COMMENT OF DRI AND THE DRI CENTER FOR LAW AND PUBLIC POLICY IN SUPPORT OF AMENDMENTS TO FEDERAL RULE OF EVIDENCE 702

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Expert witnesses have long been a part of civil and criminal trials, and it has always been the responsibility of the trial judge to determine whether experts are qualified to give expert testimony and to determine the relevance and admissibility of their testimony. The original Federal Rule of Evidence 702 as amended over time defines those standards, and of course that rule has been applied innumerable times by all federal courts, including the Supreme Court. The task of properly applying Rule 702, however, remains a challenge, as any number of decisions deviate from the terms of the current rule and its Committee Note.

DRI applauds and supports this Committee's effort to improve the rule (the "FRE 702 Amendment") to achieve a necessary uniformity of application. It does so not by changing the intent or purpose of the rule, but by placing within the rule itself two clear statements. First, the amendment makes clear that the burden is upon the party calling the expert to demonstrate by the preponderance of the evidence that the witness and the testimony meet the requirements set forth in the subsections of Rule 702. This principle has been too often ignored, given the requirements of FRE 104. Placing that language in the rule itself provides necessary emphasis on a term that has too often been overlooked. Second, the amendment reminds the judge of the responsibility to make sure that the proponent of the expert's opinion testimony has satisfied the court that not only is the testimony the product of reliable principles and methods, but also that the expert's opinion reflects a reliable application of those principles and methods to the facts of the case. While these principles have always been true, this Committee has properly observed that some courts have failed in their duty to apply these two rules faithfully. With some regularity, courts elide both the preponderance standard and the reliability standard when ruling on proffered FRE 702 evidence**.**

NUMEROUS DECISIONS UNDERMINE 2000 FRE 702, WHICH JUSTIFIES THE FRE 702 AMENDMENT

Opponents of the proposed amendment to FRE 702 assert that the rule is being applied as intended, but an abundant number of decisions contradict that assertion. An example of ignoring the preponderance standard when admitting expert evidence is the MDL *In re C. R. Bard, Inc. Pelvic Repair System Products Liability Litigation*, 2018 WL 4220618 (S.D. W. Va. 2018). When considering pretrial motions on the admissibility of evidence, the district court stated that the "proponent of expert testimony does not have the burden to 'prove' anything." *Id.* at *2,

quoting Md. Cas. Com v. Therm-O-Disc, Inc., 137 F.3d 780, 783 (4th Cir. 1998). In addition to the pre-2000 FRE 702[1] *Therm-O-Disc* case, the district court also cited another case from that era for the proposition that admissibility considers the principles and methodology of the expert, but not "the conclusions reached." *Id., quoting Westberry v. Gislaved Gummi AB*, 178 F.3 257, 261 (4th Cir. 1998).

Prior to 2000 FRE 702, *Therm-O-Disc* rejected the argument that "*Daubert* requires the party proffering the expert testimony to meet its [FRE] 104(a) burden by a preponderance of evidence." *Therm-O-Disc, Inc.*, 137 F.3d at 782–83, n. 9; *but see Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 A.S. 579, 592, n. 10 (1993) (imposing preponderance standard on FRE 702). The 2000 FRE 702 amendment spoke directly to and countered that appellate court's analysis. The Committee Note for 2000 FRE 702 states, in direct contradiction of *Therm-O-Disc*, "the admissibility of all expert testimony is governed by the principles of Rule 104(a). Under that Rule, the proponent has the burden of establishing that the pertinent admissibility requirements are met by a preponderance of the evidence. *See Bourjaily v. United States*, 483 U.S. 171 (1987)."

Another example is *Bluetooth SIG, Inc.*, 468 F. Supp. 1342 (W.D. Wash. 2020). *Bluetooth* confuses the factual sufficiency of an expert's opinion with the credibility of that opinion, saying that 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 on cross-examination." *Id.* at 1349, *quoting In re Toyota Motor Corp Unintended Acceleration Mktg., Sales Practices, & Prod. Liab. Litig.*, 978 F. Supp.2d 1053, 1069 (C.D. Cal. 2013). The antecedent citations in *Toyota* lead back to a decision superseded by the 2000 FRE 702 Amendment. *See Hose v. Chicago Northwestern Transp. Co.*, 70 F.3d 968, 974 (8th Cir.1995). *Hose* states, "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. Only if the expert's opinion is so fundamentally unsupported that it can offer no assistance to the jury must such testimony be excluded." *Id.* In that iteration of pre-2000 FRE 702 decisions that passed down to *Bluetooth* in 2020, the proponent does not have to show that more likely than not that facts undergird an expert opinion. Instead, the opponent of that evidence has to convince the judge or jury that facts do not support the opinion. *Bresler v. Wilmington Trust*, 855 F.3d 178 (4th Cir. 2017) makes a similar misstatement of 2000 FRE 702, saying, "questions regarding the factual underpinnings of the expert witness' opinion affect the weight and credibility of the witness' assessment, not its admissibility." *Id.* at 195 (cleaned up).

Johnson v. Mead Johnson & Co., 754 F.3d 557 (8th Cir. 2014), illustrates the profound power of ignoring the preponderance standard articulated in the FRE 702 Amendment. The trial court had excluded certain expert opinions, **after reciting 2000 FRE 702 and applying Eighth**

[1] The amendments of FRE 702 in 2000 and 2011 are collectively referred to as "2000 FRE 702." In 2011 the language of Rule 702 was amended "as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only." Committee Note on Rules – 2011 Amendment, FRE 702.

Circuit precedent employing the preponderance standard to admit expert opinion evidence. *Johnson v. Mead Johnson & Co.*, 2013 WL 716816 (D. Minn. 2013). The district court noted Eighth Circuit precedent resolving doubts in favor of admissibility and the utility of cross-examination for discerning the truth, *id.* at *3, but it also noted the precedent that, "[t]he proponent of the proffered expert testimony must show by the preponderance of the evidence that the expert is qualified and the expert's proffered opinion is reliable." *Id., citing Khoury v. Philips Med. Sys.*, 614 F.3d 888, 892 (8th Cir.2010). The trial court meticulously considered the probability that the proffered evidence fulfilled the requirements of 2000 FRE 702. *Id.* at *4–*8. That effort included reference to the preponderance admissibility standard. *Id.* at 7. After excluding plaintiff's causation experts because the burden of establishing admissibility was not fulfilled, summary judgment was granted to the defendant.

On appeal the exclusion of the evidence was reversed. *Johnson*, 754 F.3d 557. In articulating the standard for reviewing the admission of expert opinions, the appellate court cited its prior ruling in *Polski v. Quigley Corp.*, 5387 F.3d 836, 839 (8th Cir. 2008). *Polski* states that the proponent of expert evidence bears the burden of establishing admissibility by a preponderance. *Id.* at 841 (*citing Marmo v. Tyson Fresh Meats, Inc.*, 457 F.3d 748, 757–58 (8th Cir. 2006, *citing Daubert*, 509 U.S. at 580 (sic)). The *Johnson* appellate court neglected its own *Khoury* decision cited by the district court, which says the same thing. Without any regard for the preponderance standard in its own precedents, and without finding that the proponent had fulfilled the preponderance requirement, the appellate court reversed the exclusion of the experts. That decision occurred 14 years after the adoption of 2000 FRE 702, and more than 20 years after *Daubert* invoked the preponderance standard with specific reference to FRE 702.

Likewise, the Ninth Circuit reversed a trial court without ever considering the probability of admissibility of the contested evidence, in *City of Pomona v. SQM North Am. Corp.*, 750 F.3d 1036 (9th Cir. 2014). The appellate court ruled that the trial court abused its discretion when finding an inadequate methodology, testing of the opinion, and the adequacy of the data. *Id.* at 1044–49. The appellate court, however, never considered whether the proponent of the evidence had established by a preponderance that the expert evidence was admissible, as intended by 2000 FRE 702.

Opponents of amending FRE 702 also err if they mean to say that courts are routinely requiring that expert evidence reliably apply the expert's principles and methods to the facts of the case. *C. R. Bard, supra,* also exemplifies cases that rely on superseded law pre-dating 2000 FRE 702, when it focused on the reliability of the expert's principles and methodology, to the exclusion of the reliability of "the conclusions reached." *Id*., quoting *Westberry*, 178 F.3 at 261. The Committee Note for 2000 FRE 702 addressed the very reason that FRE 702(d) was added to the rule: "[t]he 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. 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.* '" (Emph. in *In re Paoli*).

The Procter & Gamble Co. v. Haugen, 2007 WL 709298 (D. Utah, N.D. 2007), follows the same pattern of ignoring 2000 FRE 702. That decision quoted a Tenth Circuit decision for

the framework of judging expert opinion testimony. *Id.* at *1, *quoting United States v. Rodriguez-Felix*, 450 F.3d 1117, 1122–23 (10th Cir. 2006). *Rodriguez-Felix* quotes—six years after the effective date of 2000 FRE 702—the 1975 version of FRE 702 to determine the legal standard and gatekeeping role! *Id.* at 1122–23. The appellate court recites precedent prior to 2000 FRE 702 to limit the judicial gatekeeping role, ignoring the Committee Note for 2000 FRE 702 concerning the preponderance of the evidence of standard for determining admissibility.

Oshana v. The Coca-Cola Co., 2005 WL 1661999 (N.D. Ill. 2005), is in the same vein. Its analysis of Rule 702 is limited to citations to the 1993 *Daubert* decision, in spite of 2000 FRE 702. This results in the district court citing *Daubert* when saying that cross-examination is *the* tool for addressing challenges to an expert's application of reliable methodology, 2005 WL 1661999 at *4, even though 2000 FRE 702(d) instructs the court to condition admission of expert evidence on the expert's reliable application of acceptable principles and methods to the facts of the case. The cross-examination dodge concerning reliable application of principles and methodology was also employed in *United States v. Adam Bros. Farming, Inc.*, 2005 WL 5957827, *5, *6 (C.D. Cal. 2005). That case also only cites to *Daubert* as precedent, without recognition of the terms of 2000 FRE 702(d).

The proposed the FRE 702 Amendment places these important requirements governing experts and their testimony in the rule itself, demonstrating their importance when deciding whether the expert is qualified and whether the testimony is admissible. Placing this language in the rule, illuminated by the Committee Note, emphasizes how to apply this rule properly. Two decades of experience illustrate the wisdom of writing into FRE 702 what the Committee Note said in 2000.

ADDITIONAL AMENDMENTS ARE WARRANTED

Several amendments to the FRE 702 Amendment would improve those proposals. A prior draft of the FRE 702 Amendment provided that, "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 court finds* the proponent has demonstrated by a preponderance of the evidence that. . . ." It should be plain that the Rules of Evidence are applied by the court to determine admissibility, but the history subsequent to 2000 FRE 702 is of many courts failing to do what that Rule and accompanying Committee Note states. So many decisions have confused the roles of judge and jury regarding FRE 702 that the text of the Rule should plainly state that the court has an obligation to determine whether a preponderance of evidence supports admission.

Lawyers for Civil Justice has soundly proposed an amendment to the Note for the FRE 702 Amendment, to address the many decisions that incorrectly have favored admission of expert evidence without fidelity to 2000 FRE 702. The current draft says, "Unfortunately, some courts have required the expert's testimony to 'appreciably help' the trier of fact. Applying a higher standard than helpfulness to otherwise reliable expert testimony is unnecessarily strict." The proposed Note should go on to say, "Rule 702 favors neither admission nor exclusion of evidence, but rather states the process for determining admissibility. Prior decisions that stated either a heightened burden of admissibility or a presumption in favor of admissibility are not consistent with Rule 702."

CONCLUSION

The members of DRI frequently represent clients who wish to admit expert testimony, and face opponents who also wish to use such testimony at trial. Experience has established the soundness and necessity of the FRE 702 Amendment. Without it, the standard for expert evidence is hazy, and different litigants get different justice regarding critical expert opinion evidence. DRI and the Center for Law and Public Policy believe these changes will help counsel properly present qualified experts and appropriately oppose witnesses when their qualifications or testimony do not meet the clear requirements contained in this amendment.