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FEDERAL RULE OF EVIDENCE 702: A PRACTITIONER'S GUIDE TO UNDERSTANDING THE 2023 AMENDMENTS

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Mr. Mickus is also Co-Chair of the Rule 702 committee for Lawyers for Civil Justice. In that capacity he has written articles, given presentations to judges and attorneys, and provided comments and testimony to the Advisory Committee on Evidence Rules during the rulemaking process that led to the 2023 amendments. In his litigation practice, Mr. Mickus often develops strategies for addressing expert testimony, including challenging the admissibility of expert opinions that fall short of the Rule 702 standard.

FEDERAL RULE OF EVIDENCE 702: A PRACTITIONER'S GUIDE TO UNDERSTANDING THE 2023 AMENDMENTS

INTRODUCTION

Prior to the Rule 702 amendments that took effect on December 1, 2023, three misconceptions of the Rule 702 standard appeared frequently in rulings addressing the admissibility of opinion testimony. First, despite the explicit directives of Rule 702(b) and (d), many decisions declared the factual basis of an expert's opinion and the application of the expert's methodology to the facts of the case to be matters of weight for juries to evaluate and not admissibility considerations for the court to decide. Second, some courts did not assess expert testimony under the preponderance of the evidence burden of production that applies to Rule 702 inquiries, but instead relied on characterizations of Rule 702 as being a "liberal" standard or "presuming admissibility." Finally, a number of judges allowed experts to overstate the conclusions that their methodology will actually support, resulting in expressions of a degree of confidence in the experts' conclusions that go beyond what reliable science will allow.

Each of these misunderstandings reflects a perspective that is legally flawed. The new Rule 702 amendments seek to correct these errors.

The amendments changed Rule 702 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 the proponent demonstrates to the court that it is more likely than not that**:

(a) the expert's witness'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 **expert's opinion reflects a reliable application of** the principles and methods to the facts of the case.[1]

The discussion that follows examines the corrective effects of the 2023 amendments and how these changes to the Rule impact court and litigant practices.

I. RULE 702's CRITERIA MUST BE MET BY A PREPONDERANCE OF THE EVIDENCE

Rule 702's admissibility requirements must be viewed through the lens of Rule 104(a)'s burden of production. This has been true for decades. The Committee Note to the 2000 Amendment to Rule 702 instructs:

> 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).

Even though this direction has been in place for many years, the Advisory Committee during the rulemaking process leading to the 2023 amendments found that "many courts are ignoring that standard."[2]

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[1] Language to be added appears in bold with underlining.

[2] Hon. Patrick J. Schiltz, Report of the Advisory Committee on Evidence Rules (Dec. 1, 2020) at 5, *in* COMMITTEE ON RULES OF PRACTICE & PROCEDURE JANUARY 2021 AGENDA BOOK 441 (2021), https://www.uscourts.gov/sites/default/files/2021-01_standing_agenda_book.pdf. *See also* Thomas D. Schroeder, *Toward a More Apparent Approach to Considering the Admission of Expert Testimony*, 95 NOTRE DAME L. REV. 2039,

Rather than hold the proponent to meeting the burden of production, many judges examined opinion testimony using deferential approaches that assume, rather than assess, admissibility. For example, some courts declared there is a "presumption of admissibility"[3] or applied an understanding that exclusion is "the exception rather than the rule."[4] Others described the admissibility hurdle as minimal, so that "[o]nly if the expert's opinion is so fundamentally unsupported that it can offer no assistance to the [trier of fact] must such testimony be excluded."[5]

2060 (2020) ("In the vast majority of cases under question, while Rule 702 and relevant cases are cited, there is no acknowledgement that the gatekeeper function requires application of Rule 104(a)'s preponderance test, much less for each of the elements of the Rule. Instead, courts tend to defer to statements from caselaw, even if it is outdated.") (emphasis original). Notably, Judge Schroder was Chair of the Advisory Committee on Evidence Rules' Subcommittee on Rule 702.

[3] *See, e.g.*, *Campbell v. City of New York*, 2021 WL 826899, at *2 (S.D.N.Y. Mar. 4, 2021) ("courts are to adhere to a liberal standard of admissibility for expert opinions, and begin with a presumption that expert evidence is admissible[.]"); *Price v. General Motors, LLC*, 2018 WL 8333415, at *1 (W.D. Okla. Oct. 3, 2018) ("The Federal Rules encourage the admission of expert testimony and there is a presumption under the Rules that expert testimony is admissible.") (quotations omitted); *Powell v. Schindler Elevator Corp.*, 2015 WL 7720460, at *2 (D. Conn. Nov. 30, 2015) ("The Second Circuit has made clear that *Daubert* contemplates liberal admissibility standards, and reinforces the idea that there should be a presumption of admissibility of evidence that there should be a presumption of admissibility of evidence.").

[4] *See, e.g.*, *Eaton v. Ascent Res. - Utica, LLC*, 2021 WL 3398975, at *3 (S.D. Ohio Aug. 4, 2021) (quotation and citations omitted); *Trice v. Napoli Shkolnik PLLC*, 2020 WL 4816377, at *10 (D. Minn. Aug. 19, 2020) (quotation and citations omitted); *Wright v. Stern*, 450 F. Supp.2d 335, 359–60 (S.D.N.Y. 2006) ("Rejection of expert testimony, however, is still 'the exception rather than the rule,' Fed.R.Evid. 702 advisory committee's note (2000 Amendments)[.] . . . Thus, in a close case the testimony should be allowed for the jury's consideration.") (quotation omitted).

[5] *Beebe v. Colorado*, 2019 WL 6044742, at *6 (D. Colo. Nov. 15, 2019) (emphasis original) (quotation omitted). *See also Trice*, 2020 WL 4816377, at *10; *Wischermann Partners, Inc. v. Nashville Hosp. Capital LLC*, 2019 WL 3802121, at *3 (M.D. Tenn. Aug.13, 2019); *Thompson v. APS of Okla., LLC*, 2018 WL 4608505, at *5 n. 15 (W.D. Okla. Sept. 25, 2018); (similar statements). Notably, the quoted description of an exceedingly low hurdle that expert testimony must overcome is taken from *Bonner v. ISP Tech., Inc.*, 259 F.3d 924, 929-30 (8th Cir. 2001). *Bonner*, however, draws that language from *Hose v. Chicago Nw. Transp. Co.*, 70 F.3d 968, 974 (8th Cir. 1996), which itself quotes the 1988 *Loudermill* opinion, 863 F.2d at 570. The statement therefore does not interpret or apply the current

These conceptions misunderstand the burden of production. It "is decidedly not the case" that expert testimony can be described as "presumptively admissible."[6] Rule 702 compels courts to look first to the burden of production and determine at the outset if the opinion testimony meets the standard:

> It is not the case that the judge can say 'I see the problems, but they go to the weight of the evidence.' After a preponderance is found, then any slight defect in either of these factors becomes a question of weight. But not before.[7]

In fact, the 2000 amendments to Rule 702 sought to reflect the Supreme Court's determination in *Daubert* "that cross-examination alone is ineffective in revealing nuanced defects in expert opinion testimony," and so "the trial judge must act as a gatekeeper to ensure that unreliable opinions don't get to the jury in the first place."[8] When courts fail to apply the

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standard—it pre-dates Rule 702 and even *Daubert* and constitutes a recycled approach to expert admissibility that courts should have discarded upon the adoption of the 2000 version of Rule 702, if not before.

[6] *See* Memorandum from Daniel J. Capra, Reporter, Advisory Comm. on Evidence Rules, to Advisory Comm. on Evidence Rules, *Forensic Evidence, Daubert and Rule 702* (Apr. 1, 2018) at 11, n.4 *in* ADVISORY COMMITTEE ON EVIDENCE RULES APRIL 2018 AGENDA BOOK 49 (2018), https://www.uscourts.gov/rules-policies/archives/agenda-books/advisory-committee-rules-evidence-april-2018 (emphasis added). *See also* Lee Mickus, *Gatekeeping Reorientation: Amend Rule 702 to Correct Judicial Misunderstandings about Expert Evidence*, WLF Working Paper No. 217 at 17 (May 2020), https://www.wlf.org/wp-content/uploads/2020/05/0520Mickus WPfinal-for-web-002.pdf ("Decisions applying the view that 'exclusion is disfavored' fail to hold the proponent responsible for establishing by a preponderance of the evidence that the expert's analysis meets all the Rule 702 requirements.").

[7] *Id*. at 43 (emphasis original). *See also Davis v. McKesson Corp.*, 2019 WL 3532179, at *3 n. 2 (D. Ariz. Aug 2., 2019) ("[T]he Court may admit expert opinions only if it can determine, under Rule 104(a), that Plaintiffs have shown each of the Rule 702 requirements to be satisfied by a preponderance of the evidence").

[8] Minutes of the Meeting of May 3, 2019, Advisory Comm. on Evidence Rules at 23, in ADVISORY COMMITTEE ON EVIDENCE RULES OCTOBER 2019 AGENDA BOOK 73 (2019), https://www.uscourts.gov/rules-policies/archives/agenda-books/advisory-committee-rules-evidence-october-2019. *See also* Mickus, *supra* n.6, at 8 ("The key to

preponderance of the evidence test and instead presume admissibility, they improperly move the burden of production away from the proponent. Shifting the burden in this way "relegate[s] to the jury the very decisions that Rule 702 contemplates to be beyond jury consideration."[9]

To address the erroneous court practice of misapplying or overlooking the burden of production applicable to admissibility decisions, amended Rule 702 "explicitly add[ed] the preponderance of evidence standard" into the text of the rule.[10] The Committee Note explains that the change is intended "to clarify and emphasize that the expert testimony may not be admitted unless the proponent demonstrates to the court that it is more likely than not that the proffered testimony meets the admissibility requirements set forth in the rule."[11]

Courts have responded to the amendment's corrective purpose by recognizing that the changes require judges "to analyze the expert's data and methodology at the admissibility stage more critically than in the past."[12] To

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reconciling these divergent strands of the *Daubert* holding is the recognition that cross-examination simply is not capable of safeguarding the trial process against the misleading influence of unreliable expert testimony.").

[9] Schroeder, 95 NOTRE DAME L. REV. at 2043.

[10] Schiltz, *supra* n. 2, at 5. *See also* Minutes - Advisory Committee on Evidence Rules (Nov. 13, 2020) at 3-4, *in* ADVISORY COMMITTEE ON EVIDENCE RULES APRIL 2021 AGENDA BOOK 15 (2021), https://tinyurl.com/4s5s792r ("Twenty years later [after adoption of current Rule 702] – when it is clear that federal judges are not uniformly finding and following the preponderance standard – the justification for a clarifying amendment exists.").

[11] Committee Note, 2023 Amendment to Federal Rule of Evidence 702 (emphasis added).

[12] *Boyer v. Citi of Simi Valley*, 2024 WL 993316, at *1 (C.D. Cal. Feb. 13, 2024). *See also Optical Solutions, Inc. v. Nanometrics, Inc.*, 2023 WL 8101885, at *1 (N.D. Cal. Nov. 21, 2023) (court must ensure an expert's "opinion meets the more stringent standard under the amendment to Rule 702(d)"); *United States v. Briscoe*, 2023 WL 8096886, at *12 (D.N.M.

meet the burden of production, the expert's proponent must "provid[e] adequate evidence to ensure the Court" that all the Rule 702 requirements are established.[13] Judges should exclude the opinion testimony when an admissibility challenge is met with only "vague and conclusory arguments" or otherwise fail "to carry their burden of proving" that the expert meets the admissibility criteria.[14] Rule 702 does not allow courts to defer these considerations to juries and depend on the power of "vigorous cross-examination" to dispel the impact of unsupported or unreliable opinion testimony.[15]

II. EXPERT'S FACTUAL BASIS AND APPLICATION OF METHODOLOGY ARE QUESTIONS OF ADMISSIBILITY, NOT WEIGHT

Before the amendments became effective, courts often declared that challenges to the factual basis of an expert's opinion conceptually raise issues of weight for the jury to determine, not questions of admissibility that the court must decide. To provide some perspective on just how widespread this misunderstanding was, between January 1, 2015, and February 1, 2021:

- 232 federal cases recited variations of the following statement: "As a general rule, the factual basis of an expert opinion goes to the credibility of the testimony, not the admissibility, and it is up to the opposing party to examine the factual basis for the opinion in

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Nov. 21, 2023) ("in keeping with the proposed amendments to Rule 702, the Court takes its gatekeeping role seriously.").

[13] *See McKee v. Chubb Lloyds Ins. Co.*, 2024 WL 1055122, at *6 (W.D. Tex. Mar. 11, 2024).

[14] *Zaragoza v. Cty. of Riverside*, 2024 WL 663235, at *4 (C.D. Cal. Jan. 18, 2024).

[15] *Briscoe*, 2023 WL 8096886, at *4.

cross-examination."[16]

- 170 federal cases reiterated this statement: "[Q]uestions relating to the bases and sources of an expert's opinion affect the weight to be assigned that opinion rather than its admissibility."[17]

- 79 federal cases incorporated the following statement: "Soundness of the factual underpinnings of the expert's analysis and the correctness of the expert's conclusions based on that analysis are factual matters to be determined by the trier of fact[.]"[18]

Statements such as these have been pervasive, appearing in decisions in every federal circuit. But they are simply wrong on the law:

> It is clear that a judge should not allow expert testimony without determining that all requirements of Rule 702 [, including that it is based on sufficient facts or data,] are met by a preponderance of the evidence. . . . <u>It is not appropriate for these</u>

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[16] *See, e.g.*, *NuTech Orchard Removal, LLC, v. DuraTech Indus. Int'l, Inc.*, 2020 WL 6994246, at *5 (D.N.D. Oct. 14, 2020) ("It is well settled that 'the factual basis of an expert opinion goes to the credibility of the testimony, not the admissibility.' In the Court's view, the differences between the 5064T and 5064 models can be adequately addressed during cross-examination and are not a basis for excluding [the expert's] opinions."); *Hoover v. Bayer Healthcare Pharms. Inc.,* 2016 WL 9047166 (W.D. Mo. Dec. 20, 2016) (rejecting Rule 702 challenging adequacy of expert's factual foundation, stating "[a]s a general rule, the factual basis of an expert opinion goes to the credibility of the testimony, not the admissibility, and it is up to the opposing party to examine the factual basis for the opinion in cross-examination.").

[17] *See, e.g.*, *Trevelyn Enterprises, L.L.C. v. SeaBrook Marine, L.L.C.*, 2021 WL 65689, at *2 (E.D. La. Jan. 7, 2021) ("With respect to defendants' arguments that Boulon's testimony is based upon unsupported factual and legal conclusions and speculation, this challenge goes to the bases for Boulon's opinion. '[Q]uestions relating to the bases and sources of an expert's opinion[,] affect the weight to be assigned that opinion rather than its admissibility and should be left for the [fact-finder's] consideration.'"); *Hale v. Denton Cty.*, 2020 WL 4431860, at 4 (E.D. Tex. July 31, 2020) ("questions relating to the bases and sources of an expert's opinion affect the weight to be assigned that opinion rather than its admissibility" and admitting opinion challenged for insufficient bases finding "cross examination is the proper way to expose these alleged deficiencies.").

[18] *See, e.g.*, *Stapleton v. Union Pac. R.R. Co.*, 2020 WL 2796707, at *6 (N.D. Ill. May 29, 2020) ("these and Stapleton's other factual criticisms go to the weight of Mathias's opinions, not their admissibility"); *Bakov v. Consol. World Travel, Inc.*, 2019 WL 1294659, at *12 (N.D. Ill. Mar. 21, 2019) (stating "[t]he soundness of the factual underpinnings of the expert's analysis . . . [is a] factual matter[] to be determined by the trier of fact" and concluding that "an expert's reliance on allegedly faulty information is a matter to be explored on cross-examination.").

> determinations to be punted to the jury, but judges often do so.[19]

Rule 702, and not any other source of law, provides the standard that district courts must use to assess whether a proffered expert's opinions are admissible.[20] As a rule of evidence adopted pursuant to the Rules Enabling Act, Rule 702 supersedes any other law: "All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect."[21] Thus, "the elements of Rule 702, not the caselaw, are the starting point for the requirements of admissibility."[22] Thus, when courts apply an analysis that deviates from the directions set forth in Rule 702, they act in error.

During the process of considering whether Rule 702 would be amended, the Reporter to the Advisory Committee on Evidence Rules lamented the frequency with which such erroneous statements appeared in court decisions:

> Many opinions can be found with broad statements such as "challenges to the sufficiency of an expert's basis raise questions of weight and not admissibility" – a misstatement made by

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[19] Minutes - Committee on Rules of Practice & Procedure, Report of the Advisory Committee on Evidence Rules (Jan. 5, 2021) at 25, *in* ADVISORY COMMITTEE ON EVIDENCE RULES APRIL 2021 AGENDA BOOK 36 (2021), https://tinyurl.com/4s5s792r (emphasis added). *See also* Schroeder, 95 NOTRE DAME L. REV. at 2039 ("some trial and appellate courts misstate and muddle the admissibility standard, suggesting that questions of the sufficiency of the expert's basis and the reliability of the application of the expert's method raise questions of weight that should be resolved by a jury, where they can be subject to cross-examination and competing evidence.") (emphasis original). .

[20] *See Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2316-17 (2016) (addressing admissibility of expert testimony using Rule 702).

[21] 28 U.S.C. § 2072(b).

[22] Schroeder, 95 NOTRE DAME L. REV. at 2060. *See also Kansas City S. Ry. Co. v. Sny Island Levee Drainage Dist.*, 831 F.3d 892, 900 (7th Cir. 2016) (stating that the litigants "should have paid more attention to Federal Rule of Evidence 702, which superseded *Daubert* many years ago"); *United States v. Parra*, 402 F.3d 752, 758 (7th Cir. 2005) (recognizing that, "[a]t this point, Rule 702 has superseded *Daubert*").

> circuit courts and district courts in a disturbing number of cases.[23]

The Reporter's frustration emanates from the fact that Rule 702(b) explicitly directs that proffered opinions must be "based on sufficient facts or data," and Rule 702(d) requires that the expert "reliably appl[y] the principles and methods to the facts of the case." Accordingly, Rule 702 directs courts, not juries, to decide the adequacy of an expert's factual foundation and methodological application as a matter of admissibility:

> In sum, the 2000 amendment [to Rule 702] specifies that sufficient basis and application of method are admissibility requirements – the judge must be satisfied by a preponderance of the evidence that the expert has relied on sufficient facts or data, and that the expert has reliably applied the methods.[24]

Therefore, unless the court concludes by a preponderance of proof that the opinions have sufficient factual support and involve a reliable application of the methodology, the expert's testimony should be excluded.[25]

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[23] Memorandum from Daniel J. Capra, Reporter, Advisory Comm. on Evidence Rules, to Advisory Comm. on Evidence Rules, *Possible Amendment to Rule 702* (Apr. 1, 2021) at 11 *in* ADVISORY COMMITTEE ON EVIDENCE RULES APRIL 2021 AGENDA BOOK 90 (2021), https://www.uscourts.gov/sites/default/files/ advisory_committee_on_evidence_rules_-agenda_book_spring_2021_0.pdf.

[24] Capra, *supra* n.6, at 43.

[25] *See* Advisory Committee Note to 2000 Amendments to Rule 702 ("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.") (emphasis added). *See also* Memorandum from Daniel J. Capra, Reporter, Advisory Comm. on Evidence Rules, to Advisory Comm. on Evidence Rules, *Possible Amendments to Rule 702* (Apr. 1, 2019) at 23 *in* ADVISORY COMMITTEE ON EVIDENCE RULES MAY 2019 AGENDA BOOK 95 (2019), https://www.uscourts.gov/rules-policies/archives/meeting-minutes/advisory-committee-rules-evidence-may-2019 ("The Rule provides that the requirements of sufficient basis and reliable application must be treated as questions of admissibility, and so must be established by a preponderance of the evidence under Rule 104(a).") (emphasis added).

Cases stating that an expert's factual basis or methodological application present issues of weight, not admissibility, are not just inconsistent with Rule 702—they are usually not even interpretations of Rule 702. Instead, these statements can often be traced to pre-Rule 702 caselaw that the 2000 amendments rejected.[26] For example, in *NuTech Orchard Removal, LLC, v. DuraTech Indus. Int'l, Inc.*,[27] referenced above, the court quoted language that an expert's factual basis is a matter of weight and not admissibility from the 2008 decision in *Sappington v. Skyjack, Inc.*[28] But *Sappington* takes that passage from the 1996 *Triton Corp. v. Hardrives, Inc.* ruling,[29] which in turn recycled the language from a 1988 opinion, *Loudermill v. Dow Chem. Co.*[30] Performing this type of "DNA analysis" on other phrases commonly repeated in cases to support this incorrect proposition consistently reveals that they stem from opinions issued years before adoption of even the 2000 version of Rule 702.[31]

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[26] *See* Hon. Fern M. Smith, Report of the Advisory Committee on Evidence Rules (May 1, 1999) at 7, *in* ADVISORY COMMITTEE ON EVIDENCE RULES OCTOBER 1999 AGENDA BOOK 52 (1999), https://www.uscourts.gov/rules-policies/archives/agenda-books/advisory-committee-rules-evidence-october-1999 ("The proposed amendment and the Committee Note clearly envision a more rigorous and structured approach than some courts are currently employing.").

[27] 2020 WL 6994246, at *5.

[28] 512 F.3d 440, 450 (8th Cir. 2008).

[29] 85 F.3d 343, 347 (8th Cir.1996).

[30] 863 F.2d 566, 570 (8th Cir. 1988).

[31] *See, e.g.*, *Trevelyn Enterprises*, 2021 WL 65689, at *2 (quoting *United States v. 14.38 Acres of Land*, 80 F.3d 1074, 1077 (5th Cir. 1996), which itself quotes *Viterbo v. Dow Chem. Co.*, 826 F.2d 420, 422 (5th Cir. 1987)). *See also Acevedo v. NCL (Bahamas) Ltd.*, 317 F. Supp. 3d 1188, 1197 (S.D. Fla. 2017) ("Based upon a review of the report and Mr. Camuccio's observations which provide the basis for his conclusions, the report and testimony on the issues contained therein are admissible. As the Court of Appeals for the Eleventh Circuit has stated, '[a]ny weaknesses in the factual underpinnings of [the

Decisions expressing the misguided belief that an expert's factual basis involves only the weight and not the admissibility of opinion testimony became such a problem that the Advisory Committee on Evidence Rules determined that a corrective amendment to Rule 702 was necessary. The Committee Note that accompanies the 2023 amendment explicitly rejects those rulings that describe an expert's factual foundation as an issue of weight and not admissibility:

> But many courts have held that the critical questions of the sufficiency of an expert's basis, and the application of the expert's methodology, are generally questions of weight and not admissibility. These rulings are an incorrect application of Rules 702 and 104(a)[.][32]

The 2023 amendments "clarify that expert testimony should not be permitted unless the judge finds by a preponderance of the evidence that each of the prerequisites are met."[33]

Enactment of the 2023 amendments has caused courts to change their perception of Rule 702 and recognize that the factual basis of an expert's opinions is an admissibility factor. In one of the earliest rulings to apply amended Rule 702, the court quoted the Committee Note and added:

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expert's] opinion go to the weight and credibility of his testimony, not to its admissibility.' *Sorrels*, 796 F.3d at 1285 (quoting *Hurst v. United States*, 882 F.2d 306, 311 (8th Cir. 1989).").

[32] Committee Note, 2023 Amendment to Federal Rule of Evidence Rule 702 (emphasis added).

[33] Minutes - Committee on Rules of Practice & Procedure, Report of the Advisory Committee on Evidence Rules (Jan. 5, 2021) at 25, *in* ADVISORY COMMITTEE ON EVIDENCE RULES APRIL 2021 AGENDA BOOK 36 (2021), https://www.uscourts.gov/sites/default/files/advisory_committee_on_evidence_rules_-_agenda_book_spring_2021_0.pdf (emphasis added).

> The Court rejects the plaintiff's argument that "questions relating to the bases and sources of an expert's opinion affect the weight to be assigned that opinion rather than its admissibility". Recent revisions to FRE 702 and the official comments clarify that this is an inaccurate statement of the Court's inquiry under *Daubert* and FRE 702. The intent of the rule change is to focus and direct district courts to conduct the gate-keeping inquiry enunciated in *Daubert* and refrain from bypassing the admissibility determination in favor of a question of weight to be decided by a fact finder.[34]

Similarly, the Fifth Circuit explicitly recognized that Rule 702(b)'s requirement of a sufficient factual basis constitutes an admissibility criterion, declaring that a district court "abdicated its role as gatekeeper" when it allowed an expert to testify "without a proper foundation."[35] The Second Circuit also affirmed a district court's expert exclusion pursuant to Rule 702(b), rejecting the argument that any deficiencies in factual basis "relate to the weight to be assigned to [the expert's] opinion, not its admissibility."[36] And a number of district courts have extensively quoted the Committee Note's description that the amendments overturn the inaccurate perception that courts may defer to juries rather than decide themselves whether an expert has adequate factual foundation and reliably applied the chosen methodology.[37]

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[34] *Johnson v. Packaging Corp. of America*, 2023 WL 8649814, at *2 (M.D. La. Dec. 14, 2023). *See also Cleaver v. Transnation Title & Escrow, Inc.*, 2024 WL 3326848, at *2 (D. Idaho Jan. 29, 2024) ("the amendments are intended to correct some courts' prior, inaccurate application of Rule 702").

[35] *Harris v. Fedex Corp. Svcs., Inc.*, 92 F.4th 286, 303 (5th Cir. 2024).

[36] *Moncayo v. United Parcel Service, Inc.*, 2024 WL 461694, at *1 (2d Cir. Feb. 7, 2024).

[37] *See, e.g.*, *West v. Home Depot U.S.A., Inc.*, 2024 WL 2845988, at *3 (N.D. Ill. June 5, 2024); *Allen v. Foxway Transportation., Inc.*, 2024 WL 388133, at *3 (M.D. Pa. Feb. 1,

The 2023 amendments established a new understanding that renders obsolete a substantial number of case-law statements refusing to acknowledge an expert's factual basis as an admissibility issue. The court in *United States v. Uchendu* aptly articulated the change that Rule 702 now mandates: "questions as to the sufficiency of the basis for an expert's opinion and the application of his methodology go to admissibility rather than weight."[38]

III. RULE 702 LIMITS EXPERTS TO EXPRESSING ONLY THOSE CONCLUSIONS THAT THE METHODOLOGY CAN RELIABLY PRODUCE

Concerns surrounding expert "overstatement" have typically focused on opinions expressed in criminal cases, such as instances in which forensic experts testify to a "match."[39] Although perhaps less obvious in civil cases, experts' assertions of confidence in their conclusions' veracity also carry the potential for abuse. The Reporter to the Advisory Committee noted:

> Experts in civil cases are essentially incentivized to exaggerate their opinions. And studies have shown that the more overstated the opinion, the more it has an effect on juries. . . . Research on juries (including post-trial interviews) indicates that the greater the expert's confidence in her conclusion, the more the expert's testimony is likely to sway the jury. If this confidence is unfounded, the risk of inaccurate verdicts runs high. [40]

2024); *Ballew v. StandardAero Bus. Aviation Svcs., LLC*, 2024 WL 245803, at *4 (M.D. Fla. Jan. 23, 2024).

[38] *United States v. Uchendu*, 2024 WL 1016114, at *2 (D. Utah Mar. 8, 2024).

[39] *E.g.*, *United States v. Williams*, 506 F.3d 151 (2nd Cir. 2007) (The court found no abuse of discretion in allowing a ballistics expert to testify to a "match" despite the inability of the methodology to conclude that only the weapon at issue could produce the same marks).

[40] Capra, *supra* n. 23, at 5, 7. (citing Neal Vidmar, *Expert Evidence, the Adversary System, and the Jury*, 95 American J. of Pub. Health, S137 (2005)).

Some case examples show that courts had trouble recognizing and excluding overstatement in civil cases. For example, in *Adams v. Toyota*, the Eighth Circuit affirmed the admission of an expert's conclusion that he had "ruled out" pedal misapplication as a potential cause of a sudden acceleration accident.[41] Similarly, the court in *In re Trasylol Prod. Liab. Litig*. improperly allowed the expert to testify, on the basis of a differential diagnosis, that the use of a drug "in all medical certainty" contributed to the occurrence of a kidney injury, despite conceding "scientific unknowns."[42] But these persuasive statements of certainty in the causation conclusion do not result from any actual methodology and amount to nothing more than puffery. Such overstated expressions of confidence simply do not square with the requirement that all expert opinions must be the product of reliable principles and methods applied reliably to the facts of the case.

The Advisory Committee on Evidence Rules recognized that testimony expressed by a witness recognized to be an "expert" has the potential to mislead juries and produce unjust results unless supported by a reliable methodology and limited by the established understanding in the field of expertise. The change to the text of Rule 702(d) aims to re-focus courts on the need to regulate expert overstatements. The Committee Note provides courts

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[41] 867 F.3d 903, 916 (8th Cir. 2017).

[42] 2010 WL 8354662 (S.D. Fla. Nov. 23, 2010). Additional examples are listed in Memorandum from Daniel J. Capra, Reporter, Advisory Comm. on Evidence Rules, to Advisory Comm. on Evidence Rules, *Possible Amendments to Rule 702* (Oct. 1, 2019) at 25 *in* ADVISORY COMMITTEE ON EVIDENCE RULES OCTOBER 2019 AGENDA BOOK 131 (2019), https://tinyurl.com/5cw6n8ra.

with additional clarification:

> The amendment is especially pertinent to the testimony of forensic experts in both criminal and civil cases. Forensic experts should avoid assertions of absolute or one hundred percent certainty – or to a reasonable degree of scientific certainty – if the methodology is subjective and thus potentially prone to error. In deciding whether to admit such forensic expert testimony, the judge should (where possible) receive an estimate of the known or potential rate of error of the methodology employed, based (where appropriate) on studies that reflect how often the method produces accurate results. Expert opinion testimony regarding the weight of feature comparison evidence (i.e., evidence that a set of features corresponds between two examined items) must be limited to those inferences that can reasonably be drawn from a reliable application of the principles and methods.[43]

These revisions to the rule, coupled with the Committee Note, provide strong authority for litigants who seek to convince judges that an expert should not be allowed to claim a degree of confidence in a conclusion where doing so reflects an overstated expression of certainty. Courts have recognized, in response to the direction provided by amended Rule 702, that "each expert opinion must stay within the bounds of what can be concluded from a reliable application of the expert's basis and methodology."[44]

CONCLUSION

The 2023 Rule 702 amendments and new Committee Note are a major course correction. The Advisory Committee recommended the amendments because courts and litigants showed that they misunderstood the

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[43] Committee Note, 2023 Amendment to Federal Rule of Evidence 702.

[44] *State Automobile Mutual Insurance Co. v. Freehold Management, Inc.*, 2023 WL 8606773, at *10 (N.D. Tex. Dec. 12, 2023). *See also United States v. Graham*, 2024 WL 688256, at *14 (W.D. Va. Feb. 20, 2024); *Briscoe*, 2023 WL 8096886, at *7.

requirements of Rule 702. Amended Rule 702 displaces several problematic approaches that previously had been used habitually. Arguments for exclusion or acceptance of an expert's testimony should focus on Rule 702's admissibility criteria and whether the proponent has presented sufficient support for each element places the judge's focus where it belongs.

Judge David Campbell, former Chair of the Committee on Rules of Practice and Procedure, described how Rule 702 properly operates:

> As made clear in recent amendments to Rule 702, the proponent of expert testimony must show by a preponderance of the evidence that the proposed testimony satisfies each of the rule's requirements. The trial court—not the jury—applies this standard, acting as a gatekeeper to ensure expert testimony satisfies Rule 702[.][45]

Taking this approach properly views the admissibility determination through the prism of Rule 104(a) and avoids the temptations of imagined shortcuts or outcome preferences.

[45] *Farmers Ins. Co. of Ariz. v. DNS Auto Glass Shop LLC*, 2024 WL 1256042, at *7 (D. Ariz. Mar. 25, 2024).