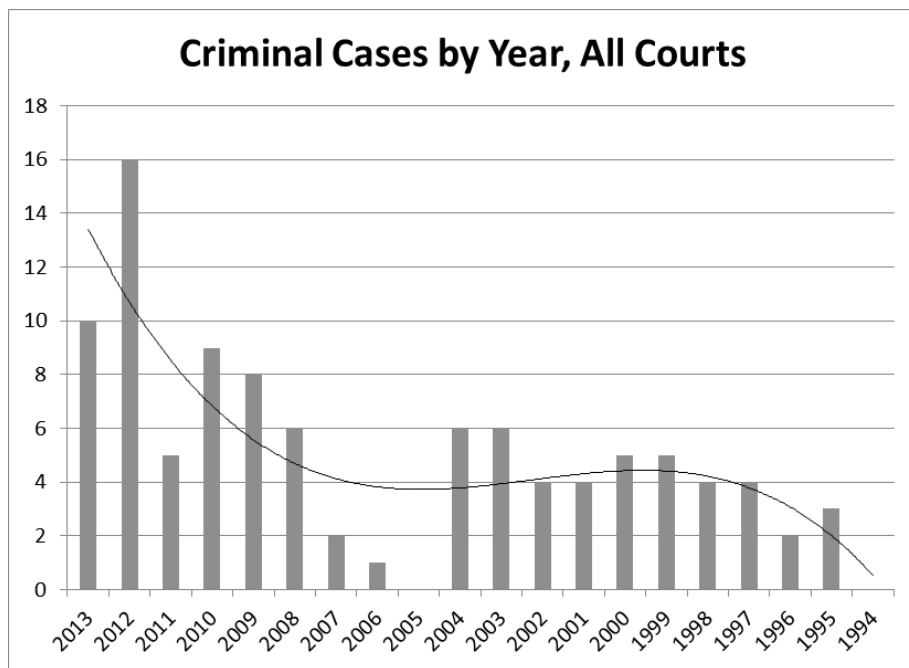
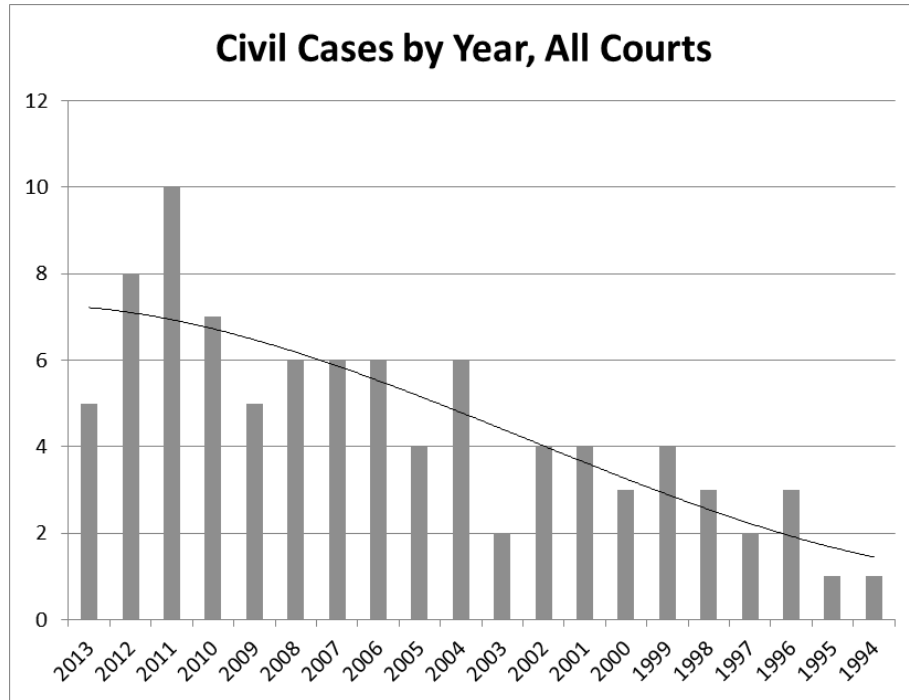
The raw numbers illustrate a generally increasing number of Rule 702 cases over the years,⁴⁶ with 2014⁴⁷ shaping up to be somewhat consistent with the overall trend. I have chosen also to break down the decisions by whether they were in civil or criminal cases.⁴⁸

Year	Civil	Criminal
2013	10	5
2012	8	16
2011	10	5
2010	7	9
2009	5	8
2008	6	6
2007	6	2
2006	6	1
2005	4	0
2004	6	6
2003	2	6
2002	4	4
2001	4	4
2000	4	5
1999	1	8
1998	3	4
1997	2	4
1996	3	2
1995	1	3
1994	1	0

46. The trendline superimposed over the bar graph was generated by the use of a third-order polynomial in Microsoft Excel, as this type of curve seemed to fit the data best. In layman's terms, this will generally produce a curve with two "bends" in it. *Choosing the best trendline for your data*, MICROSOFT, <http://office.microsoft.com/en-us/help/choosing-the-best-trendline-for-your-data-HP005262321.aspx> (last visited Nov. 5, 2014), *archived at* <http://perma.cc/FK5P-E7S3>. I have used third-order polynomial trendlines for all graphs in this Article. This Article, however, is not intended (to say the least) to represent any sort of in-depth statistical study of Rule 702 decisions. I have included trendlines on my graphs merely for illustrative purposes.

47. *See supra* note 45.

48. I have chosen to include appeals in post-conviction relief cases (of which there were five from 1994 through 2013) in the criminal cases despite that they are technically civil in nature.



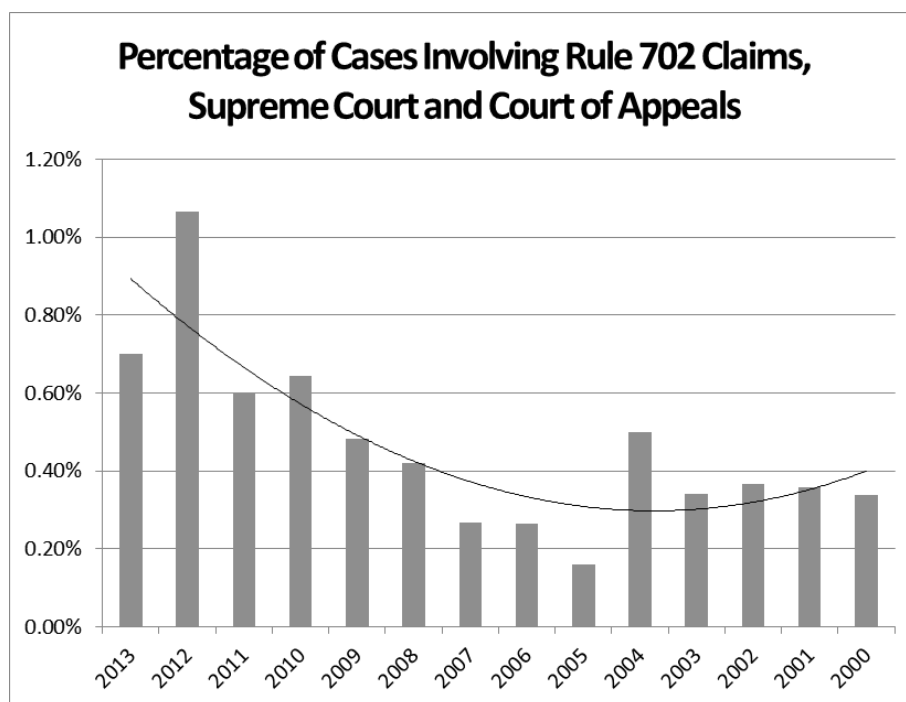
The numbers indicate that the overall increase in Rule 702 cases cannot be attributed exclusively to an increase in either civil or criminal cases. The increase in the number of civil cases has been more consistent than in the criminal arena, which has seen an especially pronounced increase in Rule 702 cases since 2008. I will share some thoughts on this phenomenon later.

The increase in Rule 702 cases cannot be attributed to an overall increase in appeals; dispositions peaked in 2007 and were down twenty-eight percent from that peak in 2013.⁴⁹ In fact, the overall percentage of cases addressing Rule 702 claims is generally increasing.⁵⁰

Year	Rule 702 Decisions	Total Number of Case Dispositions	Percentage of Cases With Rule 702 Claims
2013	15	2146	0.70%
2012	24	2254	1.06%
2011	15	2493	0.60%
2010	16	2491	0.64%
2009	13	2692	0.48%
2008	12	2867	0.43%
2007	8	2983	0.27%
2006	7	2639	0.27%
2005	4	2510	0.16%
2004	12	2403	0.50%
2003	8	2351	0.34%
2002	8	2178	0.37%
2001	8	2234	0.36%
2000	8	2377	0.34%

49. See generally COURT OF APPEALS OF INDIANA, 2013 ANNUAL REPORT (2013), available at http://www.in.gov/judiciary/appeals/files/2013_Court_of_Appeals_Annual_Report.pdf, archived at <http://perma.cc/NT5T-8RDL>.

50. For a given year, the total number of dispositions by the Court of Appeals was taken from that court's annual reports. *Court of Appeals Publications*, COURT OF APPEALS OF INDIANA, <http://www.in.gov/judiciary/appeals/2343.htm> (last visited on Nov. 5, 2014), archived at <http://perma.cc/9LFN-XRCW>. The number of yearly dispositions by the Indiana Supreme Court was taken from, *Supreme Court of Indiana Decisions*, JUSTIA US LAW, <http://law.justia.com/cases/indiana/supreme-court/> (last visited Nov. 5, 2014), archived at <http://perma.cc/S3MC-MQ8E>. I have chosen not to include the Tax Court in this tabulation, as figures for total dispositions are readily available only back to 2004. I felt that the additional three years were more important than including statistics from the Tax Court, which disposes of relatively few cases.

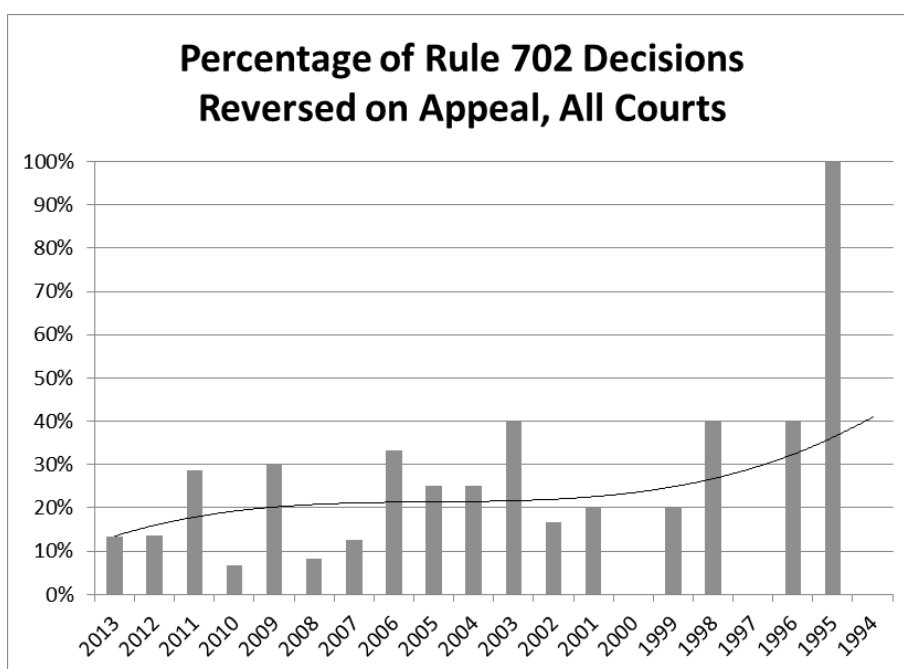


Although the percentage of cases involving Rule 702 issues is small and has only topped one percent once (2012), there is an unmistakable trend of such issues being litigated at the appellate level with greater frequency.

At the same time, there seems to be a lessening willingness on the part of the Indiana appellate courts to reverse lower-court determinations on Rule 702 claims. It is difficult to make any assessments with confidence due to such a small sample size, but, at the very least, there does not seem to be a trend of judicial activity in this regard.

Year	Number of Reversals	Number of Rule 702 Claims	Percentage of 702 Claims Resulting in Reversal
2013	2	15	13%
2012	3	22	14%
2011	4	14	29%
2010	1	15	7%
2009	3	10	30%
2008	1	12	8%
2007	1	8	13%
2006	2	7	29%
2005	1	4	25%
2004	3	12	25%

Year	Number of Reversals	Number of Rule 702 Claims	Percentage of 702 Claims Resulting in Reversal
2003	2	5	40%
2002	1	6	17%
2001	1	5	20%
2000	0	5	0%
1999	1	5	20%
1998	2	5	40%
1997	0	3	0%
1996	2	5	40%
1995	2	2	100%
1994	0	1	0%



In summary, the overall trend is that the number and percentage of Rule 702 claims, relative to the total number of cases, is increasing over time. I do not believe that the data shows that this increase can be attributed to a greater likelihood of success, as the percentage of Rule 702 claims resulting in reversals is, if anything, decreasing over time.

B. Trends in Rule 702

In this final section, I will finally get around to doing what I said I would do

in the introductory paragraph: say something that might be of use to the practitioner. To that end, I will identify and discuss some trends in Rule 702 jurisprudence in the hopes that the practicing attorney may be able to adjust his sails to meet the prevailing winds.

1. *Medical Causation.*—There is, in my view, no recent trend more noteworthy in this area than the recent liberalization in cases involving medical testimony, i.e., an increased willingness to accept medical expert testimony from persons other than physicians. Historically, at least during the Rule 702 era, Indiana courts have not been receptive to the idea of a non-physician expert testifying about medical matters.⁵¹ In 1996, in concluding that a chiropractor was not qualified to testify about medical reports prepared by a physician, the Court of Appeals stated, “this court has concluded that chiropractors are generally not qualified to serve as experts in cases involving physicians. They do not have the same education, training or experience, all of which are generally necessary to render an opinion of benefit to a jury.”⁵² In 1998, the Court of Appeals addressed nurses, ruling in *Long v. Methodist Hospital of Indiana, Inc.*, that nurses were not qualified to testify to either the appropriate physician standard of care or medical causation.⁵³ In 1999, the Court of Appeals rejected the medical testimony of an expert holding a Ph.D. in anatomy, citing, among other things, his lack of a medical degree.⁵⁴

In 2004, the Court of Appeals held that a Ph.D. toxicologist was not qualified to testify regarding the medical record of a defendant who contended that a medical condition caused him to fail field-sobriety tests.⁵⁵ The court said the following in rejecting the testimony: “Here . . . Dr. McCoy . . . is [not] a medical doctor. Dr. McCoy has a Ph.D., with a major in toxicology and a minor in pharmacology In other words, . . . Dr. McCoy [does not have] the same education, training, or expertise as the physician who prepared the one-page medical record.”⁵⁶

As recently as 2010, the Court of Appeals issued two opinions, both

51. See *Faulkner v. Markkay of Ind., Inc.*, 663 N.E.2d 798, 801 (Ind. Ct. App. 1996).

52. *Id.* (citing *Stackhouse v. Scanlon*, 576 N.E.2d 635, 639 (Ind. Ct. App. 1991)). Showing considerable foresight, Judge Sullivan dissented, saying that:

The implication that chiropractors are automatically, by lack of education and/or training, incapable of analyzing and meaningfully answering medical questions sweeps too broadly. Doctors of chiropractic may or may not have the education and training necessary to render helpful and meaningful analysis with regard to the bases of their opinions. The answer may well depend upon the matter under inquiry and the specific matters which are contained in the reports referred to. *Faulkner*, 663 N.E.2d at 802 (Sullivan, J., dissenting).

53. *Long v. Methodist Hosp. of Ind., Inc.*, 699 N.E.2d 1164, 1168-69 (Ind. Ct. App. 1998).

54. *Ind. Mich. Power Co. v. Runge*, 717 N.E.2d 216, 237 (Ind. Ct. App. 1999).

55. *Schmidt v. State*, 816 N.E.2d 925, 941 (Ind. Ct. App. 2004).

56. *Id.* Judge Sullivan again dissented, writing, “I disagree with my colleagues in this case that Dr. McCoy was per se unqualified to render an expert opinion based upon [the physician’s] report.” *Id.* at 947 n.7 (Sullivan, J., dissenting).

following *Long* and concluding that a nurse was not qualified to testify as an expert on questions of medical causation.⁵⁷

However, within two years, much would change. The first crack in the wall came in July of 2011, with the case of *K.D. v. Chambers*.⁵⁸ The *K.D.* court ruled that the trial court had erred in excluding the medical causation testimony of a Ph.D. toxicologist “based solely on his curriculum vitae and lack of a medical degree.”⁵⁹ The *K.D.* court noted that prior decisions had limited medical testimony to physicians and that “the reasoning for such statements is that physicians are uniquely qualified to diagnose and treat disease.”⁶⁰ The court essentially recognized, however, (and I believe this to be crucial) that questions of diagnosis and treatment do not necessarily have anything to do with causation: “McCoy’s proposed testimony does not relate to diagnosing or treating a disease, or to whether the standard of care was breached, because the fact K.D. suffered an overdose is undisputed. Rather, McCoy’s proposed testimony relates to the toxic effects of the overdose and whether these include K.D.’s tremor.”⁶¹ Consequently, the court remanded with instructions to determine whether the toxicologist was qualified to testify regarding medical causation.⁶² *K.D.* represents the first Indiana case⁶³ that admits the possibility that a non-physician could testify as an expert regarding medical matters, including causation.⁶⁴

In two cases issued on the same day in January of 2012, the Indiana Supreme Court left no doubt that the area of medical expert testimony was no longer limited to physicians.⁶⁵ In *Bennett v. Richmond*, the question was whether a

57. See *Nasser v. St. Vincent Hosp. & Health Servs.*, 926 N.E.2d 43, 52 (Ind. Ct. App. 2010) (“Since we have already determined in *Long* that there is a significant difference in the education, training, and authority to diagnose and treat diseases between physicians and nurses and that the determination of the medical cause of injuries for purposes of offering expert testimony is beyond the scope of nurses’ professional expertise, Nurse Busacca is not qualified to give her expert opinion as to medical causation in this case.”); *Clarian Health Partners, Inc. v. Wagler*, 925 N.E.2d 388, 398 (Ind. Ct. App. 2010) (“Based upon *Long*, we conclude that Nurse Little’s affidavit was inadmissible for the purpose of creating an issue of fact regarding whether Clarian’s actions were the proximate cause of Wagler’s injuries.”)

58. *K.D. v. Chambers*, 951 N.E.2d 855 (Ind. Ct. App. 2011), *disapproved of on other grounds* by *Spangler v. Bechtel*, 958 N.E.2d 458 (Ind. 2011).

59. *Id.* at 861.

60. *Id.*

61. *Id.*

62. *Id.* at 862.

63. *Id.* at 855. At least it is the first Indiana case that survives as precedent. *K.D.* relied, in part, on *Person v. Shipley*, 949 N.E.2d 386 (Ind. Ct. App. 2011), an opinion that was later vacated. See *Person v. Shipley*, 962 N.E.2d 649 (Ind. 2011) (granting transfer and vacating Court of Appeals opinion). We will get to the Indiana Supreme Court’s resolution of the case momentarily.

64. See *id.* at 861 (“The trial court excluded McCoy’s entire testimony based solely on his curriculum vitae and lack of a medical degree. Under the facts and circumstances of this case, . . . the trial court’s complete exclusion of McCoy’s testimony was premature and overbroad.”).

65. See *Bennett v. Richmond*, 960 N.E.2d 782 (Ind. 2012); see also *Person*, 962 N.E.2d at

psychologist could be qualified to testify as to the cause of a brain injury in a rear-end collision case.⁶⁶ The *Bennett* court concluded that a psychologist could be qualified to testify regarding medical causation, noting that “[n]either the criteria for qualifying under Rule 702 (knowledge, skill, experience, training, or education) nor the purpose for which expert testimony is admitted (to assist the trier of fact) supports a per se rule banning psychologists’ testimony in this manner.”⁶⁷ At issue in *Person v. Shipley* was whether a Ph.D. biomedical engineer could testify as to medical causation in another rear-end collision case.⁶⁸ The *Person* court concluded that the trial court did not abuse its discretion in allowing the testimony from the biomedical engineer, again noting that nothing in Rule 702 required a medical degree in order to offer an expert opinion on medical causation.⁶⁹

Since *Bennett* and *Person*, the Court of Appeals has squarely addressed the question of non-physician, medical testimony twice.⁷⁰ In *Curts v. Miller’s Health Systems, Inc.*, the court concluded that, under some circumstances, a nurse could be qualified as an expert witness on medical standard of care or causation matters.⁷¹ In *Tucker v. Harrison*, the court concluded that a Ph.D. epidemiologist was not, at least in this case, qualified to testify regarding medical causation.⁷² The question was whether alleged malpractice during the performance of a particular surgical procedure was the cause of the plaintiff’s ovarian failure, and the epidemiologist was prepared to testify that incidence of ovarian failure in those having the procedure was significantly higher than in the general population.⁷³ The testimony was not rejected on the basis that the epidemiologist was not a physician, however, but on the basis that he could not offer any evidence that the physician did anything wrong—in other words, no evidence that ovarian failure was not simply an inherent risk of the surgery in question.⁷⁴ *Tucker* certainly leaves open the possibility that such epidemiological evidence might be admitted in the future with the proper foundation.

I have no way of predicting how all of this will play out, but I think the prudent practitioner who handles cases involving issues of medical causation or standards of care would be well-advised to study these recent cases. In particular, whether you are attempting to get such evidence in or attempting to

1192.

66. *Bennett*, 960 N.E.2d at 783.

67. *Id.* at 786. The *Bennett* court specifically noted that its approach differed from the Court of Appeals’ traditional practice of per se exclusion of nurse testimony regarding medical causation. *See id.* at 786 n.8.

68. *Person*, 962 N.E.2d at 1193.

69. *Id.* at 1196.

70. *See Curts v. Miller’s Health Sys., Inc.*, 972 N.E.2d 966 (Ind. Ct. App. 2012); *see also Tucker v. Harrison*, 973 N.E.2d 46, 52 (Ind. Ct. App. 2012), *trans. denied*.

71. *Curts*, 972 N.E.2d at 971.

72. *Tucker*, 973 N.E.2d at 52.

73. *Id.*

74. *Id.*

keep it out, keep in mind that it will no longer be rejected on the basis that the proffered expert is not a physician. Whether this trend away from reliance on credentials and degrees in medical cases expands to other areas has yet to be seen, but I see no reason why it would not. All of this would be entirely consistent with the Indiana Supreme Court's general view that more expert testimony should come in under Rule 702 and be tested by cross-examination.

2. *Increase in Rule 702 Issues in Criminal Cases.*—As seen in Part II.A, there has been an increase in the number of Rule 702 issues addressed in criminal appeals, beginning in 2008. My review of the subject matter of these claims, however, does not reveal the existence of a “hot” issue that might, alone or in large part, account for the increase, such as the increased use of a new forensic technique.

One possible cause of this increase is the so-called “CSI Effect.” In their 2009 article, *Investigating the ‘CSI Effect’ Effect: Media and Litigation Crisis in Criminal Law*,⁷⁵ Simon A. Cole and Rachel Dioso-Villa provided the following background:

Since 2002, popular media has been disseminating serious concerns that the integrity of the criminal trial is being compromised by the effects of television drama. This concern has been dubbed the “CSI effect” after the popular franchise Crime Scene Investigation (CSI). Specifically, it was widely alleged that CSI, one of the most watched programs on television, was affecting jury deliberations and outcomes. It was claimed that jurors confused the idealized portrayal of the capabilities of forensic science on television with the actual capabilities of forensic science in the contemporary criminal justice system. Accordingly, jurors held inflated expectations concerning the occurrence and probative value of forensic evidence. When forensic evidence failed to reach these expectations, it was suggested, juries acquitted. In short, it was argued that, in cases lacking forensic evidence in which juries would have convicted before the advent of the CSI franchise, juries were now acquitting.⁷⁶

Whether Indiana juries are more likely to acquit without forensic evidence than they were ten or fifteen years ago, I cannot say. Even if that were the case, however, that would not account for an increase in appellate activity in the Rule 702 arena. What *might* account for the increase is the *belief* that juries expect forensic evidence, whether the goal is to secure a conviction or an acquittal. Cole and Dioso-Villa cite to three studies in which prosecutors, defense attorneys, and trial judges were asked about the CSI Effect.⁷⁷ In one, forty-nine percent of prosecutors and defense attorneys claimed to have observed acquittal

75. Simon A. Cole & Rachel Dioso-Villa, *Investigating the ‘CSI Effect’ Effect: Media and Litigation Crisis in Criminal Law*, 61 STAN. L. REV. 1335 (2009).

76. *Id.* at 1336.

77. *See id.* at 1351-52 (discussing three separate studies that examine the CSI effect).

in cases where they felt there was sufficient circumstantial evidence to convict.⁷⁸ In a second, thirty-eight percent of prosecutors reported at least one wrongful acquittal or hung jury due to a lack of forensic evidence.⁷⁹ In a third, seventy-nine percent of prosecutors, defense attorneys, and judges reported a specific instance in which they felt that juries' decisions were influenced by forensic programs.⁸⁰ Although there does not seem to be any hard data, there is no reason to believe that Indiana prosecutors and defense attorneys feel significantly differently about all of this. Hoosier prosecutors and defense attorneys might well be attempting to present more expert testimony in the hopes of countering the CSI Effect, which would almost certainly lead to more appeals in the area. Whatever the cause, it seems that we are in the midst of an increase in Rule 702 claims, and prosecutors and defense attorneys would be wise to hone their skills in this area.

CONCLUSION

Since the advent of Indiana Rule 702, we have witnessed both an increase in number of such claims at the appellate level (which almost certainly corresponds to more expert testimony being used at the trial level) and a liberalization of standards in the area. The appellate courts in Indiana are resolving approximately twice as many Rule 702 claims as they were a decade ago,⁸¹ and the Indiana Supreme Court is showing that it means what it says about liberalization, especially in the field of medical expert testimony. Nothing I have seen gives a hint that either of these trends will reverse anytime soon.

78. *Id.* at 1351 (citing Michael J. Watkins, *Forensics in the Media: Have Attorneys Reacted to the Growing Popularity of Forensic Crime Dramas?* 59 (Aug. 3, 2004) (unpublished M.A. thesis, Florida State University) (on file with Cole and Dioso-Villa)).

79. *Id.* at 1352 (citing MARICOPA COUNTY ATT'Y'S OFFICE, *CSI: MARICOPA COUNTY: THE CSI EFFECT AND ITS REAL-LIFE IMPACT ON JUSTICE* 1, 10 (2005)).

80. *Id.* (citing Monica L.P. Robbers, *Blinded by Science: The Social Construction of Reality in Forensic Television Shows and its Effect on Criminal Jury Trials*, 19 CRIM. JUST. POL'Y REV. 84, 91-98 (2008)).

81. The average number of Rule 702 cases decided per year from 2010 to 2012 was 18.33, while the average number decided from 2000 to 2002 was eight. *See supra* Part II.A.