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Critical Legal Issues: WORKING PAPER SERIES

THE FIRST 100 DAYS OF AMENDED FRE 702: The Good, the Bad, the Ugly, and the Next Steps

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THE FIRST 100 DAYS OF AMENDED FRE 702: The Good, the Bad, the Ugly and the Next Steps

INTRODUCTION

On December 1, 2023, amended Federal Rule of Evidence 702 became effective. The Advisory Committee's Note declares that the amendments were put into place to "clarify and emphasize" the applicable burden of proof and the admissibility criteria, and not to change the standard. Put more directly, the Rule 702 amendments have a corrective purpose: before the amendments, some courts had "failed to apply correctly the reliability requirements of that rule." In its final report to the Judicial Conference Committee on Rules of Practice and Procedure prior to adoption of the proposed amendments, the Advisory Committee identified two frequent errors that courts had been making, and that the amendments sought to remedy:

> the Committee resolved to respond to the fact that many courts have declared that the reliability requirements set forth in Rule 702(b) and (d) – that the expert has relied on sufficient facts or data and has reliably applied a reliable methodology – are questions of weight and not admissibility, and more broadly that expert testimony is presumed to be admissible. These statements misstate Rule 702, because its admissibility requirements must be established to a court by a preponderance of the evidence.

Report of the Advisory Committee on Evidence Rules to the Standing Committee on Rules of Practice and Procedure, May 15, 2022, at 6.

Now that new Rule 702 has been in effect for almost four months and has been applied in more than 100 rulings, it is appropriate to ask whether the amendments have succeeded in correcting the earlier misunderstandings. The discussion which follows will review the most notable gatekeeping decisions issued since December 1 to answer this question.

The results have been mixed. Many of the recent orders recognized the amendments' directive that courts must focus on Rule 702's admissibility criteria and must scrutinize the proposed experts' testimony using the preponderance standard. These decisions reflect proper adherence to the amendments' objective.

Other decisions, however, overlooked the new rule's specification that the court, and not the jury, must determine if the expert meets the enumerated requirements. These rulings rely on statements from prior caselaw that declare an expert's factual basis and methodological application to be "questions of weight and not admissibility," and which the Advisory Committee's Note rejected as being "an incorrect application of Rules 702 and 104(a)."

Finally, a number of orders simply ignored the most visible aspect of the amendments—bringing the preponderance standard into the text of Rule 702 itself—and instead evaluated admissibility challenges with the view that courts should decide admissibility using a different scale, one that prefers admission and reserves exclusion for exceptional situations.

With apologies to Sergio Leone, these post-amendment decisions can be categorized as "the Good, the Bad and the Ugly."

These observations about recent Rule 702 rulings then beg a further question: how should counsel adjust their litigation tactics to emphasize amended Rule 702's requirements? Several steps to focus courts' attention on the corrective nature of the amendments will be suggested.

I. THE GOOD

Many of the court orders applying amended Rule 702 in its first months have noted the revisions and followed the gatekeeping approach directed by the clarifications. Acknowledging the overall intended effect of the rule change, several decisions explicitly recognize that courts must take an active role in considering and ultimately deciding if an expert has met the admission requirements. The effect is that courts are "required to analyze the expert's data and methodology at the admissibility stage more critically than in the past." *Boyer v. Citi of Simi Valley*, 2024 WL 993316, at *1 (C.D. Cal. Feb. 13, 2024). As an MDL court addressing general causation opinions observed, new Rule 702 "emphasize[s]" the "essential" role of "judicial gatekeeping" to prevent jurors from becoming misled by opinion testimony that "go[es] beyond what the expert's basis and methodology may reliably support." *In re Acetaminophen – ASD – ADHD Prods. Liab. Litig.*, 2023 WL 8711617, at *16, n.27 (S.D.N.Y. Dec. 18, 2023) (quoting Advisory Committee Note).

By clarifying that the criteria set forth in Rule 702 present questions for the court to answer, the rule changes sweep away any uncertainty about judges' responsibility and "empower courts to fulfill their gatekeeping obligation[.]" *United States v. Briscoe*, ___ F.Supp.3d ___, 2023 WL 8096886, at *12 (D.N.M. Nov. 21, 2023). In one of the first appellate cases to address the amended rule, the Sixth Circuit was blunt about trial judges' obligation to use the steps set out in Rule 702 to screen out deficient expert testimony: "district courts may allow juries to evaluate and weigh ***only*** relevant and reliable expert testimony." *In re Onglyza Prods. Liab. Litig.*, 93 F.4th 339, 348 (6th Cir. 2024) (emphasis original).

Courts that grasped the purpose of the amendments understood that some judges must overcome their reluctance to view experts' factual basis and application as admissibility considerations. Several courts extensively quoted the Advisory 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. *See, e.g.*, *Allen v. Foxway Transportation., Inc.*, 2024 WL 388133, at *3 (M.D. Pa. Feb. 1, 2024); *Ballew v. StandardAero Bus. Aviation Svcs., LLC*, 2024 WL 245,803, at *4 (M.D. Fla. Jan. 23, 2024); *Johnson v. Packaging Corp. of Amer.*, 2023 WL 8649814, at *2 (M.D. La. Dec. 14, 2023). As one court aptly summarized, "the amendments are intended to correct some courts' prior, inaccurate application of Rule 702." *Cleaver v.*

Transnation Title & Escrow, Inc., 2024 WL 3326848, at *2 (D. Idaho Jan. 29, 2024). Consistent with that understanding, the court in *United States v. Uchendu* boldly declared that the characterization set forth in many pre-amendment decisions and explicitly rejected by the Advisory Committee must be flipped: "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." 2024 WL 1016114, at *2 (D. Utah Mar. 8, 2024).

The amendments' key correction is that courts must use the preponderance-of-proof standard to determine if the proponent has fulfilled each element of Rule 702. Rulings have reflected this directive. *See*, *e.g.*, *Greene v. Ledvance LLC*, 2023 WL 8635246, at *7 n.1 (E.D. Tenn. Dec. 13, 2023) (quoting Advisory Committee Note statement that "the amendment clarifies that the preponderance standard applies to the three reliability-based requirements added in 2000–requirements that many courts have incorrectly determined to be governed by the more permissive Rule 104(b) standard."). This focus on applying the preponderance standard to all provisions of Rule 702 led a number of courts to loudly reject arguments that an expert's factual foundation "goe[s] to the weight or credibility" of the testimony; instead, exclusion is proper where the proponent "has not sufficiently established that [the] testimony is based on sufficient data." *Boyer v. Citi of Simi Valley*, 2024 WL 993316, at *2 (C.D. Cal. Feb. 13, 2024); *see also McKee v. Chubb Lloyds Ins. Co.*, 2024 WL 1055122, at *5 (W.D. Tex. Mar. 11, 2024) (excluding

opinions "unsupported by sufficient facts or data to ensure the Court of their reliability."); *Greene*, 2023 WL 8635246, at *12 (ruling opinion inadmissible where the expert did "not provide a factual foundation for his opinion").

Recognizing that Rule 702(b)'s requirement of a sufficient factual basis constitutes an admissibility criterion, the Fifth Circuit observed that a district court "abdicated its role as gatekeeper" when it allowed an expert to testify "without a proper foundation." *Harris v. Fedex Corp. Svcs., Inc.*, 92 F.4th 286, 303 (5th Cir. 2024). 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." *Moncayo v. United Parcel Service, Inc.*, 2024 WL 461694, at *1 (2d Cir. Feb. 7, 2024).

Courts that understand the amendments' purpose have also given new vitality to Rule 702(d) as a basis for excluding an expert if the proponent has not shown by a preponderance of proof that the expert reliably applied the methodology. *See, e.g., In re Acetaminophen*, 2023 WL 8711617, at *35 (ruling causation opinions inadmissible because "deficiencies demonstrate that his opinion does not 'reflect[] a reliable application of the principles and methods to the facts of the case.' Fed. R. Evid.702[(d)]."). If the sponsoring party does not "demonstrate" that the expert's methodology is "properly applied to the facts of the case," then exclusion is the necessary outcome under amended Rule 702. *Burdess v. Cottrell, Inc.*, 2024 WL 864127, at *5 - *6 (E.D. Mo. Feb.

29, 2024). Even opinions based on well-recognized methodologies are properly excluded if the court does not conclude that the expert reliably applied the methodology to the facts and circumstances at issue. So invoking the differential-diagnosis methodology was not adequate to overcome an admissibility challenge where the plaintiffs "have not met their burden to establish" that the expert "reliably linked" plaintiffs' alleged exposure to health conditions subsequently experienced. *Leakas v. Monterey Bay Military Housing, LLC*, 2024 WL 496992, at *7 (N.D. Cal. Feb. 8, 2024). And even when an expert states that he employed the Bradford Hill methodology for determining general causation, district courts nonetheless have "an independent duty to ensure that all experts 'reliably applied' Bradford Hill" and properly exclude the testimony where there are "grounds to find that [an expert] had not reliably applied Bradford Hill." *In re Onglyza*, 93 F.4th at 347.

In sum, although the 2023 amendments did not make substantive revisions to Rule 702's admissibility standard, the changes require district courts "to analyze the expert's data and methodology at the admissibility stage more critically than in the past." *Boyer*, 2024 WL 993316, at *1; *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*, ___ F.Supp.3d ___, 2023 WL 8096886, at *12 (D.N.M. Nov. 21, 2023) ("in keeping with the proposed amendments to Rule 702, the Court

takes its gatekeeping role seriously."). To 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. *McKee*, 2024 WL 1055122, at *6. Courts 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. *Zaragoza v. Cty. of Riverside*, 2024 WL 663235, at *4 (C.D. Cal. Jan. 18, 2024). District courts cannot defer these considerations to juries and depend on the power of "vigorous cross-examination" to dispel the impact of unreliable opinion testimony. *Briscoe*, 2023 WL 8096886, at *4.

II. THE BAD

In contrast to those courts that have followed the Advisory Committee's guidance and brought their gatekeeping practices in line with the intent of the amendments, a substantial number of courts continue to follow that body of erroneous but "extensive caselaw holding that issues related to the factual basis of an expert's opinion go to credibility of the testimony as opposed to its admissibility." *Garcia-Insausti v. United States*, 2024 WL 531270, at *4 (D.P.R. Feb. 8, 2024). Despite the text of Rule 702(b), some courts persist in concluding that "questioning the factual underpinnings" of an expert's opinions only addresses "the weight and credibility of the witness' assessment, not its admissibility." *BAE Systems Norfolk Ship Repair, inc. v. United States*, 2024 WL 1057773, at *4 (E.D. Va. Feb. 23, 2024); *see also Sher v. Amica Mut.*

Ins. Co., 2024 WL 1090588, at *4 (D. Colo. Mar. 8, 2024) ("Although defendant's criticisms suggest challenges to the sufficiency of [the expert's] data and/or assumptions, they do not address [the expert's] methodology or its application of such methodology to the data, and thus go to the weight, rather than the admissibility, of [the expert's] opinions."). Troublingly, even the First Circuit gave some support to this perspective. Although it ultimately affirmed an expert's exclusion, the First Circuit suggested that there was "some force" to the argument that a district court erred in excluding opinion testimony "because it wrongly based the ruling on its own assessment of the factual underpinning of the opinion," rather than viewing factual foundation as merely a "matter affecting the weight and credibility of the testimony[.]" *Rodriguez v. Hospital San Cristobal, Inc.*, 91 F.4th 59, 71-72 (1st Cir. 2024).

District courts in the Fifth and Eighth Circuits were more likely than courts in other circuits to issue decisions that fail to observe Rule 702(b)'s establishment of an admissibility requirement that courts must determine. This preference for a pre-amendment approach is not surprising given how those circuits have historically addressed expert evidence.

In 1987, more than five years prior to the Supreme Court's decision in *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993), and thirteen years before the 2000 amendment that established Rule 702(b), the Eighth Circuit announced its "general rule" that "the factual basis of an expert opinion goes to the credibility of the testimony, not the admissibility." *Loudermill v. Dow*

Chem. Co., 863 F.2d 566, 570 (8th Cir. 1988). Courts in the Eighth Circuit have quoted and followed this statement despite the amendment. *See*, *e.g.*, *Regents of the Univ. of Minnesota v. AT&T Mobility Inc.*, 2024 WL 844579, at *2, *8 (D. Minn. Feb 28, 2024); *Lindt & Sprungli (N. Amer.), Inc. v. GXO Warehouse Co.*, 2024 WL 893409, at *1, *4 (W.D. Mo. Feb. 23, 2024); *Kuecker Log. Grp., Inc. v. Greater Omaha Packing Co.*, 2024 WL 149839, at *6, *13 (D. Neb. Jan. 12, 2024) (all reiterating and applying *Loudermill* language to overrule objection to expert). *Loudermill* and its progeny have even misled district courts in other circuits to ignore Rule 702(b). *See McKeon v. Bank of Amer.*, 2024 WL 810023, at *3 (D. Colo. Feb. 27, 2024); *Martin v. Hannu*, 2024 WL 139939, at *3 (D. Or. Jan. 12, 2024) (both quoting referenced *Loudermill* statement). In a decision with remarkable internal inconsistency, one court followed the *Loudermill* approach even after quoting the entire 2023 Advisory Committee Note, including the Note's description that such rulings reflect "an incorrect application of Rule 702 and 104(a)." *Blue Buffalo Co., v. Wilbur-Ellis Co.*, 2024 WL 111712, at *1 -*3, *5 (E.D. Mo. Jan. 10, 2024). Old habits apparently die hard, even in the face of explicit rejection.

A number of courts in the Fifth Circuit have followed a similarly problematic pathway. In its 1987 decision, *Viterbo v. Dow Chem. Co.*, the Fifth Circuit declared its own "general rule" that closely parallels the *Loudermill* pronouncement: "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 should be left for the jury's consideration." 826 F.2d 420, 422 (5th Cir. 1987). Several district courts within the Fifth Circuit have continued to quote and follow this outdated direction even after adoption of the corrective Rule 702 amendments. *See, e.g.*, *Certain Underwriters at Lloyd's, London v. Covington Flooring Co.*, 2024 WL 1006004, at *4 - *5 (E.D. La. Mar. 8, 2024); *Jackson v. State Farm Fire & Cas. Co.*, 2024 WL 965613, at *12 (S.D. Miss. Mar. 6, 2024); *Buttross v. Great Lakes Ins. SE*, 2024 WL 50421, at *3 - *5 (N.D. Tex. Jan. 4, 2024) (all quoting and applying *Viterbo* statement to reject admissibility challenge). The Fifth Circuit's recent opinion in *Harris*, however, has forced some courts to reconsider this approach and instead exclude opinions that "lack proper foundation" because "an expert's testimony must be based on sufficient facts or data." *Nehal LLC v. Accelerant Spec. Ins. Co.*, 2024 WL 1134967, at *3 (W.D. Tex. Feb. 29, 2024) (citing *Harris*). Such reminders that Rule 702 itself sets the requirements for courts' gatekeeping role are useful to remedy the misunderstandings that have arisen from outdated cases.

To be sure, decisions that rely on these assertions from cases like *Loudermill* and *Viterbo* improperly elevate pre-amendment judicial opinions above Rule 702. Prior to adoption of the 2023 amendments there might have been an arguable basis for confusion about what authority to follow, but at this point there is no justification for committing the error of following caselaw that incorrectly states the standard. The Rules Enabling Act empowers the U.S.

Supreme Court to prescribe "rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals." 28 U.S.C. § 2072(a). As a rule of evidence that has now been adopted pursuant to the Rules Enabling Act, Rule 702 in its current form 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." 28 U.S.C. § 2072(b).

Further, the Advisory Committee's intent to relegate the "general rules" of *Loudermill* and *Viterbo* to the trash can of judicial history is unmistakable. As previously observed, the Advisory Committee Note declares such rulings to be "an incorrect application of Rules 702 and 104(a)" and to have been "incorrectly determined[.]" Late in the rulemaking process, the Advisory Committee also added the explicit reference to "the court" to the text of Rule 702 for the very purpose of eliminating any possible misunderstanding about the identity of the decisionmaker:

> The Committee was also convinced by the suggestion in the public comment that the rule should clarify that it is the court and not the jury that must decide whether it is more likely than not that the reliability requirements of the rule have been met. Therefore, the Committee unanimously agreed with a change requiring that the proponent establish "***to the court***" that it is more likely than not that the reliability requirements have been met.

Report of the Advisory Committee on Evidence Rules to the Standing Committee on Rules of Practice and Procedure, May 15, 2022, at 7 (emphasis original).

Thus, as Judge Schroder, the Chair of the Advisory Committee's Subcommittee on Rule 702 wrote, "the elements of Rule 702, not the caselaw, are the starting point for the requirements of admissibility." Thomas D. Schroeder, *Toward a More Apparent Approach to Considering the Admission of Expert Testimony*, 95 NOTRE DAME L. REV. 2039, 2060 (2020). The elements listed in Rule 702 unquestionably set forth admissibility criteria subject to judicial assessment, and each provides an independent basis for excluding the expert.

III. THE UGLY

Some courts have overlooked or misapplied even the most basic aspects of the 2023 amendments. Most egregiously, a number of judges have continued to apply the outdated version of Rule 702 and failed even to recognize that the amendments became effective on December 1, 2023. *See*, *e.g.*, *Taylor v. Garrett*, 2024 WL 1177744, at *1 - *2 (C.D. Ill. Mar. 19, 2024; *McKeon*, 2024 WL 810023, at *1 - *2; *Fort Worth Partners, LLC v. Nilfisk, Inc.*, 2024 WL 734527, at * 4 (Feb. 22, 2024) (all quoting and applying prior version of Rule 702 with no acknowledgment of 2023 amendment).

Beyond recognition that the amendments have occurred, perhaps the most unmistakable feature of the revisions is the emphasis on the preponderance standard—the "more likely than not" test for assessing the admissibility criteria was added to the text of the rule itself and is highlighted in the very first sentence of the Advisory Committee's Note. But despite the

spotlight on this clarification that courts must decide if the proponent has demonstrated by a preponderance of proof that the expert has met each of the requirements, a number of courts nonetheless still state that Rule 702 prefers admission over exclusion and apply that perspective to gatekeeping decisions.

Courts described this perceived outcome preference in several ways. Most directly, and most problematically, some judges declared that Rule 702 "favors admission over exclusion." *Blue Buffalo,* 2024 WL 111712, at *4. In this mistaken conception, "[t]he rule presents a high bar, and the Court is to resolve disputes in favor of admission." *Regents of the Univ. of Minnesota*, 2024 WL 844579, at *8; *see also United States v. .55 Acres of Land*, 2024 WL 960941, at *3 (E.D. Mo. Mar. 6, 2024) (any doubt "should generally be resolved in favor of admissibility"); *United States v. Dyncorp. Int'l LLC*, 2024 WL 604923, at *3 (D.D.C. Jan. 25, 2024) (In general, Rule 702 has been interpreted to favor admissibility."). Similarly, some judges bring to their Rule 702 gatekeeping the expectation that "rejection of expert testimony is the exception rather than the rule." *Sher*, 2024 WL 1090588, at *3; *United States v. G&C Fab-Con, LLC*, 2024 WL 624040, at *8 (D.N.J. Feb. 14, 2024). Notably, this perspective draws on a statement from the Advisory Committee's Note to the 2000 amendments that made a historical observation about the relative frequency of expert exclusions, rather than voicing an outcome preference for Rule 702.

Some courts simply replaced the preponderance standard with a different, much lower admissibility threshold. For instance, "the role of the Court" is to ensure "that [the expert's] opinion is not based on unsupported speculation." *Blackburn v. United States*, 2024 WL 643137, at *5 (E.D. Ky. Feb. 15, 2024). Or, "[a]n expert should be excluded only if there are serious flaws in reasoning or methodology." *Access Bus. Grp. Int'l, LLC*, 2023 WL 8280139, at *2 (S.D.N.Y. Nov. 30, 2023). Perhaps the most frequently repeated alternative to the preponderance standard asserts that "[u]nder Rule 702, the Court's responsibility is to exclude evidence that is so fundamentally unsupported that it will not be useful to the jury." *Regents of the Univ. of Minnesota*, 2024 WL 844579, at *8; *see also Blue Buffalo,* 2024 WL 111712, at *4 ("The exclusion of expert testimony is proper only if it is so fundamentally unsupported that it can offer no assistance to the jury.").

The conflict between outcome preferences signaled by caselaw and the neutral, preponderance-driven analysis directed by Rule 702 has confused some courts into bewilderment. For instance, in *Sprafka v. Medical Device Business Services*, the court acknowledged the 2023 amendments, including that they "intended to clarify that preponderance of the evidence standard applies to expert opinions under this rule." 2024 WL 1269226, at *2 (D. Minn. Mar. 26, 2024). Yet the court still declared, on the authority of a 23-year-old opinion, that Rule 702 "favors admissibility over exclusion" and for good measure reiterated the *Loudermill* "general rule" that an expert's factual basis

"goes to the credibility of the testimony, not the admissibility[.]" *Id.* (citing *Lauzon v. Seneca Prods., Inc.*, 270 F.3d 681, 686 (8th Cir. 2001) and quoting *Bonner v. ISP Techs., Inc.*, 259 F.3d 924, 929-30 (8th Cir. 2001)). This court ultimately excluded the testimony because the plaintiff "has not shown by a preponderance of the evidence the reliability of [the expert's] opinion[,]" *id.* at *6, but it is impossible to discern how the court reconciled the contradictory standards when reaching this conclusion.

Statements that Rule 702 favors an expert's admission or depends on meeting a lenient threshold distinct from the preponderance standard plainly misconceive how the gatekeeping function operates. In fact, the 2023 amendments are directly aimed at correcting this misunderstanding. Discussing its motivation for adding the words "if the proponent demonstrates to the court that it is more likely than not" to the text of the rule, the Advisory Committee

> resolved to respond to the fact that many courts have declared . . . that expert testimony is presumed to be admissible. These statements misstate Rule 702, because its admissibility requirements must be established to a court by a preponderance of the evidence.

Report of the Advisory Committee on Evidence Rules to the Standing Committee on Rules of Practice and Procedure, May 15, 2022, at 6.

There is nothing tricky about the preponderance test, and there are no magic decoders hidden away in pre-amendment judicial opinions. Contrary to the approach followed by some courts, certain arguments for excluding an

expert cannot be brushed aside as being, by their nature, "simply challenges [to] the credibility and weight to be given" to the opinion. *See McGinley v. Lun N' Care, Ltd.*, 2024 WL 58291, at *2 (W.D. La. Jan. 4, 2024). Preponderance places the burden of production squarely on the expert's sponsor. It does not require, as one court incorrectly suggested, that the party seeking exclusion must convince the court that "[the expert's] methodology is not reliable." *Samuel Stamping Tech., LLC v. Therma-Tru Corp.*, 2024 WL 669707, at *2 (N.D. Ohio Feb. 19, 2024). Instead, if the proponent fails to demonstrate to the court by a preponderance of proof that the expert has a sufficient factual basis, employed a reliable methodology, and reliably applied that methodology to the facts of the case, then Rule 702 directs exclusion. *See*, *e.g.*, *Exafer Ltd. v. Microsoft Corp.*, ___ F.Supp.3d ___, 2024 WL 1087374, at *3 (W.D. Tex. Mar. 7, 2024) ("Exafer has failed to meet its burden to show that [the expert's] damages theory is based on a sufficiently reliable methodology such that it should go before a jury."); *Boyer*, 2024 WL 993316, at *2 ("Because Plaintiff has not sufficiently established that either [experts'] testimony is based on sufficient data and is the product of reliable principles and methods, the Court finds that Plaintiff has not met his burden of establishing that Rule 702's requirements have been met."). Alternatively, if the proponent establishes that, more likely than not, the expert has fulfilled Rule 702's requirements, then the court may allow admission. *See*, *e.g.*, *North Dakota v. United States*, 2024 WL 7708864, at *5 (Feb. 8, 2024) (The expert's "opinions are, by a

preponderance of the evidence, admissible under Rule 702.").

IV. THE NEXT STEPS

Courts have reacted very inconsistently over the first 100 days in which new Rule 702 has been effective. Although many judges have conformed to the requirements of the revised rule, a significant number of rulings reveal errors which indicate ongoing confusion about the gatekeeping process.

To help courts overcome their misunderstandings, there are a number of actions that counsel involved in expert admissibility challenges can take to align motion practice with amended Rule 702 and the purposes underlying its adoption. First, because some courts do not recognize that the rule has changed, pointing out that Rule 702 was changed as of December 1, 2023 is useful.

Next, counsel should go beyond simply describing the revisions; they should also discuss the corrective purposes that motivated the amendments. This action is particularly important in courts that have a history of overlooking Rule 702(b) and (d) as admissibility considerations or employing outcome preferences. Some courts believe that because the amendments did not substantively alter the admissibility standard, they may continue to follow the same erroneous approach they used prior to the rule change. *See*, *e.g.*, *Blue Buffalo,* 2024 WL 111712, at *3, n.1 ("Given that the Eighth Circuit already applied the preponderance of the evidence standard to determine the admissibility of expert testimony, . . ., the Court sees no conflict in this line of

authority and Rule 702 as amended and will continue to apply it as the binding law of this Circuit."). Of course, as the Advisory Committee's Note confirms, the amendments became necessary because "many courts" had issued rulings that manifested "incorrect application of Rules 702 and 104(a)," and so ongoing reliance on erroneous caselaw simply perpetuates the problem that the amendments were intended to fix. *See also* Report of the Advisory Committee on Evidence Rules to the Standing Committee on Rules of Practice and Procedure, May 15, 2022, at 7 ("incorporating the preponderance standard into the text of Rule 702 was made necessary by the decisions that have failed to apply it to the reliability requirements of Rule 702."). Presenting courts with statements from the Advisory Committee's Note and the May 15, 2022 Report to the Standing Committee that discuss the flawed judicial understandings that required correction by the 2023 amendments should prove useful.

Third, counsel should center their arguments on the rule itself. Rule 702, not caselaw (not even *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993)), establishes the governing admissibility standard and courts' gatekeeping obligations. Accordingly, discussion of caselaw—and particularly pre-amendment rulings—should be minimized. Structuring arguments for exclusion or acceptance of an expert's testimony 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 Campbell, former

Chair of the Committee on Rules of Practice and Procedure, described exactly this approach as reflecting 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[.]

Farmers Ins., 2024 WL 1256042, at *7. Taking this approach allows the judge to view the admissibility determination through the prism of Rule 104(a) and avoid the tempting shortcuts of imagined outcome preferences.

Put simply, if revised Rule 702 is to achieve its reformative potential, litigants need to approach application of the rule differently and convince the courts that the amendments make a difference.

