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Amended Fed. R. Evid. 702 – Progress and Precedent

By James M. Beck

It is incumbent on defendants to use the 2023 amendments to Rule 702 to win real cases and to overturn prior, "incorrect" applications of the Rule...

In a major defense win, the amendments strengthening Fed. R. Evid. 702 took effect on December 1, 2023. The precise changes are reflected with new language in italics and deleted language struck out:

Rule 702: Testimony by Expert Witnesses

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 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 expert's opinion reflects a reliable application of* the principles and methods to the facts of the case.

These changes: (1) include the proponent's burden of proof (preponderance) in the language of the rule itself; (2) specify that "the court" – not a jury – must determine that all four of the substantive criteria for expert admissibility are satisfied; and (3) specify that the judicial gatekeeping function includes ensuring that expert testimony reliably applies the expert's "principles and methods" to the case-specific facts.

These 2023 amendments occurred because the federal judiciary's Civil Rules Committee, believed that many of their judicial colleagues were misapplying the prior (2000) version of Rule 702, and explicitly said so in the commentary to these amendments.

First, the Rules Committee saw fit to "emphasize" both the judicial gatekeeping function and the concomitant burden of proof on proponents of expert opinion. "[E]xpert 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." Committee Note to 2023 Amendments at (1).

Second, too many courts were getting Rule 702 wrong, particularly as to its "reliability requirements":

> The Committee concluded that emphasizing the preponderance standard in Rule 702 specifically was made necessary by the courts that have ***failed to apply correctly*** the reliability requirements of that rule.

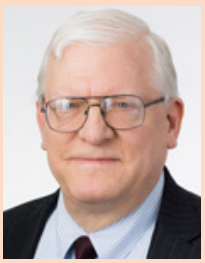
Id. (emphasis added).

Third, no "presumption" in favor of admissibility exists under Rule 702. Excusing the proponent from having to prove each of the Rule's four elements was "incorrect":

> 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. But it remains the case that other admissibility requirements in the rule (such as that the expert must be qualified and the expert's testimony must help the trier of fact) are governed by the Rule 104(a) standard as well.
>
> Id. (emphasis added).

Specifically, courts applying the previous formulation of Rule 702 were "incorrectly" admitting experts under a "weight not admissibility" rationale far more frequently than the Rule's text allowed – particularly as to opinions lacking an adequate basis in fact to support experts' use of what are, in general, accepted methodologies:

> [M]any courts have held that the critical questions of the sufficiency of an expert's basis, and the application of



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> the expert's methodology, are questions of weight and not admissibility. ***These rulings are an incorrect application*** of Rules 702 and 104(a).

Id. (emphasis added). While the Rules Committee elected not to criticize particular decisions by name, the final "Memorandum" that the Committee's Reporter submitted prior to final adoption of the 2023 amendments listed the following "statements, made by some courts in the past" as "not supportable" and "certainly incorrect":

- "There is a presumption in favor of admitting expert testimony."
- "The sufficiency of facts or data supporting an expert opinion is a question for the jury, not the court."
- "Whether the expert has properly applied the methodology is a question for the jury, not the court."
- "The Federal Rules of Evidence establish a liberal thrust in favor of expert testimony."

"Under the amendment, it is quite clear that the statements above are wrong as a simple matter of textual analysis." Advisory Committee on Evidence Rules, May 6, 2022 Agenda Book, at pp. 148-49 (Tab 4A). This concern over judicial errors also led to the amendment to Rule 702(d) emphasizing judicial scrutiny of the "reliable application" of their methodology to the facts of particular cases.

The Committee Note confines "weight" to minor quibbles, such as "that the expert has not read every single study that exists." Id. Weight "does not mean, as certain courts have held, that arguments about the sufficiency of an expert's basis always go to weight and not admissibility." Id. Rather, "weight" is grounds for admissibility only "once the court has found it more likely than not that the admissibility requirement has been met." Id. "[I]t does not permit the expert to make claims that are unsupported by the expert's basis and methodology." Committee Note to 2023 Amendments at (2).

The full Committee "unanimously" adopted the 2023 Rule 702 amendments. Committee on Rules of Practice & Procedure, Agenda Book, Tab 7A, "Report to the Standing Committee," at 871 (June 7, 2022) (available at < https://www.uscourts.gov/sites/default/files/2022-06_standing_committee_agenda_book_final.pdf >). The amendments "emphasize that the court must focus on the expert's opinion and must find that the opinion actually proceeds from a reliable application of the methodology." Id. They "more clearly empower[] the court to pass judgment on the conclusion that the expert has drawn from the methodology." Id. Specifically as to weight versus admissibility, the Committee amended Rule 702 to change "misstatement[s]" in "contrary" decisions rendered by "many courts":

> [T]he 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. The Committee concluded that in a fair number of cases, the courts have found expert testimony admissible even though the proponent has not satisfied the Rule 702(b) and (d) requirements by a preponderance of the evidence – essentially treating these questions as ones of weight rather than admissibility, which ***is contrary*** to the Supreme Court's holdings that under Rule 104(a), admissibility requirements are to be determined by the court under the preponderance standard.

Id. (emphasis added). The amendment also "clarif[ied] 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. Id. at 872. On this record, the Committee on Rules of

Practice and Procedure "unanimously gave final approval to the proposed amendment to Rule 702." Id.

It is incumbent on defendants to use the 2023 amendments to Rule 702 to win real cases and to overturn prior, "incorrect" applications of the Rule – especially in those circuits where such judicial errors appear in otherwise binding appellate precedent. Critically, the 2023 amendments are the binding law – not prior precedent. "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). The Supreme Court recognizes the federal rules to be "as binding as any statute duly enacted by Congress, and federal courts have no more discretion to disregard the Rule's mandate than they do to disregard constitutional or statutory provisions." *Bank of Nova Scotia v. United States*, 487 U.S. 250, 2550 (1988). Thus, federal rules "are binding upon court and parties alike, with fully the force of law." *In re Nat'l Prescription Opiate Litig.*, 956 F.3d 838, 844 (6th Cir. 2020) (citations omitted).

Obviously, this controlling effect extends to rules' amendments, just as it would with statutory changes, since Congress also must consent – and did consent in 2023 – to all such amendments. Indeed, in 2023 "Congress did not amend the Advisory Committee's draft in any way... [thus,] the Committee's commentary is particularly relevant in determining the meaning of the document Congress enacted." *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 165-66 n.9 (1988). The Supreme Court has explained that "Advisory Committee Notes are "a reliable source of insight into the meaning of a rule".... [W]hen the Committee intended a new rule to change existing federal practice, it typically explained the departure." *Hall v. Hall*, 138 S. Ct. 1118, 1130 (2018) (quoting *United States v. Vonn*, 535 U.S. 55, 64 n.6 (2002)). That is precisely what happened with Rule 702. In 2023, the Committee explicitly set out "to change existing federal practice."

Thus, neither the Supreme Court's landmark decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), nor (obviously) any of the prior judicial decisions that the Advisory Committee specifically stated (more than once) "incorrectly" applied the prior version of Rule 702, provide any basis for any further judicial disregard of the Rule's express terms. In particular, three relatively recent adverse appellate decisions are no longer valid.

- *In re Bair Hugger Forced Air Warming Devices Prods. Liab. Litig.*, 9 F.4th 768, 788 (8th Cir. 2021), which assessed only whether the expert's opinions were "fundamentally unsupported," rather than applying Rule 702's criteria and burden of proof (relying on the pre-*Daubert* case *Loudermill v. Dow Chem. Co.*, 863 F.2d 566 (8th Cir. 1988)).
- *Puga v. RCX Sols., Inc.*, 922 F.3d 285, 294 (5th Cir. 2019), which followed a "general rule" that questions about the bases and sources of an expert's opinion go to weight, not admissibility (relying on the pre-*Daubert* case *Viterbo v. Dow Chem. Co.*, 826 F.2d 420, 422 (5th Cir. 1987)).
- *Mighty Enters., Inc. v. She Hong Indus. Co.*, 745 F. App'x 706, 709 (9th Cir. 2018), which considered the factual basis of an expert's opinion as a matter of weight, not admissibility (relying on *Hangarter v. Provident Life & Accident Ins. Co.*, 373 F.3d 998 (9th Cir. 2004), which in turn was based on language from other decisions following *Loudermill*).

To take full advantage of the 2023 amendments to Rule 702, defense counsel likewise need to amend – our own briefs. All pre-amendments briefing concerning expert admissibility under Rule 702 needs to be thoroughly revised to ensure that we are relying on the current, post 2023 amendments Rule 702 language. If we do not assert the updated language, plaintiffs certainly will not.

We also should stop calling Rule 702 motions "*Daubert* motions," both in briefs and in oral argument. Indeed, *Daubert* references should generally be minimized, since in 1996, the Supreme Court was interpreting a version of Rule 702 that has since been amended twice and which in no way resembled the current rule. Continued defense reliance on *Daubert* only gives weight to those aspects of *Daubert*, such as "liberal[ity]," that the 2023 amendments supersede and designate as "incorrect." Any reference defense briefs do make to *Daubert* should include, at minimum, a footnote pointing out that *Daubert*'s essentially common-law approach to expert admissibility has been superseded by amended Rule 702. While limited use of *Daubert*'s so-called "factors" is acceptable, those factors should be presented as considerations applicable to one of the four express elements of Rule 702 analysis.

To take full advantage of the 2023 amendments to Rule 702, defense counsel likewise need to amend – our own briefs

Defendants briefing Rule 702 motions should also cleanse their papers of any language that: (1) suggests a bias or presumption toward admissibility; (2) uses "weight" versus "admissibility" language; or (3) offers "cross-examination" as a solution to expert problems. Instead, we should rely on the favorable comments and history of the 2023 Rule 702 amendments as much as we can. As the Supreme Court has recognized, amendments to the language of the federal rules are to be treated in the same way as statutory amendments. Also, in order to fully implement the 2023 amendments, defendants should not be reluctant to take on bad decisions explicitly. Since they are undermined by formal rules amendments, they are no longer governed by stare decisis, since stare decisis, "in the area of statutory interpretation," is always subject to "Congress remain[ing] free to alter what we [courts] have done." *Patterson v. McLean Credit Union*, 491 U.S. 164, 173 (1989) (superseded by statute). That is precisely what happened to Rule 702 in 2023. Congress, in approving the Rule 702 amendments, did precisely that – "alter[ing] any reading [courts] adopt simply by amending the [rule]." *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 280 (2009). Decisions based on "incorrect" interpretations of Rule 702 are ripe for overruling.

So far, in most courts, it seems that the 2023 Rule 702 amendments have had the

desired effect. Numerous decisions have explicitly referenced the amendments, and the relevant Rules Committee commentary in excluding expert testimony. Appellate authority is still relatively sparse. Most notably *Sardis v. Overhead Door Corp.*, 10 F.4th 268 (4th Cir. 2021), applied the amendments to reverse the admission of an expert even before they took effect. Id. at 283-84. *Sardis* "confirm[ed] once again the indispensable nature of district courts' Rule 702 gatekeeping function in all cases in which expert testimony is challenged on relevance and/or reliability grounds." Id. at 284. In *Doucette v. Jacobs*, 106 F.4th 156 (1st Cir. 2024), the court recognized that, "[i]n 2023, Rule 702 was amended to directly state that the proponent of the expert testimony must establish these reliability requirements by a preponderance of the evidence," id., at 169 n.17, while affirming a district court's *sua sponte* exclusion of an education-related causation expert. Id. at 169-70. The only other appellate decision to date is *In re Onglyza (Saxagliptin) & Kombiglyze (Saxagliptin & Metformin) Products Liability Litigation*, 93 F.4th 339 (6th Cir. 2024). But *Onglyza*, while noting the intervening amendment, id. at 345 n.4, did not apply it, since the "old rule... was still in force at the time of the district court's decision. Id.

In re Paraquat Products Liability Litigation, ___ F. Supp.3d ___, MDL No. 3004, 2024 WL 1659687 (S.D. Ill. April 17, 2024), excluded the MDL plaintiffs' general causation expert. *Paraquat* relied on the 2023 amendments, which became effective in the midst of the MDL's Rule 702 motion practice – after the motion had been briefed, but before it was decided. Id. at *4 n.8. Those amendments:

> emphasized that the proponent bears the burden of demonstrating compliance with Rule 702 by a preponderance of the evidence, and 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.

Id. (citation and quotation marks omitted). *Paraquat* enforced the 2023 amendments by requiring "that 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." Id. at 4 n.9 (quoting Committee Note to 2023 amendments) (emphasis added by the court).

Paraquat found that the 2023 amendments were necessary because "courts had erroneously admitted unreliable expert testimony based on the assumption that the jury would properly judge reliability." Id. Specifically, "some courts had 'incorrect[ly]' held that an expert's basis of opinion and application of her methodology were questions of weight, not admissibility." Id. (again quoting Committee Note). Thus:

> Mindful of its role as the witness stand's "vigorous gatekeeper," the Court will closely scrutinize the reliability of proffered expert testimony before permitting an expert to share her opinion with the jury. Expert testimony that is not scientifically reliable should not be admitted. The gatekeeping function, after all, requires more than simply taking the expert's word for it.

Id. (citations and quotation marks omitted).

Paraquat's application of the 2023 Rule 702 was influenced by the MDL ruling in *In re Acetaminophen ASD-ADHD Products Liability Litigation*, 707 F. Supp. 3d 309, No. 22MD3043 (DLC), 2023 WL 8711617 (S.D.N.Y. Dec. 18, 2023). *Acetaminophen* had quite a bit to say about the 2023 amendments:

> Rule 702 was amended effective December 1, 2023. "Nothing in the amendment imposes any new, specific procedures." Fed. R. Evid. 702, Advisory Committee Notes, 2023 Amendments. Instead, one purpose of the amendment was to emphasize that
>
> > Judicial gatekeeping is essential because just as jurors may be unable, due to lack of specialized knowledge, to evaluate meaningfully the reliability of scientific and other methods underlying expert opinion, jurors may also lack the specialized knowledge to determine whether the conclusions of an expert go beyond what the expert's basis and methodology may reliably support. Id.

Id. at 335 *16 n.27.

Similarly, in *Sprafka v. Medical Device Business Services, Inc.*, C.A. No. 22-331 (DWF/TNL), 2024 WL 1269226 (D. Minn. March 26, 2024), the court in non-MDL litigation excluded the plaintiff's causation expert. *Sprafka* found another part of the Committee Note important enough to quote – the part stating that prior Eighth Circuit precedent was wrongly decided:

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

Id. at *2 (quoting Advisory Committee Note to 2023 Amendment).

More recently, the court in *In re Johnson & Johnson Talcum Powder Products Marketing, Sales Practices & Products Liability Litigation*, C.A. No. 16-2738 (MAS) (RLS), 2024 WL 1914881 (D.N.J. April 30, 2024), agreed that earlier Rule 702 decisions should be reassessed in light of, inter alia, the "recent changes to Federal Rule of Evidence 702." Id. at *1. Plaintiffs' argument that the court should "ignore Rule 702's most recent clarifications" was soundly rejected. Id. at *2. The Rules Committee's "clarification is precisely why it would be inappropriate for this Court to preclude Defendants from challenging this Court's previous *Daubert* holdings." Id. at *3 (emphasis original).

> The 2023 amendments provide that Rule 702:
>
> 'clarif[ied] and emphasize[d] that 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.' The amendment was motivated by the Advisory Committee's 'observation that in "a number of federal cases... judges did not apply the preponderance standard of admissibility to Rule 702's requirements of sufficiency of basis and reliable application of principles and methods, instead holding that such issues were ones of weight for the jury."' The Committee emphasized that rulings which have held 'the critical questions of the sufficiency of an expert's basis for his testimony, and the application of the expert's methodology, are generally questions of weight and not admissibility' 'are an incorrect application of Rules 702 and 104(a).'

Id. (quoting *Allen v. Foxway Transp., Inc.*, No. 4:21-CV-00156, 2024 WL 388133, at *3 (M.D. Pa. Feb. 1, 2024) (footnotes omitted)) (which, in turn, quoted the Advisory Committee Note). The Advisory Committee Note "outline[d] a consistent and concerning misapplication of Rule 702 by federal courts in the ***past***." Id. (emphasis original). Thus, "it is self-evident that Defendants should be allowed to contest previous [Rule 702] holdings" in the MDL if they could "identify any incorrect application of Rule 702 in the [previous] 2020 Opinion." Id.

Among cases further removed from prescription medical product liability litigation, an extensive discussion of the 2023 Rule 702 amendment and the reasoning behind it took place in *State Automobile Mutual Insurance Co. v. Freehold Management, Inc.*, 3:16-CV-2255-L, 2023 WL 8606773 (N.D. Tex. Dec. 12, 2023). Like *Talcum*, *State Auto* involved a post-amendment reconsideration of an earlier Rule 702 decision, this time involving "forensic experts" on property damage. *State Auto* qualified the adverse pre-*Daubert* language from *Viterbo*, 826 F.2d at 422, that only "generally" could juries resolve "issues regarding the bases and sources of an expert's opinion that affect the weight of an opinion rather than [its] admissibility" because it recognized that *Viterbo* had been impaired by the 2023 amendments. *State Auto. Mut. Ins. Co.*, 2023 WL 8606773, at *10. The broad statement from *Viterbo* was "incorrect" under Rule 702:

> The court previously emphasized the word generally because the 2023 amendments to Rule 702 explain that issues pertaining to the sufficiency of facts or data relied upon by an expert and the sufficiency of an expert's bases do not always concern questions of weight that should be left to the jury.

Id. The 2023 amendments recognized that *Viterbo* was "an incorrect application of Rules 702 and 104(a)." Id. (quoting Committee Note to 2023 Amendment). *State Auto* also applied Rule 702(d)'s amended "reliable" application prong:

> Additionally, the 2023 amendments to Rule 702 "emphasize 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"...:
>
> > Judicial gatekeeping is essential.... ***The [admissibility] standard does not require perfection. On the other hand, it does not permit the expert to make claims that are unsupported by the expert's basis and methodology.***

Id. at *11 (emphasis in original). *State Auto* demonstrates that the same Rule 702 principles apply across all types of cases involving expert testimony since December 2023. Indeed, a discussion verbatim to *State Auto* may be found in *Dewolff, Boberg & Associates, Inc. v. Pethick*, C.A. No. 3:20-CV-3649-L, 2024 WL 1396267, at *5-6 (N.D. Tex. March 31, 2024), which resulted in the exclusion of a totally different kind of damages expert (lost profits).

The most important aspect of the Rule 702 amendments, at least in the near term, is their recognition that a large number of previous expert admissibility decisions are "incorrect" or "incorrectly determined," as the Committee Note quoted in *State Auto* stated.

> The amendment was aimed at courts that had erroneously held that "the critical questions of the sufficiency of an expert's basis, and the application of the expert's methodology, are questions of weight and not admissibility."

Johnson v. United States, No. 21-CV-2851 (MKB), 2024 WL 1246503, at *3 n.7 (E.D.N.Y. Jan. 16, 2024) (quoting Committee Note; excluding causation opinions). Other decisions that quote the Committee's determination that numerous prior decisions applying the previous version of Rule 702 were "incorrect" in the course of excluding purported experts from testifying are: *In re Deepwater Horizon Belo Cases*, Nos. 3:19cv963-MCR-HTC, et al., 2024 WL 3176927, at *17 (N.D. Fla. June 25, 2024) (magistrate recommending exclusion of causation experts in multiple cases); *Princeton Excess & Surplus Lines Ins. Co. v. Caraballo*, No. 1:21CV1981, 2024 WL 2294827, at *19 (N.D. Ohio May 21, 2024) (excluding insurance practices expert); *West v. Home Depot U.S.A., Inc.*, No. 21 CV 1145, 2024 WL 1834112, at *2, 4 (N.D. Ill. April 26, 2024) (excluding multiple medical causation opinions), *reaffirmed on reconsideration*, 2024 WL 2845988, at *2-3 (N.D. Ill. June 5, 2024); *Maney v. Oregon*, No. 6:20-cv-00570-SB, 2024 WL 1695083, at *2 (D. Or. April 19, 2024) (excluding prison procedures expert); *Davidson Surface/Air, Inc. v. Zurich Am. Ins. Co.*, No. 4:22 CV 547 CDP, 2024 WL 1674519, at *2 n.3 (E.D. Mo. April 18, 2024) (excluding weather opinion); *Coblin v. Depuy Orthopaedics, Inc.*, No. 3:22-cv-00075-GFVT-MAS, 2024 WL 1588752, at *2 (E.D. Ky. April 11, 2024) (plaintiff required to supplement cause-of-death report); *Lane v. Am. Airlines, Inc.*, No. 2024 WL 1200074, 2024 WL 1200074, at *4 n.3 (E.D.N.Y. March 20, 2024) (excluding causation experts on both sides); *Burdess v. Cottrell, Inc.*, No. 4:17-CV-01515-JAR, 2024 WL 864127, at *3 (E.D. Mo. Feb. 29, 2024) (excluding human factors expert "notwithstanding" the prior "liberal standard," given 2023 amendments); *Austin v. Brown*, C.A. No. 1:21-cv-02682-RMR-SBP, 2024 WL 1602968, at *10 (D. Colo. Feb. 22, 2024) (emphasizing the "incorrect" language; excluding police procedures expert); *Boyer v. City of Simi Valley*, No. 2:19-cv-00560-DSF-JPR, 2024 WL 993316, at *1 (C.D. Cal. Feb. 13, 2024) (excluding damages experts); *Allen*, 2024 WL 388133, at *3 (excluding industry standards expert); *Cleaver v. Transnation Title & Escrow, Inc.*, No. 1:21-cv-00031-AKB, 2024 WL 326848, at *2 (D. Idaho Jan. 29, 2024) ("The amendments are intended to correct some courts' prior, inaccurate application of Rule 702.") (excluding industry standards opinion); *Mann v. QuikTrip Corp.*, No. 4:22-cv-01060-JAR, 2023 WL 9023262, at *2 n.2 (E.D. Mo. Dec. 29, 2023) (excluding premises liability expert); *Greene v. Ledvance LLC*, No. 3:21-CV-256-TAV-JEM, 2023 WL 8636962, at *3 n.1 (E.D. Tenn. Dec. 13, 2023) (excluding causation expert).

A second important aspect of the 2023 Rule 702 amendments is the strengthening of Rule 702(d), now requiring that an expert "must stay within the bounds of what can be concluded from a reliable application of the expert's basis and methodology." Committee Note to 2023 Amendment. The factual basis of an opinion is a predicate to admissibility:

> I cannot find that [plaintiff] met its burden of establishing by a preponderance of the evidence that [the expert's] opinions are reliable, that is, that they have a sufficient factual basis and that he reli-

A second important aspect of the 2023 Rule 702 amendments is the strengthening of Rule 702(d)...

> ably applied an accepted methodology in reaching his conclusions. ***Because those questions go to the admissibility and not the weight of [the] opinions, they are for me to resolve instead of a jury.***

Davidson Surface, 2024 WL 1674519, at *6 (emphasis added). "The recent amendment is... a refocusing of the Supreme Court's instruction for district court judges to act as a gatekeeper to ensure proposed expert testimony 'is not only relevant, but reliable when testimony is challenged.'" *West*, 2024 WL 1834112, at *2 (quoting Committee Note). Under amended Rule 702, "[p]unting the reliability requirements of Rule 702 to the jury is inconsistent with this Court's gatekeeping function." *Ozuna v. Pena*, C.A. No. 22-915-SDD-RLB, 2024 WL 2955609, at *2 (M.D. La. June 12, 2024) (excluding future medical and earnings opinions).

Thus, "the 2023 amendments to Rule 702 make clear that reliability, both in theory and application, is the hallmark of admissible expert testimony." *Post v. Hanchett*, No. 21-2587-(D.D.C., 2024 WL 474484, at *2 (D. Kan. Feb. 7, 2024) (excluding tire expert) (citation and quotation marks omitted). Under the amended rule, "[c]ourts must probe more deeply" and

> [o]nly after the proponent has proved it more likely than not that the opinion is based in the evidence on which it purports to rely and represents a reliable application of the expert's methodology do challenges to the bases of an expert's opinion go to weight alone.

Hellen v. Am. Family Ins. Co., C.A. No. 22-cv-02717-REB-SBP2024 WL 1832451, at *1 (D. Colo. March 19, 2024) (excluding opinions of insurance practices expert). "Such is the point which the recent amendments to Rule 702 emphasize – an expert's opinions must be shown by a preponderance of the evidence to be supported by the evidence on which they ostensibly are based." Id. at *3. An opinion that "is not clearly supported by the evidence on which it purports to rely... is inadmissible." Id. at *5. "[T]he language of the amendment more clearly empowers the court to pass judgment on the conclusion that the expert has drawn from the methodology." *United States v. Diaz*, No. 24-CR-0032 MV, 2024 WL 758395, at *4 (D.N.M. Feb. 23, 2024) (quoting Committee Note) (limiting police officer expert testimony).

Other decisions have explicitly relied on new Rule 702(d) while excluding expert witnesses. *Doucette*, 2024 WL 3271906, at *9 (opinion "fell short" of amended Rule 702(d)'s reliability requirements), *Plantan v. Smith*, C.A. No. 2024 WL 3048648, 2024 WL 3048648, at *4-5 n.55 (E.D. Va. June 18, 2024), expressly applied the 2023 amendments, to reject the proponent's suggestion "that the Court should admit [the expert's] opinions, notwithstanding these gaps, and allow cross examination to make up for what the opinion may lack in reliability." Id. at *12 (that approach "would directly contradict" the amended rule); *Coblin*, 2024 WL 1588752, at *4 (expert failed to "rule out" other causes in differential diagnosis); *Thomas v. State Farm Mut. Auto. Ins. Co.*, ____ F. Supp. 3d ____, No. 4:22-CV-724 RLW, 2024 WL 195752, at *2 n.1 (E.D. Mo. Jan. 18, 2024) (excluding insurance practices expert).

Another judicial error that the Rule 702 amendment corrected was the notion that expert testimony was presumed admissible. Courts that "[i]n the past" had "operated on the presumption is that expert testimony is admissible" misconstrued Rule 702. Diaz, 2024 WL 758395, at *4. The Civil Rules Committee's express addition of "more likely than not" to the proponent's burden of proof corrected this error.

> In support of this change, the Committee noted that the changes "respond to the fact that many courts have declared the requirements set forth in Rule 702(b) and (d)... are questions of weight and not admissibility, and more broadly that expert testimony is presumed to be admissible." The Committee found that "these statements misstate Rule 702, because its admissibility requirements must be established to a court by a preponderance of the evidence."

Id. (quoting Committee Note; other citations and quotation marks omitted).

All the above is not to say, however, that courts have uniformly mended their "incorrect" ways and are uniformly doing what amended Rule 702 requires. One notable failure to do so is *Blue Buffalo Co. v. Wilbur-Ellis Co. LLC*, No. 4:14 CV 859 RWS, 2024 WL 111712 (E.D. Mo. Jan. 10, 2024), which is particularly notable for its disguised quote from *Loudermill*, one of the decisions identified by the Rules Committee as being "incorrect." *Blue Buffalo* laundered *Loudermill* through an intervening Eighth Circuit decision. *See* 2024 WL 111712, at *4 ("exclusion of expert testimony is proper 'only if it is so fundamentally unsupported that it can offer no assistance to the jury'") (quoting *Wood v. Minn. Mining & Mfg. Co.*, 112 F.3d 306, 309 (8th Cir. 1997), but "cleaned up" to remove *Wood*'s quoting of *Loudermill*).

The 2023 amendments to Rule 702 have repeatedly proven to be a valuable recalibration of expert admissibility standards.

The 2023 amendments to Rule 702 have repeatedly proven to be a valuable recalibration of expert admissibility standards. Defendants, particularly those involved in prescription medical product liability litigation, should rely on them to the maximum extent possible to seek exclusion of junk science opinions, notwithstanding adverse, pre-2023 precedents, which are no longer good law.