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GATEKEEPING REORIENTATION:
AMEND RULE 702 TO CORRECT JUDICIAL MISUNDERSTANDING ABOUT EXPERT EVIDENCE

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GATEKEEPING REORIENTATION:
A RULE 702 AMENDMENT CAN CORRECT JUDICIAL MISUNDERSTANDINGS ABOUT EXPERT EVIDENCE

Federal Rule of Evidence 702 needs attention. The language of the rule articulates courts' gatekeeping responsibilities and the extensive Committee Note explains the rule's elements and proper application, but courts nonetheless fail to carry out Rule 702's requirements.[1] Some courts discard the burden of production that Rule 702 places on an expert's proponent in favor of a "presumption of admissibility"[2] or an understanding that exclusion is "the exception rather than the rule."[3] Despite Rule 702's direction that the judge must determine if an expert's factual basis and application of methodology are reliable, some courts see such

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[1] *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 50 *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:

> It does not appear to be a matter of vague language. The wayward courts simply don't follow the rule. They have a different, less stringent view of the gatekeeper function.

[2] *See*, *e.g.*, *Powell v. Schindler Elevator Corp.*, No. 3:14cv579 (WIG), 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."); *Advanced Fiber Technologies (AFT) Trust v. J&L Fiber Services, Inc.*, No. 1:07-CV-1191, 2015 WL 1472015, at *20 (N.D.N.Y. Mar. 31, 2015)("In assuming this [gatekeeper] role, the Court applies a presumption of admissibility.").

[3] *See*, *e.g.*, *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).

questions addressing merely the weight and not the admissibility of opinion testimony.[4] Some courts even go so far as to state that the Rule 702 gatekeeping responsibility exists to achieve a mission of only minimal significance:

- "The aim is to exclude expert testimony based merely on subjective belief or unsupported speculation."[5]
- "[T]he gatekeeping function is meant to 'screen the jury from unreliable nonsense opinions[.]'"[6]
- "Ultimately, a trial judge should exclude expert testimony if it is speculative or conjectural or based on assumptions that are so unrealistic and contradictory as to suggest bad faith or to be in essence an apples and oranges comparison."[7]
- "The expert's opinion thus should be excluded only when it is so fundamentally unreliable that it can offer no assistance to the jury."[8]

Rule 702 would hardly be necessary if it were intended to preclude only such deeply flawed and problematic testimony as these courts describe.

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[4] *See*, *e.g.*, *Alvarez v. State Farm Lloyds*, No. SA-18-CV-01191-XR, 2020 WL 734482, at *3 (W.D. Tex. Feb. 13, 2020)("To the extent State Farm wishes to attack the 'bases and sources' of Dr. Hall's opinion, such questions affect the weight to be assigned to that opinion rather than its admissibility and should also be left for the jury's consideration.")(quotation omitted).

[5] *Imperial Trading Co. v. Travelers Prop. Cas. Co. of Am.*, No. CIV.A. 06-4262, 2009 WL 2356292, at *2 (E.D. La. July 28, 2009).

[6] *In re Viagra (Sildenafil Citrate) and Cialis (Tadalafil) Products Liability Litigation*, 424 F. Supp. 3d 781, 790 (N.D. Cal. 2020)(quoting *Alaska Rent-A-Car, Inc. v. Avis Budget Group, Inc.*, 738 F.3d 960, 969 (9th Cir. 2013)).

[7] *Hulett v. City of Syracuse*, 253 F. Supp. 3d 462, 507 (N.D.N.Y. 2017)(quotations omitted). *See also Berman v. Mobil Shipping & Trans. Co*., No. 14 CIV. 10025 (GBD), 2019 WL 1510941, at *9 (S.D.N.Y. Mar. 27, 2019)(similar statement).

[8] *Paul Beverage Co. v. American Bottling Co*., No. 4:17CV2672 JCH, 2019 WL 1044057, at *2 (E.D. Mo. Mar. 5, 2019). *See also Sandoe v. Boston Sci. Corp.*, 333 F.R.D. 4, 10 (D. Mass. 2019)("Expert testimony should be excluded only if it is so 'fundamentally unsupported that it can offer no assistance to the jury.'")(quotation omitted).

The 2000 amendments to Rule 702 sought to establish a uniform approach to scrutinizing the admissibility of proffered opinion testimony: "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."[9] This critical goal of uniformity has gotten lost, and now courts operating in different circuits apply quite divergent standards. As one court recently recognized, for example, district judges in the Ninth Circuit "must account for the fact that a wider range of expert opinions (arguably much wider) will be admissible in this circuit."[10]

This WORKING PAPER will address how Rule 702 was intended to function, the misunderstandings courts have embraced that produce striking departures from this intent, and available avenues for clarifying the rule's requirements to restore substance and consistency to court applications of Rule 702. Section I discusses the Advisory Committee's proceedings in the period leading up to adoption of the 2000 amendments to Rule 702 and its recent activities considering possible amendments. Review of the Advisory Committee's work reveals that Rule 702 was intended to incorporate three key elements: (1) rigorous judicial scrutiny of the expert's methodology, factual basis, and application to the issues of the case undertaken before determining that the opinion testimony may be admitted; (2) a burden of

[9] Advisory Committee Note to 2000 Amendments to Rule 702 (emphasis added).

[10] *In re Roundup Products Liability Litigation*, 358 F. Supp. 2d 956, 960 (N.D. Cal. 2019).

production placed on the sponsor to establish admissibility of the opinion testimony; and (3) uniformity of approach in analyzing the admissibility of opinion testimony.[11]

Considering the intent motivating the 2000 amendment, Section II reviews current court practices to find that failures to comprehend Rule 702 have effectively re-written the rule in ways that significantly change the nature and rigor of the gatekeeping function. First, courts rely on outcome-oriented characterizations of the admissibility standard. These conceptions tilt the admissibility analysis and displace the sponsor's burden of establishing by a preponderance of the evidence that the opinion testimony is admissible. Also, courts misunderstand the rule's requirement that the court must assess an expert's factual basis and application of the methodology to the issues at hand. Instead, they hold that the rule makes those steps pertinent only to the weight of the opinion testimony which the jury alone must determine. Courts that include these common missteps in their admissibility analysis simply fail to understand the requirements of Rule 702.

With these patterns of Rule 702 departures in mind, Section III examines the need for reform to clarify its requirements in order to address these recognized

[11] The full name of the "Advisory Committee" is the Judicial Conference Advisory Committee on Evidence Rules. Its agenda books contain minutes of previous meetings, as well as memoranda prepared by the Reporter on topics of concern and other references and materials considered by the members. Additionally, the Advisory Committee has conducted conferences and symposia to address questions and issues about current practice and contemplated amendments. These materials provide considerable insight regarding the intent of Rule 702 and the extent to which courts have departed from the course charted by the Advisory Committee.

deviations from Rule 702 as the Advisory Committee intended the rule to be applied. The WORKING PAPER concludes that rulemaking is needed to overcome the influence of previous court mischaracterizations and ongoing misapprehensions of the expert admissibility standard.

I. THE ADVISORY COMMITTEE INTENDED RULE 702 TO ESTABLISH A UNIFORM STANDARD COURTS WOULD USE TO SCRUTINIZE AN EXPERT'S BASIS, METHODOLOGY, AND APPLICATION

The Advisory Committee intended Rule 702 in its current form to bring a consistent thoroughness to courts' assessment of opinion testimony. The Supreme Court's 1993 ruling in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[12] had produced waves of disruption among the lower courts. Courts were initially unclear if the gatekeeping function applied broadly to all opinion testimony, or only to the narrow category of experts offering opinions about "scientific" knowledge.[13] More fundamentally, they disagreed about the depth of analysis that a court must undertake before concluding that opinion testimony could be admitted.[14]

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[12] 509 U.S. 579 (1993).

[13] The Supreme Court in *Kumho Tire Co. v. Carmichael* resolved this issue, recognizing the incompatibility of decisions finding that *Daubert* does not reach "technical" or "other specialized" knowledge, such as *Compton v. Subaru of America, Inc.,* 82 F.3d 1513, 1518–19 (10th Cir.), *cert. denied*, 519 U.S. 1042 (1996), with cases holding that *Daubert* applies broadly to all expert testimony, as held by *Watkins v. Telsmith, Inc.,* 121 F.3d 984, 990–91 (5th Cir. 1997). *See Kumho Tire*, 526 U.S. 137, 147 (1999).

[14] *See* Draft Minutes of the Meeting of April 12-13, 1999, Advisory Comm. on Evidence Rules at 6, *in* ADVISORY COMMITTEE ON EVIDENCE RULES OCTOBER 1999 AGENDA BOOK 10 (1999), https://www.uscourts.gov/rules-policies/archives/agenda-books/advisory-committee-rules-evidence-october-1999 ("[T]here are a number of *Daubert* questions on which the courts disagree, including

The Advisory Committee on Evidence Rules recognized that courts had widely differing perspectives on *Daubert*'s requirements:

> Some courts approach *Daubert* as a rigorous exercise requiring the trial court to scrutinize in detail the expert's basis, methods, and application. Other courts hold that *Daubert* requires only that the trial court assure itself that the expert's opinion is something more than unfounded speculation.[15]

Confronting this cacophony, the Advisory Committee sought to reform Rule 702 so that it would both provide "a uniform structure for assessing expert testimony"[16] and establish a standard mandating courts to assess, as a matter of admissibility, opinion testimony's factual foundation, methodological underpinnings, and application to the issues in dispute.[17]

The Advisory Committee started from the position that the analytical

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the appropriate standard of proof and the rigor with which expert testimony should be scrutinized."). *See also* May 1, 1998 Report of the Advisory Committee on Evidence Rules, *in* Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure and Evidence: Request for Comment, 181 F.R.D. 18, 132 (1998)(indicating that the proposed amendment to Rule 702 "attempts to address the conflict in the courts about the meaning of *Daubert*.").

[15] 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.

[16] Apr. 1, 2018 Memorandum from Daniel J. Capra, Reporter, *supra* n.1, at 44 n.6.

[17] *See* May 1, 1998 Report of the Advisory Committee on Evidence Rules, *supra* n. 14, 181 F.R.D. at 131 ("The proposed amendment specifically extends the trial court's *Daubert* gatekeeping function to all expert testimony; requires a showing of reliable methodology and sufficient basis; and provides that the expert's methodology must be applied properly to the facts of the case.").

framework set forth by the U.S. Supreme Court should define the standard.[18] The complexity of the *Daubert* holding, however, posed difficulties for rulemaking. The Advisory Committee's Reporter, Professor Daniel J. Capra, has colorfully observed that the *Daubert* ruling can be seen as "a schizophrenic opinion."[19] On the one hand, *Daubert* directs trial courts to evaluate proffered expert opinions to ensure that they arise from a reliable methodology that is properly applied to the facts at issue.[20] On the other hand, the opinion stresses the value of cross-examination and the

[18] The Advisory Committee understood that it was empowered to alter the admissibility standard, but determined that it should not change from the direction taken in *Daubert* and clarified by the *Kumho Tire* ruling:

> Judge Shadur opened the discussion on Rule 702 by noting that in deciding how to amend the Rule, the Committee was not technically bound by the Supreme Court's interpretation of the existing Rule 702 in *Daubert* and in the recent case of *Kumho Tire v. Carmichael*. However, all members of the Committee were in agreement that the approach taken by the Supreme Court – an approach that is followed in the proposal issued for public comment – provided an excellent and definitive means of regulating unreliable expert testimony. There was unanimous agreement that if the Rule is to be amended, it should stick as closely as possible to the Supreme Court's teachings in *Daubert* and *Kumho*.

Draft Minutes of the Meeting of April 12-13, 1999, Advisory Comm. on Evidence Rules, *supra* n. 14, at 2.

[19] Daniel J. Capra, *Symposium on Forensic Expert Testimony,* Daubert*, and Rule 702*, 86 FORDHAM L. REV. 1463, 1528 (2018). *See also United States v. McCluskey*, 954 F. Supp. 2d 1224, 1254 (D.N.M. 2013)(observing that "the extent of the trial judge's gatekeeping function" is '[p]erhaps *Daubert's* most serious ambiguity.'")(quoting 29 Charles Alan Wright & Victor James Gold, *Federal Practice and Procedure* § 6266, at 287 (1997 & Supp.2012)).

[20] *See Daubert*, 509 at 592-93 (indicating that trial judges must make "a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue.").

adversarial process to drive the appropriate outcome of a trial.[21]

The key to 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.[22] Because the foundations of expert testimony lay beyond the experience and instincts of jurors, courts cannot expect them to recognize when opinions are formed from flawed methodological analysis or inadequate facts.[23] Accordingly, the judge must protect the integrity of trials by policing opinion testimony to ensure that unreliable analyses do not reach the jury. The Advisory Committee sought to produce a rule that

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[21] *Id*. at 596 ("Vigorous 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.").

[22] *See* 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**:**

> The key to *Daubert* is that cross-examination alone is ineffective in revealing nuanced defects in expert opinion testimony and that the trial judge must act as a gatekeeper to ensure that unreliable opinions don't get to the jury in the first place.

[23] *See* Memorandum from Daniel J. Capra, Reporter, Advisory Comm. on Evidence Rules, to Advisory Comm. on Evidence Rules, *Possible Amendment to Rule 702* (Oct. 1, 2019) at 11 *in* ADVISORY COMMITTEE ON EVIDENCE RULES OCTOBER 2019 AGENDA BOOK 131 (2019), https://www.uscourts.gov/rules-policies/archives/agenda-books/advisory-committee-rules-evidence-october-2019:

> The premise [in *Daubert*] is that cross-examination cannot undo the damage that has been done by the expert who has power over the jury. This is because, for the very reason that an expert is needed (because lay jurors need assistance) the jury may well be unable to figure out whether the expert is providing real information or junk.

remained true to the expert admissibility standard the Supreme Court had articulated, and so it incorporated this distillation of the *Daubert* holding into Rule 702.[24]

The Advisory Committee understood that the expert admissibility standard it set forth in amended Rule 702 "clearly envision[s] a more rigorous and structured approach than some courts are currently employing."[25] Displacing softer interpretations of the admissibility standard that depend on jurors to identify and reject unreliable opinion testimony was an intended result of amending Rule 702, as the Advisory Committee sought to produce "uniformity in the *approach* to *Daubert* questions."[26] The pre-amendment perspectives and practices of some courts would therefore need to change in order to meet the directives of amended Rule 702.

The Advisory Committee used the Committee Note as well as the language of the rule itself to convey to courts that they must scrutinize expert opinions in a manner consistent with the amended rule's scope before allowing presentation of the

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[24] Draft Minutes of the Meeting of April 12-13, 1999, Advisory Comm. on Evidence Rules, *supra* n. 14, at 2. ("There was unanimous agreement that [the amendment to Rule 702] should stick as closely as possible to the Supreme Court's teachings in *Daubert* and *Kumho*."). *See also* Apr. 1, 2018 Memorandum from Daniel J. Capra, Reporter, *supra* n.1, at 42 n.5 ("the amendment was intended to codify and expand upon, not depart from, *Daubert*."). After the Advisory Committee had begun its rulemaking efforts, the Supreme Court issued its *Kumho Tire* holding. The Advisory Committee found that ruling to be in line with the Committee's understanding of the standard previously articulated by the Court and the approach taken in the Committee's existing proposals for modifying the rule. *See* Draft Minutes of the Meeting of April 12-13, 1999, Advisory Comm. on Evidence Rules, *supra* n. 14, at 8 ("The sense of the Committee was that the analysis in *Kumho* is completely consistent with and supportive of, the approach taken in the proposed amendment and Committee Note[.]").

[25] May 1, 1999 Report of the Advisory Committee on Evidence Rules, *supra* n. 15, at 7 (emphasis original).

[26] *Id*.

testimony to a jury.[27] Issuing the lengthy Committee Note itself has been described as a "goal" of the rulemaking process.[28] The extensive Note was meant to be a resource that would

> provide substantial and detailed guidance into the meaning of *Daubert* and its progeny; that would instruct on how to use the *Daubert* factors; and that would assist courts and litigants in determining which questions about experts would go to weight and which to admissibility.[29]

Considering the weight that the Advisory Committee attached to the Committee Note as an authority articulating the proper understanding of Rule 702, its contents warrant considerable attention.

The Committee Note discusses the critical elements of Rule 702. First, the proponent of the opinion testimony "has the burden of establishing that the pertinent admissibility requirements are met by a preponderance of the evidence."[30] That burden specifically includes showing that the expert employed a reliable methodology, based each opinion on sufficient facts or data, and applied the

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[27] *Id.* (identifying the Committee Note along with the amended rule as collectively signaling "a more rigorous and structured approach than some courts are currently employing" and that were expected "to provide uniformity" in the manner in which courts approached admissibility challenges). *See also* May 1, 1998 Report of the Advisory Committee on Evidence Rules, *supra* n. 14, 181 F.R.D. at 131 ("The Committee has prepared an extensive Committee Note that will provide guidance for courts and litigants in determining whether expert testimony is sufficiently reliable to be admissible.").

[28] Apr. 1, 2018 Memorandum from Daniel J. Capra, Reporter, *supra* n.1, at 42 n.5. Professor Capra has explained that "[b]ecause a Committee Note cannot be freestanding, an amendment was necessary[.]"

[29] *Id*.

[30] Advisory Committee Note to 2000 Amendments to Rule 702.

methodology to the facts of the case in a reliable way.[31] Put another way, the sponsor must satisfy the court that *all steps* employed in the development of the expert's opinions are sound.[32] In evaluating these underpinnings of the opinion testimony, the reviewing court must apply "exacting"[33] scrutiny. As Justice Scalia observed in his *Kumho Tire* concurring opinion, trial courts do not have the discretion "to perform the [gatekeeping] function inadequately."[34] Notably, the barometer initially suggested in the Advisory Committee's 1998 draft Committee Note—that in testifying an expert must adhere to the same standards of intellectual rigor demanded in the expert's

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[31] *See* May 1, 1999 Report of the Advisory Committee on Evidence Rules, *supra* n. 15, at 5 ("The proposed amendment to Evidence Rule 702 . . . requires a showing of reliable methodology and sufficient basis, and provides that the expert's methodology must be applied properly to the facts of the case."). *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)."); Apr. 1, 2018 Memorandum from Daniel J. Capra, Reporter, *supra* n.1, at 43 ("In sum, the 2000 amendment 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.").

[32] *See* Advisory Committee Note to 2000 Amendments ("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*.'")(emphasis original).

[33] *Weisgram v. Marley Co.*, 528 U.S. 440, 455 (2000)("Since *Daubert,* moreover, parties relying on expert evidence have had notice of the exacting standards of reliability such evidence must meet."). *See also* Advisory Committee Note to 2000 Amendments to Rule 702 ("The amendment specifically provides that 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."). Of course, the content of Rule 702 itself also directs that each of these three requirements must be established. *See* Fed. R. Evid. 702(b)-(d).

[34] *Kumho Tire*, 526 U.S. at 159 (Scalia, J., concurring).

professional field—was adopted in the Supreme Court's *Kumho Tire* holding.[35]

Critically, these reliability components are admissibility questions that the court must decide, not credibility issues for the jury to weigh:[36]

> 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.[37]

Thus, only *after* the sponsor has demonstrated that the expert satisfies all Rule 702 requirements may the court defer to the jury regarding the expert's basis, application, or method.

Finally, *all* opinion testimony must receive scrutiny. Rule 702 "specifically extends the trial court's *Daubert* gatekeeping function to all expert testimony[.]"[38] The jury should only hear opinions that have been fully considered and determined meet Rule 702's admissibility requirements.

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[35] May 1, 1999 Report of the Advisory Committee on Evidence Rules, *supra* n.15, at 6 ("The Court in *Kumho* emphasized the same overriding standard as that set forth in the Committee Note to the proposed amendment, i.e., that an expert must employ the same degree of intellectual rigor in testifying as he would be expected to employ in his professional life"). *See also Kumho Tire*, 526 U.S. at 152 ("The objective of [the gatekeeping] requirement . . . is to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field."); Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure and Evidence: Request for Comment, 181 F.R.D. at 147.

[36] *Id*. *See also* Oct. 1, 2019 Memorandum from Daniel J. Capra, Reporter, *supra* n.23, at 1 (Rule 702 "already establishes that the reliability requirements are questions for the court, to be decided by a preponderance of the evidence.").

[37] Apr. 1, 2018 Memorandum from Daniel J. Capra, Reporter, *supra* n.1, at 43 (emphasis original).

[38] May 1, 1999 Report of the Advisory Committee on Evidence Rules, *supra* n. 15, at 7.

II. COURTS HAVE RE-WRITTEN THE EXPERT ADMISSIBILITY STANDARD IN WAYS THAT EVADE THE INTENT OF RULE 702

During the twenty years that have passed since the 2000 amendment, courts have departed so substantially from Rule 702's intended approach for evaluating the admissibility of opinion testimony that today's court assessments often bear little resemblance to the analytical process described by the Committee Note. Patterns have emerged in which trial courts consider proffered expert testimony in ways that negate critical aspects of Rule 702. These include ignoring the sponsor's burden of establishing admissibility and deferring to the jury determinations that the court must make. These departures from the analytical approach directed by Rule 702 and the Committee Note create confusion about the admissibility standard, undermine the goal of uniformity, and expose juries to the misleading influence of unreliable opinion testimony that should not have been admitted.

A. Many Courts Read Rule 702 to Presume Admissibility Rather than to Require the Proponent to Satisfy the Burden of Production

Some courts overlay the Rule 702 analysis with outcome-focused characterizations that turn the standard upside-down. Although the Committee Note declares that an expert's proponent bears the burden of demonstrating that the

admissibility requirements are met,[39] courts have decided that the rule includes a "presumption of admissibility."[40] In certain instances, this mistaken presumption has even been juxtaposed against a recitation of Rule 702's burden of production, with no apparent recognition of these statements' incompatibility. For example:

> The party seeking to introduce the expert testimony bears the burden of establishing by a preponderance of the evidence that the proffered testimony is admissible. There is a presumption that expert testimony is admissible[.][41]

This notion that courts should place a thumb on the scale in favor of admitting expert testimony seems to stem from a misinterpretation of the *Daubert* holding that pre-dates the 2000 amendment to Rule 702, but which courts continue to cite.[42]

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[39] In addition to the Committee Note, *see supra* n. 30, the Supreme Court has indicated that the proponent of evidence bears the burden of establishing its admissibility under Rule 104(a). *See Bourjaily v. United States*, 483 U.S. 171, 175-76 (1987).

[40] *See*, *e.g.*, *Price v. General Motors, LLC*, No. CIV-17-156-R, 2018 WL 8333415, at *1 (W.D. Okla. Oct. 3, 2018)("[T]here is a presumption under the Rules that expert testimony is admissible.")(quotation omitted); *Powell*, 2015 WL 7720460, at *2 ("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."); *AFT Trust*, 2015 WL 1472015, at *20 ("In assuming this [gatekeeper] role, the Court applies a presumption of admissibility."); *Crawford v. Franklin Credit Mgt. Corp.,* 08-CV-6293 (KMW), 2015 WL 13703301, at *2 (S.D.N.Y. Jan. 22, 2015)("[T]he court should apply 'a presumption of admissibility' of evidence" in carrying out the gatekeeper function.); *Martinez v. Porta*, 598 F. Supp. 2d 807, 812 (N.D. Tex. 2009)("Expert testimony is presumed admissible").

[41] *S.E.C. v. Yorkville Advisors, LLC*, 305 F. Supp. 3d 486, 503-04 (S.D.N.Y. 2018). *See also Cates v. Trustees of Columbia Univ. in City of New York*, No. 16CIV6524GBDSDA, 2020 WL 1528124, at *6 (S.D.N.Y. Mar. 30, 2020)(similar statement).

[42] The source usually identified as the origin for this problematic characterization is a decision from the Second Circuit, *Borawick v. Shay*, 68 F.3d 597, 610 (2d Cir. 1995), *cert. denied*, 517 U.S. 1229 (1996). *See*, *e.g.*, *Yorkville Advisors, LLC*, 305 F. Supp. 3d at 503-04; *Powell*, 2015 WL 7720460, at *2. The *Borawick* decision explicitly states it did not address a challenge to the reliability of expert testimony offered. *Borawick*, 68 F.3d at 610 ("We do not believe that *Daubert* is directly applicable to the issue here"). Nonetheless, the opinion in *dicta* offered the view that, "by loosening the strictures

A second misunderstanding that courts frequently raise to tip the balance in the direction of admitting opinion testimony arises from a line in the Committee Note stating that "the rejection of expert testimony is the exception rather than the rule."[43] Some courts imagine this statement to indicate that admission of opinion testimony is Rule 702's preferred outcome:

> Any doubts regarding the admissibility of an expert's testimony should be resolved in favor of admissibility. Fed. R. Evid. 702 Advisory Committee's Notes ('[A] review of the case law ... shows that rejection of the expert testimony is the exception rather than the rule.')[.][44]

When read in context, however, this statement in the Committee Note is simply an empirical observation that, during the first few years following publication of the *Daubert* ruling, courts did not exclude opinion testimony with great regularity.[45] The Committee Note's statement is descriptive, not normative, and does not authorize or encourage courts to admit opinion testimony without confirming that the evidence

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on scientific evidence set by *Frye* [*v. United States*, 293 F. 1013 (D.C.Cir.1923)], *Daubert* reinforces the idea that there should be a presumption of admissibility of evidence." *Id*.

[43] Advisory Committee Note to 2000 Amendments to Rule 702.

[44] *In re E. I. du Pont de Nemours & Co. C-8 Pers. Injury Litig.*, No. 2:18-CV-00136, 2019 WL 6894069, at *2 (S.D. Ohio Dec. 18, 2019). *See also*, *e.g.*, *In re Scrap Metal Antitrust Litig.*, 527 F.3d 517, 530 (6th Cir. 2008)("'[R]ejection of expert testimony is the exception, rather than the rule,' and we will generally permit testimony based on allegedly erroneous facts when there is some support for those facts in the record.")(quoting Advisory Committee Note to 2000 Amendments to Rule 702); *Wright*, 450 F. Supp. 2d at 359–60 ("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).

[45] The complete sentence reads as follows: "A review of the caselaw after *Daubert* shows that the rejection of expert testimony is the exception rather than the rule." Advisory Committee Note to 2000 Amendments to Rule 702.

satisfies the requirements of Rule 702.

Another outcome-oriented characterization is based on the impression that Rule 702 embodies a "liberal standard," at least in comparison to the *Frye* test discarded by the *Daubert* Court. Some courts bootstrap this perspective of the rule into a policy favoring admissibility: "Since Rule 702 embodies a liberal standard of admissibility for expert opinions, the assumption the court starts with is that a well-qualified expert's testimony is admissible."[46] Similarly, in an approach akin to sandlot baseball's rule that a "tie goes to the runner," some courts read the rule to favor admission when a court's evaluation of opinion testimony seemingly presents a "close call" under Rule 702.[47]

Rulings that view Rule 702 as preferring admission of opinion testimony over exclusion present several serious inconsistencies with the rule's intended application.

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[46] *In re Zyprexa Prod. Liab. Litig.*, 489 F. Supp. 2d 230, 282 (E.D.N.Y. 2007). *See also In re ResCap Liquidating Tr. Litig.*, No. 13-CV-3451 (SRN/HB), 2020 WL 209790, at *3 (D. Minn. Jan. 14, 2020)("Courts generally support an attempt to liberalize the rules governing the admission of expert testimony, and favor admissibility over exclusion.")(quotation omitted); *Collie v. Wal-Mart Stores E., L.P.*, No. 1:16-CV-227, 2017 WL 2264351, at *1 (M.D. Pa. May 24, 2017)("Rule 702 embraces a 'liberal policy of admissibility,' under which it is preferable to admit any evidence that may assist the factfinder[.]"); *Billone v. Sulzer Orthopedics, Inc.*, No. 99-CV-6132, 2005 WL 2044554, at *3 (W.D.N.Y. Aug. 25, 2005)("[T]he Supreme Court has emphasized the 'liberal thrust' of Rule 702, favoring the admissibility of expert testimony.").

[47] *See*, *e.g.*, *United States v. Ameren Missouri*, No. 4:11 CV 77 RWS, 2019 WL 1384580, at *3 (E.D. Mo. Mar. 27, 2019); *Holloway v. Winkler, Inc.*, No. 4:17CV2208 RLW, 2019 WL 330872, at *3 (E.D. Mo. Jan. 25, 2019); *Conner v. W W Indus. Corp.*, No. 4:16-CV-1539 RLW, 2018 WL 2744978, at *4 (E.D. Mo. June 7, 2018). Rulings that apply this "close case" presumption of admissibility usually cite to *Lauzon v. Senco Prod., Inc.*, 270 F.3d 681, 695 (8th Cir. 2001), in which the court declared that "[i]t is far better where, in the mind of the district court, there exists a close case on relevancy of the expert testimony in light of the plaintiff's testimony to allow the expert opinion and if the court remains unconvinced, allow the jury to pass on the evidence."

First, these cases invert the burden of production that Rule 702 places on the sponsor of the opinion testimony.[48] 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.[49] Courts reading Rule 702 to presume admissibility thus misunderstand the very essence of Rule 702: unless an expert's analysis is shown to relay actual scientific or other knowledge, the court must exclude it.[50] Next, courts that presume the admissibility of

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[48] *See*, *e.g.*, *Frankenmuth Mut. Ins. Co. v. Ohio Edison Co.*, No. 5:17CV2013, 2018 WL 9870044, at *2 (N.D. Ohio Oct. 9, 2018)(quoting Advisory Committee Note to 2000 Amendments to Rule 702 that "rejection of expert testimony is the exception, rather than the rule" and concluding "[a]lthough it is a very close call, the Court declines to exclude Churchwell's expert opinions under Rule 702."); *Crawford*, 2015 WL 13703301, at *6 ("In light of the 'presumption of admissibility of evidence,' that opportunity [for cross-examination] is sufficient to ensure that the jury receives testimony that is both relevant and reliable.")(quoting *Borawick*, 68 F.3d at 610).

[49] *See*, *e.g.*, *Orion Drilling Co., LLC v. EQT Prod. Co.,* No. CV 16-1516, 2019 WL 4273861, at *34 (W.D. Pa. Sept. 10, 2019)(after declaring that "[e]xclusion is disfavored" under Rule 702, the court flipped the burden of production and declared the opinion testimony admissible, stating "Orion has not established that incorporation of the data renders Ray's opinion unreliable."). *See also Citizens State Bank v. Leslie*, No. 6-18-CV-00237-ADA, 2020 WL 1065723, at *4 (W.D. Tex. Mar. 5, 2020)(rejecting challenge that opinion was "not based on sufficient facts" without assessing the expert's factual basis after stating "the rejection of expert testimony is the exception rather than the rule."); *Mason v. CVS Health*, 384 F. Supp. 3d 882, 891 (S.D. Ohio 2019)("Any doubts regarding the admissibility of an expert's testimony should be resolved in favor of admissibility.").

[50] For example, in *Rovid v. Graco Children's Prod. Inc.*, No. 17-CV-01506-PJH, 2018 WL 5906075, at *13 (N.D. Cal. Nov. 9, 2018), *appeal dismissed*, No. 19-15033, 2019 WL 1522786 (9th Cir. Mar. 7, 2019), the court demonstrated how the burden of establishing admissibility should operate to exclude opinion testimony when the court cannot ascertain if the expert's methodology, basis and application are reliable:

> Because Tres' report is devoid of, *inter alia*, his findings and his methodology, the court cannot determine whether his testimony reflects scientific knowledge or whether it is the product of 'good science.' Similarly, because Tres makes no attempt to tie his general background to the facts of this action or to any relevant issue in this action, the court cannot determine whether his testimony is 'relevant

expert testimony rely too heavily on the power of cross-examination to convince jurors of the defects present in unreliable testimony.[51] As discussed above, *Daubert* and Rule 702 direct trial judges to scrutinize proffered opinion testimony for reliability precisely *because* "cross-examination alone is ineffective in revealing nuanced defects in expert opinion testimony" and the jury needs protection against the misleading influence of dubious opinion evidence addressing complicated or unfamiliar subjects.[52] Finally, use of an outcome-oriented Rule 702 characterization inaccurately suggests that courts can reach a proper assessment of a particular expert's testimony without undertaking the analysis Rule 702 directs. Rule 702 allows no short cuts.[53]

> to the task at hand,' as required by the second part of the *Daubert* analysis. *Id*. at 597. Accordingly, Tres must be excluded under Rule 702 and *Daubert*.

[51] *See*, *e.g*., *Powell*, 2015 WL 7720460, at *2 ("To the extent Defendant argues that Mr. McPartland's conclusions are unreliable, it may attack his report through cross examination."); *Wright*, 450 F. Supp. 2d at 360 ("In a close case, a court should permit the testimony to be presented at trial, where it can be tested by cross-examination and measured against the other evidence in the case.")(quotation omitted).

[52] Minutes of the Meeting of May 3, 2019, Advisory Comm. on Evidence Rules, *supra* n. 22, at 23.

[53] *See* Advisory Committee Note to 2000 Amendments to Rule 702:

> Under the amendment, as under *Daubert*, when an expert purports to apply principles and methods in accordance with professional standards, and yet reaches a conclusion that other experts in the field would not reach, the trial court may fairly suspect that the principles and methods have not been faithfully applied. The amendment specifically provides that 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. (citation omitted).

B. Treating an Expert's Basis and Application as Credibility Considerations for the Jury, rather than Admissibility Questions for the Court, Shows Deep Confusion about the Requirements of Rule 702

Despite the explicit directives of Rule 702(b)[54] and Rule 702(d)[55] that the court must rule on the sufficiency of the expert's basis and the reliability with which the expert has applied the methodology to the matters at issue, many courts misunderstand such challenges as bearing only on the weight of the testimony.[56] These rulings fail to fulfill the courts' Rule 702 gatekeeping responsibilities and place demands on jurors that they are ill-equipped to manage.[57]

The recent case law is full of courts' incorrect statements that questions concerning the sufficiency of an expert's factual basis bear only on the weight to be afforded the testimony.[58] Examples of such misreadings of the rule include:

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[54] Rule 702(b) requires consideration of whether "the testimony is based on sufficient facts or data[.]"

[55] Rule 702(d) directs determination if "the expert has reliably applied the principles and methods to the facts of the case."

[56] *See*, *e.g.*, *United States v. Hodge*, 933 F.3d 468, 478 (5th Cir. 2019)("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 and should be left for the jury's consideration."); *Katzenmeier v. Blackpowder Prods., Inc.*, 628 F.3d 948, 952 (8th Cir. 2010)("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 cross-examination.").

[57] *See* Minutes of the Meeting of May 3, 2019, Advisory Comm. on Evidence Rules, *supra* n. 22, at 23. *See also United States v. Glynn*, 578 F. Supp. 2d 567, 574 (S.D.N.Y. 2008)("[T]he explicit premise of *Daubert* and *Kumho Tire* is that, when it comes to expert testimony, cross-examination is inherently handicapped by the jury's own lack of background knowledge."), quoted in Oct. 1, 2019 Memorandum from Daniel J. Capra, Reporter, *supra* n.23, at 11.

[58] *See* Apr. 1, 2019 Memorandum from Daniel J. Capra, Reporter, *supra* n.31, at 23 (indicating that broad statements such as such as "challenges to the sufficiency of an expert's basis raise

- "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."[59]

- "More fundamentally, each of these arguments goes to the factual basis of the report, . . . , and it is well settled that the factual basis for an expert opinion generally goes to weight, not admissibility."[60]

- "[T]he court will not exclude expert testimony merely because the factual bases for an expert's opinion are weak."[61]

- "[W]hen the adequacy of the foundation for the expert testimony is at issue, the law favors vigorous cross-examination over exclusion."[62]

Courts have similarly dismissed challenges to the reliability of an expert's application of his or her methodology to the issues at hand:

- "[O]bjections [that the expert could not link her experienced-based methodology to her conclusions] are better left for cross examination, not a basis for exclusion."[63]

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questions of weight and not admissibility" are "misstatement[s] made by circuit courts in a disturbing number of cases[.]").

[59] *Puga v. RCX Sols., Inc.*, 922 F.3d 285, 294 (5th Cir. 2019).

[60] *Patenaude v. Dick's Sporting Goods, Inc.*, No. 9:18-CV-3151-RMG, 2019 WL 5288077, at *2 (D.S.C. Oct. 18, 2019).

[61] *Wischermann Partners, Inc. v. Nashville Hosp. Capital LLC*, No. 3:17-CV-00849, 2019 WL 3802121, at *1 (M.D. Tenn. Aug. 13, 2019)(quotation omitted). *See also id*. at *3 ("[A]rguments that Pinkowski's opinions are unreliable because he failed to review other relevant information and ignored certain facts bear on the factual basis for Pinkowski's opinions, and, therefore, go to the weight, rather than the admissibility, of Pinkowski's testimony.").

[62] *Carmichael v. Verso Paper, LLC*, 679 F. Supp. 2d 109, 119 (D. Me. 2010). Numerous additional examples of courts dismissing Rule 702(b) challenges as fodder only for cross-examination are described in the Apr. 1, 2018 Memorandum from Daniel J. Capra, Reporter, *supra* n.1, at 44-45.

[63] *AmGuard Ins. Co. v. Lone Star Legal Aid*, No. CV H-18-2139, 2020 WL 60247, at *8 (S.D. Tex. Jan. 6, 2020).

- "Concerns surrounding the proper application of the methodology typically go to the weight and not admissibility[.]"[64]

Broad assertions such as these do not simply reject the particular challenges to a specific expert, but rather project a deep misunderstanding of Rule 702 and the primary role it intends for the court to play in evaluating an expert's factual basis and application. The fact that some courts "routinely state the misguided notion that arguments about sufficiency of basis and reliability of application almost always go to weight and not admissibility"[65] indicates a failure in the content of the rule to communicate the judge's intended role.

Under Rule 702, criticisms of an expert's basis and application may eventually become credibility considerations for the jury to weigh, but only *after* the court first concludes that the proponent of the testimony has established by a preponderance of the evidence that the Rule 702(b) and 702(d) standards are met.[66] Courts that dismiss attacks on an expert's factual basis and application as addressing only the weight of

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[64] *Murphy-Sims v. Owners Ins. Co.*, No. 16-CV-0759-CMA-MLC, 2018 WL 8838811, at *7 (D. Colo. Feb. 27, 2018). Additional cases taking a similar view are discussed in the Apr. 1, 2018 Memorandum from Daniel J. Capra, Reporter, *supra* n.1, at 45-46. Such rulings present a sharp contrast to the instruction set forth in the Advisory Committee Note to 2000 Amendments to Rule 702: "*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*.")(quoting *In re Paoli R.R. Yard PCB Litig*., 35 F.3d 717, 745 (3d Cir. 1994))(emphasis original).

[65] Oct. 1, 2019 Memorandum from Daniel J. Capra, Reporter, *supra* n.23, at 30.

[66] *See supra* n.38. *See also* Apr. 1, 2019 Memorandum from Daniel J. Capra, Reporter, *supra* n.31, at 23 (noting that the expert's factual basis and application of methodology can be credibility considerations, but only after the court has found that the opinion testimony meets the Rule 702 burden of establishing admissibility by a preponderance of the evidence.).

the testimony therefore leave out a necessary step in the analysis. Rule 702 directs that the court must *first* decide whether the expert has been shown by a preponderance of the evidence to have employed a sufficient factual basis, used a reliable methodology, and reliably applied that methodology to the issues in dispute.[67]

Rejecting challenges to an expert's basis and application as bearing only on the weight of the evidence effectively casts the jury in the role of gatekeeper. Once the court determines it will not assess the factual basis and application underlying the opinions before they are presented at trial,[68] the jury must consider the testimony and decide whether to accept or reject the expert's conclusion.[69] Doing so ignores the central premise of Rule 702, namely that jurors are not capable of adequately performing that function:

> The whole point of Rule 702 – and the *Daubert*-Rule 104(a) gatekeeping function – is that these issues *cannot* be left to cross-examination. The underpinning of *Daubert* is that an expert's opinion could be unreliable and the jury could not figure that out, even given cross-examination and

[67] *See*, *e.g.*, *Alsadi v. Intel Corp.*, No. CV-16-03738-PHX-DGC, 2019 WL 4849482, at *4 -*5 (D. Ariz. Sept. 30, 2019)(Excluding opinion testimony because "Plaintiffs have not shown by a preponderance of the evidence that Dr. Garcia's causation opinions are based on sufficient facts or data to which reliable principles and methods have been applied reliably" and noting that these issues reflect "conditions for admissibility" and not credibility considerations). Judge David G. Campbell, author of the *Alsadi* ruling, chairs the Standing Committee on Rules of Practice and Procedure and has participated in the Advisory Committee's discussions of Rule 702 and the intent for its operation. *See*, *e.g.*, 86 FORDHAM L. REV., *supra* n.19, at 1464.

[68] *See*, *e.g.*, *Citizens State Bank*, 2020 WL 1065723, at *4.

[69] *See Nease v. Ford Motor Co*., 848 F.3d 219, 231 (4th Cir. 2017)("For the district court to conclude that Ford's reliability arguments simply 'go to the weight the jury should afford Mr. Sero's testimony' is to delegate the court's gatekeeping responsibility to the jury.").

> argument, because the jurors are deferent to a qualified expert (i.e., the white lab coat effect).[70]

Based on this conclusion that jurors lack the capability to recognize inadequate expert practices, Rule 702 extends courts' gatekeeping responsibility to all aspects of the expert's analysis and directs courts to assess the expert's factual basis and application to the issues in the case, as well as the expert's methodology.[71] This position is not an Advisory Committee invention, but stems directly from the Supreme Court's holdings.[72] In fact, the opinion testimony at issue in *Kumho Tire* was excluded because of insufficiencies in that expert's factual basis and the application of his methodology to the specific issues in that case.[73]

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[70] Oct. 1, 2019 Memorandum from Daniel J. Capra, Reporter, *supra* n.23, at 11 (emphasis original).

[71] Apr. 1, 2018 Memorandum from Daniel J. Capra, Reporter, *supra* n.1, at 50 ("The same 'white lab coat' problem – that the jury will not be able to figure out the expert's missteps – would seem to apply equally to basis, methodology and application.").

[72] *See* Apr. 1, 2018 Memorandum from Daniel J. Capra, Reporter, *supra* n.1, at 49:

> [T]here are a number of lower court decisions that do not comply with Rule 702(b) or (d). . . . [S]ome courts have defied the Rule's requirements – which stem from *Daubert* – that the sufficiency of an expert's basis and the application of methodology are both admissibility questions requiring a showing to the court by a preponderance of the evidence.

[73] *See Kumho Tire*, 526 U.S. at 153-54:

> [T]he specific issue before the court was not the reasonableness *in general* of a tire expert's use of a visual and tactile inspection to determine whether overdeflection had caused the tire's tread to separate from its steel-belted carcass. Rather, it was the reasonableness of using such an approach, along with Carlson's particular method of analyzing the data thereby obtained, to draw a

Courts that mistakenly believe Rule 702 identifies an expert's factual basis or the application of methodology as matters of weight, not admissibility, are carrying forward pre-*Daubert* approaches to opinion testimony that amended Rule 702 should have displaced. To take just one example, courts frequently reiterate the following statement as consistent with Rule 702: "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 and should be left for the jury's consideration."[74] This passage actually originates in a case decided in 1987, six years before *Daubert* was handed down, and so cannot possibly reflect the Rule 702 admissibility standard.[75] Citations to such anachronisms show that at least some courts fail to appreciate that Rule 702 has expanded the courts' gatekeeping considerations beyond what many courts employed before *Daubert*.[76] Courts that rely on these outdated statements of

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> conclusion regarding *the particular matter to which the expert testimony was directly relevant.* That matter concerned the likelihood that a defect in the tire at issue caused its tread to separate from its carcass. The tire in question, the expert conceded, had traveled far enough so that some of the tread had been worn bald; it should have been taken out of service; it had been repaired (inadequately) for punctures; and it bore some of the very marks that the expert said indicated, not a defect, but abuse through overdeflection. The relevant issue was whether the expert could reliably determine the cause of *this* tire's separation. (emphasis original; citation omitted).

[74] *See*, *e.g., MCI Communications Service Inc. v. KC Trucking & Equip. LLC*, 403 F. Supp. 3d 548, 556 (W.D. La. 2019); *Coleman v. United States*, No. SA-16-CA-00817-DAE, 2017 WL 9360840, at *4 (W.D. Tex. Aug. 16, 2017).

[75] *Viterbo v. Dow Chem. Co*., 826 F.2d 420, 422 (5th Cir. 1987).

[76] The statement in the Committee Note that "*Daubert* did not work a seachange over federal

law have thus trapped themselves in a loop that repeats a discarded approach to opinion testimony, and they have not allowed the language of amended Rule 702 to interrupt this pattern.[77] At bottom, archaic conceptions of the admissibility standard recycled for more than two decades in some circuits have produced confusion about what the rule requires, with the result that some courts fail to recognize that Rule 702 now directs a "more rigorous and structured approach" than these pre-*Daubert* cases were willing to accept.[78] As members of the Advisory Committee have suggested, breaking this pattern will require action demonstrating to courts that "it is incorrect to make broad statements that sufficiency of basis and reliable application are questions of weight and not admissibility."[79]

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evidence law" may unwittingly suggest to some courts that pre-*Daubert* interpretations of the court's gatekeeping role remain in force after adoption of the 2000 amendments to Rule 702. *See*, *e.g.*, *More, JC, Inc. v. Nutone Inc.*, No. A-05-CA-338 LY, 2007 WL 4754173, at *7 (W.D. Tex. Mar. 21, 2007)(quoting referenced passage from the Committee Note and proceeding to ignore Rule 702(b) and instead draw upon the Fifth Circuit's 1987 decision in *Viterbo*, 826 F.2d at 422, for the proposition that "[q]uestions relating to the bases and sources of an expert's opinion, rather than its admissibility, should be left for the jury's consideration.").

[77] Pronouncements that challenges to an expert's factual basis or application of the methodology bear only on the weight of the testimony, not its admissibility, consistently stem from pre-*Daubert* decisions. *Katzenmeier*, 628 F.3d at 952, discussed *supra* n. 56, cites to *Hose v. Chicago Nw. Transp. Co.,* 70 F.3d 968, 974 (8th Cir. 1995), which in turn quotes *Loudermill v. Dow Chem. Co.,* 863 F.2d 566, 570 (8th Cir. 1988)("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 cross-examination."). *Carmichael*, 679 F. Supp. 2d at 119, discussed *supra* n. 62, likewise quotes *Loudermill* and also *Viterbo*, 826 F.2d at 422. *Wischermann Partners*, 2019 WL 3802121, at *1, discussed *supra* n. 61, references *McLean v. Ontario Ltd.*, 224 F.3d 797, 801 (6th Cir. 2000), which itself quotes from *United States v. L.E. Cooke Co.,* 991 F.2d 336, 342 (6th Cir. 1993)("[W]eaknesses in the factual basis of an expert witness' opinion ... bear on the weight of the evidence rather than on its admissibility.").

[78] *See* May 1, 1999 Report of the Advisory Committee on Evidence Rules, *supra* n. 15, at 7.

[79] Apr. 1, 2019 Memorandum from Daniel J. Capra, Reporter, *supra* n.31, at 24.

III. CLARIFICATION IS NECESSARY FOR RULE 702 TO FUNCTION AS INTENDED AND SAFEGUARD THE TRIAL PROCESS AGAINST MISLEADING OPINION TESTIMONY

The intended aims of Rule 702, including establishment of a uniform approach[80] and protection of jurors against deception by influential but unreliable opinions as *Daubert* directs,[81] remain essential for a properly functioning national rule to govern expert admissibility. Twenty years of inconsistency, however, have turned Rule 702 into a mosaic of standards in which the same testimony that one court excludes would be admissible in a sister court.[82] Misunderstanding Rule 702 is no matter of small consequence: litigation outcomes change depending on the court's

[80] In light of the increasing proportion of federal civil cases assigned to multidistrict litigation matters, in which the presiding court that tries a case may sit in a different circuit than the transferor court in which the matter was originally filed, a uniform standard for admitting expert testimony is now even more important than it was in 2000. *See* Daniel S. Wittenberg, MULTIDISTRICT LITIGATION: DOMINATING THE FEDERAL DOCKET AMERICAN BAR ASSOCIATION (2020), https://www.americanbar.org/groups/litigation/publications/litigation-news/business-litigation/multidistrict-litigation-dominating-federal-docket / (last visited Feb 28, 2020)(describing rise of MDL case proportion such that "MDLs accounted for 51.9 percent of all pending federal civil cases at the end of 2018.").

[81] *See In re Zurn Pex Plumbing Prods. Liab. Litig.*, 644 F.3d 604, 613 (8th Cir. 2011)("The main purpose of *Daubert* exclusion is to protect juries from being swayed by dubious scientific testimony."). *See also* Minutes of the Meeting of May 3, 2019, Advisory Comm. on Evidence Rules, *supra* n. 22, at 23.

[82] *See*, *e.g.*, *In re Roundup Products Liability Litigation*, No. 16-md-02741-VC, 2018 WL 3368534, at *5 (N.D. Cal. July 10, 2018)("[The Ninth Circuit's] emphasis has resulted in slightly more room for deference to experts in close cases than might be appropriate in some other Circuits. This is a difference that could matter in close cases."). *See also United States v. Raniere*, No. 18-CR-204-1 (NGG)(VMS), 2019 WL 2212639, at *6 (E.D.N.Y. May 22, 2019)("The Second Circuit's standard for admissibility of expert testimony is especially broad.")(citations omitted); *McCluskey*, 954 F. Supp. 2d at 1255 (recognizing that "the approach of the Eighth and Third Circuits is somewhat more restrictive than the approach of the First and other Circuits.").

conception of the admissibility standard.[83]

The Advisory Committee's acknowledgement that courts neglect or misapply critical aspects of Rule 702[84] leads to the conclusion that courts have become confused about what the rule requires, and so steps must be taken to halt ongoing misunderstanding of the law. Amending Rule 702 is necessary to restore a common understanding of the standard. Just as in 2000, the widespread inconsistency among the courts cries out for amendments to clarify the rule, with an accompanying Committee Note to eliminate any precedential value from off-the-mark prior rulings and to solidify a single approach to the expert admissibility question.[85] Although Rule 702 currently contains language describing the scope of the gatekeeping responsibility, that language has failed to guide courts in understanding that an expert's factual basis and methodology application only become credibility matters for the jury to decide after the court initially determines that the proponent has met

[83] *Compare*, *e.g.*, *Adams*, 867 F.3d at 915-16 (affirming admission of engineer's causation opinion in which hypothesis derived from exemplar testing was applied to the facts at issue by "rul[ing] out pedal misapplication," in unintended acceleration case that resulted in partial jury verdict for plaintiff) *with Nease*, 848 F.3d at 230-32 (reversing jury verdict in plaintiffs' favor and directing entry of judgment for defendant in unintended acceleration case where district court improperly dismissed challenges to engineer's application of methodology to case facts in forming causation opinion as "go[ing] to the weight, not admissibility, of [the expert's] testimony.").

[84] *See* Apr. 1, 2018 Memorandum from Daniel J. Capra, Reporter, *supra* n.1, at 52 ("[T]he fact remains that some courts are ignoring the requirements of Rule 702(b) and (d). That is frustrating.").

[85] *See* Apr. 1, 2018 Memorandum from Daniel J. Capra, Reporter, *supra* n.1, at 53 (indicating that "it may be possible to tweak the existing language [of Rule 702] in some way, and then write a Committee Note that strongly reaffirms the admissibility requirements in Rule 702 and criticizes the cases that treat these requirements as questions of weight rather than admissibility.").

the burden of establishing by a preponderance of the evidence that the expert meets the standard of admissibility. Similarly, courts need new direction that Rule 702 does not incorporate a presumption of admissibility or otherwise prefer admitting over excluding proffered opinion testimony, but instead requires the sponsor to fulfill the burden of production. Amending Rule 702's language on these issues and publishing a detailed Committee Note that identifies common misstatements of law and describes erroneous practices would create a new understanding of the rule's requirements and disrupt the pattern of recycled citations to outmoded conceptions of the court's role.

Although concerns have been voiced that wayward judges who already disregard the requirements of Rule 702 may not respond to renewed exhortations to apply Rule 702 as written,[86] this speculation should not deter the Advisory Committee from clarifying the rule for the great majority of judges and practitioners who read the rule and do their best to follow it. Doing nothing in the face of demonstrated judicial misunderstanding amounts to tacit acceptance of a different rule of expert admissibility—a rule the Advisory Committee never wrote. Without new direction, courts will continue to carry forward errors that effectively dilute the standard of admissibility, such as a court determining it "will err on the side of admissibility" [87] or

[86] *See* Apr. 1, 2018 Memorandum from Daniel J. Capra, Reporter, *supra* n.1, at 52 ("[I]t is hard to conclude that the problem of courts straying from the text will be solved by more text.").

[87] *See*, *e.g.*, *Lombardo v. Saint Louis*, No. 4:16-CV-01637-NCC, 2019 WL 414773, at *12 (E.D. Mo. Feb. 1, 2019)("[T]he Court will err on the side of admissibility."). *See also* cases cited at n.40, n.44, and n.47, *supra*.

demanding that a party seeking exclusion show that an "expert's opinion is so fundamentally unsupported that it can offer no assistance to the jury,"[88] into future generations of misguided decisions.[89]

Until the Advisory Committee amends Rule 702 to clarify its meaning, litigants should appeal rulings that fail to follow Rule 702's mandates, including when courts rely on nonexistent presumptions or defer admissibility questions to the jury. Such practices involve errors of law[90] in determining the admissibility of evidence, which "is

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[88] *See*, *e.g.*, *Pacific Indem. Co. v. Dalla Pola*, 65 F. Supp. 3d 296, 302 (D. Mass. 2014):

> The defendant has not shown that [the expert's] testimony falls within this exception [for opinion testimony so fundamentally unsupported that it can offer no assistance to the jury], and that his expert opinion is inadmissible. Therefore, the weight of that testimony must be evaluated by the finder of fact at trial.

[89] *See*, *e.g.*, *Paul Beverage*, 2019 WL 1044057, at *2 (admitting challenged opinion testimony without addressing the expert's basis or application, following Eighth Circuit's incorrect statement in *Nebraska Plastics, Inc. v. Holland Colors Americas, Inc.*, 408 F.3d 410, 416 (8th Cir. 2005) that "[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[,]" which traces to *Loudermill*, 863 F.2d at 570); *Powell*, 2015 WL 7720460, at *2 (2015 decision quoting *MacDermid Printing Sols., Inc. v. Cortron Corp.*, No. 3:08-cv-1649 MPS, 2014 WL 2615361, at *2 (D. Conn. June 12, 2014), which in turn cites to *Borawick*, 68 F.3d at 610, for the proposition that the Second Circuit embraces the idea that there should be a presumption of admissibility of evidence.).

[90] *See* Advisory Committee Note to 2000 Amendments to Rule 702 (the proponent of the expert's testimony "has the burden of establishing that the pertinent admissibility requirements are met by a preponderance of the evidence."); May 1, 1999 Report of the Advisory Committee on Evidence Rules, *supra* n. 15, at 5 ("The proposed amendment to Evidence Rule 702 . . . requires a showing of reliable methodology and sufficient basis, and provides that the expert's methodology must be applied properly to the facts of the case."); Oct. 1, 2019 Memorandum from Daniel J. Capra, Reporter, *supra* n.23, at 30 ("[Some courts] routinely state the misguided notion that arguments about sufficiency of basis and reliability of application almost always go to weight and not admissibility"); Apr. 1, 2018 Memorandum from Daniel J. Capra, Reporter, *supra* n.1, at 52 ("[T]he fact remains that some courts are ignoring the requirements of Rule 702(b) and (d).").

by definition an abuse of discretion."[91] The recognized fact that courts are not applying Rule 702 as written, and are instead assessing admissibility using different considerations and divergent standards across the circuits[92] presents a situation that warrants appellate redress.[93]

In light of the developed patterns of Rule 702 misunderstanding, maintaining the *status quo* amounts to resignation that the rule no longer demands what the 2000 amendments intended it to require. The lower courts need the Advisory Committee's direction to understand that approaches commonly taken in the gatekeeping process rely on misunderstandings of Rule 702. Unless these patterns are displaced with a new amendment, courts will continue addressing the admissibility of opinion testimony in ways that depart from the intent of Rule 702.[94] Rulemaking action is

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[91] *Nease*, 848 F.3d at 228 (quoting *Anderson v. Westinghouse Savannah River Co*., 406 F.3d 248, 260 (4th Cir. 2005)).

[92] *See supra* n. 1, n.72 & n.82.

[93] Notably, the Supreme Court granted *certiorari* in *Kumho Tire* to rectify inconsistency among the lower courts in applying the *Daubert* standard to technical experts. 526 U.S. at 146-47; ("We granted certiorari in light of uncertainty among the lower courts about whether, or how, *Daubert* applies to expert testimony that might be characterized as based not upon 'scientific' knowledge, but rather upon 'technical' or 'other specialized' knowledge."). Similarly, the Court granted *certiorari* in *Weisgram* to resolve a split among the circuits regarding whether "Federal Rule of Civil Procedure 50 permits an appellate court to direct the entry of judgment as a matter of law when it determines that [expert] evidence [critical for establishing a prima face case] was erroneously admitted at trial[.]" 528 U.S. at 446.

[94] *See*, *e.g.*, *Citizens State Bank*, 2020 WL 1065723, at *4 (dismissing argument that opinion was "not based on sufficient facts" without assessing the expert's factual basis, following Fifth Circuit's pre-*Daubert* statement in *Viterbo*, 826 F.2d at 422, that "[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"); *Orion Drilling*, 2019 WL 4273861, at *34 (shifting burden to party challenging admissibility to show the proffered opinion testimony is unreliable, following Third Circuit's

necessary to re-orient courts to the expert admissibility standard envisioned for Rule 702.

misleading characterization of Rule 702 in *Pineda v. Ford Motor Co.*, 520 F.3d 237, 244 (3d Cir. 2008) as embodying "a liberal policy of admissibility[.]").