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Dawn R. Tezino
Partner
dtezino@kuchlerpolk.com
Admitted in TX, LA and AR

Via E-Mail: *RulesCommittee_Secretary@ao.uscourts.gov*

Rebecca A. Womeldorf, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, D.C. 20544

RE: Proposed Amendments to Federal. R. Evid. 702 Commentary

Dear Committee Members:

We understand that your committee is considering a Rule 702 amendment to clarify that sufficiency of an expert's opinion testimony is a threshold issue for the court rather than a question of weight to be decided by the jury. Confusion on that point is widespread among federal courts, and a review of inconsistent rulings within the Fifth Circuit alone underscores that revisions are badly needed to bring clarity to the law. Absent such clarification, practitioners face ongoing uncertainty and unpredictability concerning key admissibility determinations as they prepare evidence for trial. Please allow this comment to be considered in your analysis:

I. The language of and comments to Rule 702 require trial courts to determine the sufficiency of an expert's testimony as a threshold question of admissibility.

Rule 702 requires, as a prerequisite to the admission of expert testimony, that "the testimony is based on sufficient facts or data." Fed. R. Evid. 702(b). The 2000 comments to Rule 702 underscore that courts "must" assess factual basis as a component of reliability: "The amendment affirms the trial court's role as gatekeeper and provides some general standards that the trial court must use to assess the reliability and helpfulness of proffered expert testimony." Fed. R. Evid. 702, 2000 comments. The burden of demonstrating a sufficient factual basis for expert testimony, moreover, is placed squarely on its proponent: "[T]he 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)." Fed. R. Evid. 702, 2000 comments.

II. The Fifth Circuit has provided conflicting directives about the trial court's role in resolving challenges to the sufficiency of an expert's testimony.

Notwithstanding the language of Rule 702 and associated comments, practitioners are faced with conflicting directives from the Fifth Circuit. On the one hand, the Fifth Circuit has recognized that "an opinion based on 'insufficient, erroneous information,' fails the reliability standard." *Moore v. Int'l Paint, L.L.C.*, 547 F. App'x 513, 151 (5th Cir. 2013) (quoting *Paz v. Brush Engineered Materials, Inc.*, 555 F.3d 383, 389 (5th Cir. 2009)). "The existence of sufficient facts and a reliable methodology is in all instances mandatory." *Hathaway v. Bazany*, 507 F.3d 312, 318 (5th Cir. 2007). Thus, as required by the language of Rule 702, challenges to the factual basis for an expert's testimony are to be decided by the trial court as a threshold to admissibility.

On the other hand, however, the Fifth Circuit Court of Appeals has also stated:

> As a general rule, questions relating to the bases and sources of an expert's opinion affect the weight to be assigned that opinion rather than its admissibility… As the Supreme Court explained, "[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." *Daubert*, 509 U.S. at 596, 113 S.Ct. 2786; *see also Mathis v. Exxon Corp.*, 302 F.3d 448, 461 (5th Cir. 2002). While the district court must act as a gatekeeper to exclude all irrelevant and unreliable expert testimony, "the rejection of expert testimony is the exception rather than the rule." Fed. R. Evid. 702 advisory committee's notes (2000) (internal citations omitted).

Puga v. RCX Solutions, Inc., 922 F.3d 285, 294 (5th Cir. 2019).

Lacking clear guidance, the generalities stated in *Puga* have paved the way for many district courts within the Fifth Circuit to by-pass the requisite Rule 702 inquiry concerning (i) the factual basis for expert testimony, and (ii) whether the methodology has been reliably applied. These decisions reflect widespread confusion about the proper inquiry under Rule 702.

III. District courts have declined to conduct a Rule 702 inquiry into the factual basis of expert testimony.

Rule 702 states that trial courts must determine whether an expert's testimony is based on "sufficient facts and data." Nonetheless, courts have passed reliability questions on to juries without resolving a requisite threshold inquiry for the court: whether the underlying testimony is based on sufficient facts and data. Courts have deferred that question to the jury based on a mistaken belief that the "bases and sources" of expert testimony go to its weight rather than its admissibility:

- A Texas federal district court declined to resolve objections that an expert had "no support" for his opinions, and that use of and reliance on particular data inputs "rendered his opinions unreliable and speculative." According to the court, whether the expert used "arbitrary inputs" was "an issue for trial." *Innovation Sciences, LLC v. Amazon.com, Inc.*, Civ. No. 4:18-cv-474, 2020 WL 4201925, *8 (E.D. Tex. Jul. 22, 2020)

(quotation omitted). The court also stated that even "[i]f the underlying reasoning" for the expert's methodology was "flawed, absurd, or even irrational," nonetheless "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof' will serve as the proper antidote for attacking these potentially 'shaky' arguments." *Id.* And even if the expert's "claims are as unsupported or conclusory as [Defendants] claim[ ], then 'vigorous cross examination' will reveal that." *Id.*

- A district court in Louisiana held that: "To the extent [the defendant] questions otherwise the content of and support for [an expert's] report, including the bases and sources of his opinions, [the defendant] can address its concerns at trial through cross-examination of [the expert] and the presentation of countervailing testimony, as those issues go to the weight, not the admissibility, of [the expert's] testimony." *Compton v. Moncla Companies, LLC,* Civ. No. 17-2258, 2020 WL 1638287, *4 (E.D. La. Apr. 2, 2020).

- Another court declined to address an objection that the expert's damages assessment included improper assumptions and ignored key facts, stating that: "If [the expert] missed any important facts, the oversight should go to the weight of his opinions, not to their admissibility." *United States v. City of Houston, Texas,* Civ. No. H-18-0644, 2020 WL 2516603, *12 (S.D. Tex. May 15, 2020).

IV. District courts have declined to conduct a Rule 702 analysis into methodological gaps in expert testimony.

Under Rule 702, "the trial court must scrutinize not only the principles and methods used by the expert, but also whether those principles and methods have been properly applied to the facts of the case. As the court noted in *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 745 (3d Cir. 1994), "any step that renders the analysis unreliable ... renders the expert's testimony inadmissible. This is true whether the step completely changes a reliable methodology or merely misapplies that methodology." Fed. R. Evid. 702, 2000 Comment.

Nonetheless, federal district courts within the Fifth Circuit have characterized methodological challenges to gaps in expert testimony as matters of weight that may properly be deferred to the jury:

- Citing the Fifth Circuit's decision in *Puga*, a Texas federal district court permitted expert testimony over an objection that the expert failed to explain how each of his four premises validated his conclusion, and therefore that an analytical gap existed between the premises and the conclusion. "[W]hether [the expert's] testimony is supported by his premises is a question that should be determined by a jury because it attacks the weight of his testimony. The exclusion of expert testimony is the exception rather than the rule. *Puga v. RCX Sols., Inc.*, 922 F.3d 285 (5th Cir. 2019). Because the admissibility is not in question, the Court finds no reason to depart from the general rule of allowance." *Citizens State Bank v. Leslie,* Civ. No. 6-18-CV-00237, 2020 WL 3582665 (W.D. Tex. Apr. 9, 2020).

- Another Texas federal district court declined to address an objection that an expert did not "sufficiently explain the connection between her experience and her conclusions," concluding that the matter was "better left for cross examination, not a basis for exclusion." *AmGuard Insurance Companegal Aid*, 2020 WL 60247, *7, 111 Fed. R. Evid. Serv. 279 (S.D. Tex. Jan. 6, 2020). The 2000 comments to Rule 702, in contrast, specifically state: "If the witness is relying solely or primarily on experience, then the witness must explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts. The trial court's gatekeeping function requires more than simply 'taking the expert's word for it.'"

- A Louisiana federal district court declined to substantively address an objection that an expert's lost wages assessment was "not the product of reliable principles and methods and is based on unsupported assumptions and incorrect facts and data," characterizing the objection as an attack on the "basis and sources" of the expert's calculations and concluding that, as such, it went to weight rather than admissibility. *Janania v. Old Republic Insurance Co.*, Civ. No.19-12773, 2020 WL 4500160, *8 (2020).

- A Mississippi federal district court rejected an argument that the expert's opinions were based on nothing more than unsupported ipse dixit, stating simply: "[The expert] cited some basis for his opinions. Therefore, they are not wholly unreliable." *John C. Nelson Construction, LLC v. Britt, Peters and Associates, Inc.*, Civ. No. 2:18-CV-222, 2020 WL 2027218, *5 (S.D. Miss. Apr. 27, 2020).

V. Examples of Unsatisfactory Rule 702 analysis

Example 1

In an asbestos exposure matter, the Court refused to limit the expansive opinions of plaintiff's proffered "Insulation Expert" based on a lack of qualifications and inadequate methodology. The proffered expert had a high school diploma and his sole relevant experience was (1) working as an insulator in shipyards for the majority of his working career; and (2) working as a California Certified Asbestos Consultant, which advises construction companies on issues relating to asbestos remediation in building materials. Despite being tendered as an "insulation expert," the witness offered opinions regarding the asbestos content of a host of products with which the plaintiff worked, including automotive brakes, clutches, engine gaskets, materials with which he has no relevant personal or professional experience. In addition, he offered opinions regarding the ability of these products to release respirable asbestos fibers when subjected to manipulation. To support these opinions, the expert testified that he performed various at-home "tests" on these products, but that he failed to keep records of these tests, including the testing protocol, or the results of the test. He was also unable to describe the methodology he employed in conducting his tests or measuring fiber release during the tests. The expert testified that he specifically does not rely on peer reviewed literature regarding fiber release, and instead relies on his own at-home tests.

We sought to limit the expert's testimony to matters on which he possessed the requisite training and experience, which were insulation and building materials, and excluding the expert's opinions relating to automotive products, with which he had no experience. We also sought to exclude the expert's reliance on his at-home "tests." After entertaining argument and acknowledging that the expert lacked the requisite training and experience with automotive products, the Court denied the motion and instructed the parties to raise it again after void dire on qualifications during the course of the trial.

Example 2

In another asbestos exposure case, the Court refused to exclude the testimony of an expert industrial hygienist regarding estimates of asbestos exposure a claimant received from various activities at our client's facility. The industrial hygienist relied on five studies approximating asbestos exposure from various activities involving insulation products, including cutting with a saw, tearing with a hammer, and mixing dry cement. Unfortunately, the evidence in the case failed to support a contention that any of these activities occurred at our client's facility, whether in the presence of the claimant or not. In fact, the available evidence indicated that at least some of these activities affirmatively did not occur. We filed a motion to exclude the expert's opinions as having been based on an inadequate foundation and contradictory to the available evidence.

The Court entertained extensive argument from us on the motion, agreeing with the fundamental premises of the motion that the studies relied upon by the expert were inapplicable to the case. After we completed our argument, the Court announced that the motion would be denied, without explanation and without ever hearing from plaintiff's counsel.

Conclusion

As these cases demonstrate, there is widespread confusion among federal courts about the proper role of courts in assessing the basis for an expert's testimony and the reliable application of the expert's methodology. Resulting inconsistencies in the case law all but assure that proper challenges to expert testimony under Rule 702 will nonetheless be characterized as matters of "weight and sufficiency" that the trial court need not address. In turn, divergent court rulings make it difficult if not impossible to predict the likelihood that such challenges will succeed. As a consequence, parties face not only increased costs associated with arguing matters that should be well-settled based on the language of Rule 202, but more importantly decreased certainty about threshold admissibility questions as they prepare evidence to support their claims and defenses for trial.

We appreciate your consideration of this comment and look forward to the results of your committee's final recommendation.

Respectfully submitted,
KUCHLER POLK WEINER LLC

By: */s/ Dawn R. Tezino*
Dawn R. Tezino