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THE EARLY RETURNS ARE IN: A REVIEW OF THE FIRST TWO YEARS OF AMENDED FEDERAL RULE OF EVIDENCE 702

Lee Mickus, Mark A. Behrens** & Christopher E. Appel****

Amendments to Federal Rule of Evidence 702 governing the admissibility of expert testimony took effect on December 1, 2023.¹ The amendments intend to correct misapplication of the prior (2000) version of the Rule by “many courts,”² but are not viewed by the federal judiciary as a substantive change in law.³

Prior to the 2023 amendment, “many decisions” incorrectly “declared the factual basis of an expert’s opinion and the application of the expert’s methodology to the facts of the case to be matters of weight for juries to evaluate and not admissibility considerations for the court to decide.”⁴ In addition, “some courts did not assess expert testimony under the preponderance of the evidence burden of production that applies to Rule 702 inquiries, but instead relied on characterizations of Rule 702 as being

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1. See FED. R. EVID. 702; Mark Behrens & Andrew Trask, *Federal Rule of Evidence 702: A History and Guide to the 2023 Amendments Governing Expert Evidence*, 12 TEX. A&M L. REV. 43, 46-47 (2024).

2. FED. R. EVID. 702 advisory committee’s note to 2023 amendment.

3. *Id.* (“Nothing in the amendment imposes any new, specific procedures.”).

4. Lee Mickus, *Federal Rule of Evidence 702: A Practitioner’s Guide to Understanding the 2023 Amendments*, WASH. LEGAL FOUND. 1 (June 2024), <https://www.wlf.org/wp-content/uploads/2024/06/062024Mickus-CLN.pdf> [https://perma.cc/9RVP-LURP] (collecting cases). The chair of the Advisory Committee, Chief United States District Court Judge Patrick Schiltz of the District of Minnesota, explained in a memorandum to the Committee on Rules of Practice and Procedure (known as the Standing Committee):

[M]any 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.

Memorandum from the Advisory Comm. on Evidence Rules on the Report of the Advisory Committee on Evidence Rules to the Standing Comm. on Rules of Prac. & Proc. 6 (May 15, 2022), https://www.uscourts.gov/sites/default/files/evidence_rules_report_-_may_2022_0.pdf [https://perma.cc/V7GM-QYR9].

a ‘liberal’ standard or ‘presuming admissibility.’”⁵ Further, “a number of judges allowed experts to overstate the conclusions that their methodology will actually support, resulting in expressions of a degree of confidence in the experts’ conclusions that go beyond what reliable science will allow.”⁶

In response, the federal judiciary’s Advisory Committee on Evidence Rules developed amendments to: (1) “clarify and emphasize 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 [R]ule,” and (2) “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.”⁷ The amendments changed the Rule as follows:

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

5. Mickus, *supra* note 4, at 1; *see also* Fed. R. Evid. 702 advisory committee’s note to 2023 amendment (stating “many courts have incorrectly determined” that Rule 702 inquiries are “governed by the more permissive Rule 104(b) standard” rather than Rule 104(a)’s preponderance standard).

6. Mickus, *supra* note 4, at 1; *see also* Fed. R. Evid. 702 advisory committee’s note to 2023 amendment (stating “each expert opinion must stay within the bounds of what can be concluded from a reliable application of the expert’s basis and methodology.”).

7. FED. R. EVID. 702 advisory committee’s note to 2023 amendment.

(d) the ~~expert has reliably applied~~ expert's opinion reflects a reliable application of the principles and methods to the facts of the case.⁸

Amended Rule 702 is the product of years of deliberation by the Advisory Committee and a lengthy public comment process.⁹ A diverse array of organizations supported the amendments as a means of promoting reliability and fairness in cases that might turn on the admissibility and consideration of expert evidence.¹⁰ Today, an unresolved question is whether the 2023 amendments have had their intended effect of correcting widespread misapplication of the Rule by courts.

This Article examines the first two years of case law applying amended Rule 702 to assess the effect of the 2023 amendments. Section I discusses the history and development of the 2023 version of Rule 702. Section II analyzes federal courts' treatment of the amended Rule, especially in the courts that misapplied the Rule in the past. This Article finds that the 2023 amendments have had a positive impact, but some courts continue to rely on obsolete case law, resulting in rulings at odds with the plain text—and certainly the spirit—of amended Rule 702. For those courts, greater judicial education may be needed to fulfill the promise of the amended Rule or the United States Supreme Court should step in and “take up the issue directly.”¹¹ This Article calls on all judges to embrace their gatekeeping responsibility, recognize past errors that led to the latest amendments, and apply amended Rule 702 as it is written and clearly intended to be applied.

8. FED. R. EVID. 702.

9. See Behrens & Trask, *supra* note 1, at 54–65 (detailing Advisory Committee approval process); Memorandum from the Advisory Comm. on Evidence Rules on the Report of the Advisory Committee on Evidence Rules to the Standing Comm. on Rules of Prac. & Proc. 7 (May 15, 2022), https://www.uscourts.gov/sites/default/files/evidence_rules_report_-_may_2022_0.pdf [<https://perma.cc/V7GM-QYR9>] (“More than 500 comments were received on the proposed amendments to Rule 702”); see also Colleen Cochran, *The Process, Progression, and Potential Ramifications of the Rule 702 Amendment*, ABA (Sept. 5, 2022), https://www.americanbar.org/groups/business_law/resources/business-law-today/2022-september/process-progression-and-potential-ramifications-of-rule-702-amendment/ [<https://perma.cc/8T6X-7TBJ>].

10. See *infra* note 52 and accompanying text.

11. *Federal Rule of Evidence 702: Judicial Conference Amends Rule 702*, 138 HARV. L. REV. 899, 906 (Jan. 2025).

I. HISTORY AND DEVELOPMENT OF THE 2023 AMENDMENTS TO RULE 702

A. *Widespread Misapplication of Rule 702 Post-2000*

The 2023 amendments are a direct response to courts' misapplication of amendments to Rule 702 in 2000 that charged trial judges with the responsibility of acting as gatekeepers to exclude unreliable expert testimony.¹² In 2000, Rule 702 was amended to codify a series of United States Supreme Court cases in the 1990s that articulated the standards for admitting expert testimony in federal court:¹³ *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,¹⁴ *Kumho Tire Co. v. Carmichael*,¹⁵ and *General Electric Co. v. Joiner*.¹⁶ The 2000 amendments "affirm[ed] the trial court's role as gatekeeper" articulated in *Daubert* and its progeny and added "some general standards that the trial court must use to assess the reliability and helpfulness of proffered expert testimony."¹⁷ The commentary accompanying the 2000 amendments also stated that "the admissibility of all expert testimony is governed by the principles of Rule 104(a)," which requires that each of the "pertinent admissibility requirements are met by a preponderance of the evidence."¹⁸

Despite these requirements, many courts "continued to apply significantly more lenient standards for expert testimony than Rule 702 permits,"¹⁹ leading to "roulette wheel randomness" in decisions around the nation.²⁰ According to Professor David Bernstein, co-author of *The*

12. See FED. R. EVID. 702 advisory committee's note to 2023 amendment (discussing misapplication of the 2000 amendments to Rule 702 by many courts).

13. *Id.* ("Rule 702 has been amended in response to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and to the many cases applying *Daubert*, including *Kumho Tire Co. v. Carmichael*, 119 S. Ct. 1167 (1999).")

14. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993).

15. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999).

16. *Gen. Elec. Co. v. Joiner*, 522 U.S. 136 (1997).

17. FED. R. EVID. 702 advisory committee's note to 2000 amendment. "*Daubert* set forth a non-exclusive checklist for trial courts to use in assessing the reliability of scientific expert testimony." *Id.* The factors include:

(1) whether the expert's technique or theory can be or has been tested . . . or whether it is instead simply a subjective, conclusory approach that cannot reasonably be assessed for reliability; (2) whether the technique or theory has been subject to peer review and publication; (3) the known or potential rate of error of the technique or theory when applied; (4) the existence and maintenance of standards and controls; and (5) whether the technique or theory has been generally accepted in the scientific community.

Id.

18. *Id.* (citing *Bourjaily v. United States*, 483 U.S. 171 (1987)).

19. David E. Bernstein, *The Misbegotten Judicial Resistance to the Daubert Revolution*, 89 NOTRE DAME L. REV. 27, 30 (2013).

20. Victor E. Schwartz & Cary Silverman, *The Draining of Daubert and the Recidivism of Junk Science in Federal and State Courts*, 35 HOFSTRA L. REV. 217, 218 (2006); see also Bernstein, *supra* note 18, at 29 (discussing "extraordinary undercurrent of rebellion by a minority of federal judges who

New Wigmore: Expert Evidence treatise, many judges appeared to “ignore the text of Rule 702,” instead relying on “precedents that predate[d] (and conflict[ed] with) not only the text of amended Rule 702, but also with some or all of the *Daubert* trilogy.”²¹ There are numerous examples.²²

For instance, opinions from the U.S. Courts of Appeals for the Fifth, Eighth, and Ninth Circuits discarded Rule 702’s directive that admissible opinion testimony must have sufficient factual support, expressing views that the “factual basis of an expert opinion goes to the credibility of the testimony, not the admissibility,”²³ or that “deficiencies in an expert’s factual basis go to weight and not admissibility.”²⁴ Other courts admitted “shaky” expert evidence based on a perceived “liberal thrust” favoring admission.²⁵ In 2021, the U.S. Court of Appeals for the Eighth Circuit, relying on pre-*Daubert* case law, went so far as to hold that a district court may *only* exclude an expert’s opinion “if it is ‘so fundamentally unsupported’ by its factual basis ‘that it can offer no assistance to the jury.’”²⁶

In a landmark 2015 article that provided the impetus to amend Rule 702, Professor Bernstein and co-author Eric Lasker demonstrated

implicitly object to the radical changes wrought by the ‘*Daubert* revolution’); Archibald Cruz, *The Paradigm Shift in the Proposed Amendment to Federal Rule of Evidence 702*, 75 BAYLOR L. REV. 265, 265 (2023) (stating Rule 702’s “gatekeeping function is inconsistent among the federal circuits.”).

21. Bernstein, *supra* note 19, at 29.

22. *See id.* at 50-64 (providing examples of the various ways federal courts misapplied the 2000 amendments); Behrens & Trask, *supra* note 1, at 50-51 (same); Schwartz & Silverman, *supra* note 20, at 231 (discussing courts’ “draining” of the admissibility standards of the 2000 version of Rule 702 and noting “at least five areas of inconsistency: relevance, flexibility of *Daubert*’s application, application (or lack thereof) of the expert’s methodology, the necessity of pre-trial *Daubert* hearings, and appellate standards of review”).

23. *Mighty Enters., Inc. v. She Hong Indus. Co.*, 745 F. App’x 706, 709 (9th Cir. 2018); *Hangarter v. Provident Life & Accident Ins. Co.*, 373 F.3d 998, 1018 (9th Cir. 2004); *see also In re Roundup Prods. Liab. Litig.*, 390 F. Supp. 3d 1102, 1108, 1113 (N.D. Cal. 2018) (stating that the Ninth Circuit’s approach toward expert testimony “has resulted in slightly more room for deference to experts in close cases than might be appropriate in some other Circuits”); *cf.* Jessica Miller, Benjamin Halperin, & Anthony Balzano, *Defendants’ Chances on Daubert May Vary by Circuit*, LAW360 (Oct. 1, 2019), <https://www.law360.com/articles/1203411/defendants-chances-on-daubert-may-vary-by-circuit> [https://perma.cc/3GD2-ZY7J] (stating a survey of decisions found the “Ninth Circuit is considerably more likely than other circuits to reverse district courts that exclude expert witnesses.”).

24. *In re Bair Hugger Forced Air Warming Devices Prods. Liab. Litig.*, 9 F.4th 768, 786 (8th Cir. 2021); *Puga v. RCX Sols., Inc.*, 922 F.3d 285, 294 (5th Cir. 2019) (announcing similar “general rule”); *see also Child. ’s Broad. Corp. v. Walt Disney Co.*, 357 F.3d 860, 865 (8th Cir. 2004) (“[T]he 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.”).

25. *In re Roundup Prods. Liab. Litig.*, 390 F. Supp. 3d at 1151 (allowing case to proceed based upon testimony the court called “rather weak” and “shaky”); *Wendell v. GlaxoSmithKline LLC*, 858 F.3d 1227, 1237 (9th Cir. 2017) (stating the “interests of justice favor leaving difficult issues in the hands of the jury,” such as “shaky” expert evidence).

26. *In re Bair Hugger*, 9 F.4th at 778 (citation omitted).

that many courts were misapplying Rule 702.²⁷ They showed that many courts applied superseded approaches to analyze expert testimony that often quoted *Daubert* over Rule 702's text.²⁸ That was problematic, they explained, because the Court "larded *Daubert* with conflicting rhetoric that left ambiguous whether the case should be interpreted as establishing a strict or lenient standard of admissibility."²⁹ For instance, in *Daubert*, the Court noted the "liberal thrust"³⁰ of the Federal Rules of Evidence, emphasized the "'flexible' nature of the inquiry in which trial courts must engage," "expressed optimism about the capabilities of the adversarial process and of the jury, and spoke of 'shaky but admissible evidence.'"³¹ The 2000 version of Rule 702, in comparison, elaborated on the Court's requirements for expert evidence to establish a more definitive admissibility standard. Because many courts failed to recognize the distinction, the "same divisions that existed in the courts prior to 2000 continued post-2000—and on the same issues that the Judicial Conference sought to resolve" with the 2000 amendments.³² The inconsistency and seeming "randomness" in judicial decisions led Bernstein and Lasker to conclude that Rule 702 needed revision "to secure the promise of *Daubert* and effectively protect future litigants and juries from the powerful and quite misleading impact of unreliable expert testimony."³³

Other scholarship reinforced the need for reform.³⁴ For example, the organization Lawyers for Civil Justice reviewed over 1,000 federal district court opinions considering Rule 702 motions in 2020.³⁵ Sixty-five percent of the opinions did not mention the proponent's burden of proof

27. See David E. Bernstein & Eric G. Lasker, *Defending Daubert: It's Time to Amend Federal Rules of Evidence 702*, 57 WM. & MARY L. REV. 1, 19–25 (2015).

28. *Id.* at 1 ("Many courts continue to resist the judiciary's proper gatekeeping role, either by ignoring Rule 702's mandate altogether or by aggressively reinterpreting the Rule's provisions.")

29. *Id.* at 5.

30. *Id.* (quoting *Daubert v. Merrell Dow Pharms. Inc.*, 509 U.S. 579, 588 (1993)). It is noteworthy that the *Daubert* decision's reference to the "liberal thrust" of the Federal Rules of Evidence was a statement of comparison with the superseded "general acceptance" test set forth in *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923), not a separate aspiration expressed by the Court. *Daubert*, 509 U.S. at 588.

31. Bernstein & Lasker, *supra* note 27, at 5 (quoting *Daubert*, 509 U.S. at 594, 596).

32. *Id.* at 7.

33. *Id.* at 48.

34. See, e.g., Lee Mickus, *Gatekeeping Reorientation: Amend Rule 702 to Correct Judicial Misunderstanding About Expert Evidence* 13 (Wash. Legal Found., Critical Legal Issues Working Paper, No. 217, 2020), <https://www.wlf.org/wp-content/uploads/2020/05/0520MickusWPfinal-for-web-002.pdf> [<https://perma.cc/354C-JBCU>].

35. See Kateland R. Jackson & Andrew J. Trask, *Federal Rule of Evidence 702: A One-Year Review and Study of Decisions in 2020*, LAWS. FOR CIV. JUST. 2 (Sept. 30, 2021), <https://www.lfcj.com/document-directory/federal-rule-of-evidence-702a-one-year-review-and-study-of-decisions-in-2020> [<https://perma.cc/C9QJ-6CWA>].

or cite the preponderance of the evidence standard.³⁶ More disturbing was the inconsistency within judicial districts. In fifty-seven of the ninety-three federal judicial districts (sixty-one percent), “courts split over whether to apply the preponderance standard when assessing admissibility.”³⁷ Six percent of cases cited “both the preponderance standard *and* a presumption favoring admissibility (a ‘liberal thrust’ approach),” which was “remarkable” because “these standards are inconsistent with each other.”³⁸

This pervasive, continued misapplication of Rule 702—many years after the federal judiciary had time to absorb the 2000 amendments—showed that improving proper application of the Rule would likely require a rule change.³⁹

B. Development of Amended Rule 702

The Bernstein and Lasker article alerted the Advisory Committee on Evidence Rules to the seriousness and scope of courts’ misapplication of Rule 702. In 2016, the Advisory Committee’s Reporter, Professor Daniel Capra, affirmed that “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.”⁴⁰ He stated that “wayward courts simply don’t follow the rule. They have a different, less stringent view of the gatekeeper function.”⁴¹

Professor Capra added that “public reports challenging the reliability of various forms of forensic evidence” provided an even “stronger reason” for the Advisory Committee to revisit Rule 702.⁴² He noted that the National Academy of Science and President’s Council of Advisors on Science and Technology had “examined the scientific validity of forensic evidence techniques—fingerprint, bitemark, firearm, footwear and hair analysis—and ha[d] concluded that virtually all of these methods are

36. *See id.*

37. *Id.*

38. *Id.* at 4.

39. *See generally* Andrew Jurs & Scott DeVito, *A Return to Rationality: Restoring the Rule of Law After Daubert’s Disastrous U-Turn*, 54 N.M. L. REV. 163, 201 (2024) (“[T]he effect of *Daubert* since 1993 on litigant behavior has been wildly inconsistent” and “falls short of the predictability and clarity necessary for a legal test to meet fundamental notions of the rule of law...”).

40. Memorandum from Daniel J. Capra on Public Comment Suggesting an Amendment to Rule 702 to Advisory Comm. on Evidence Rules 268 (Oct. 1, 2016), <https://www.uscourts.gov/sites/default/files/2016-10-evidence-agenda-book.pdf> [<https://perma.cc/N2DX-W537>].

41. *Id.*

42. *Id.* at 271.

unscientific and insufficiently standardized.”⁴³ Professor Capra suggested that a “package” of Rule 702 amendments could address these different aspects of commonly proffered expert evidence.⁴⁴

In 2018, after several years of Advisory Committee discussions, including two symposiums examining courts’ misapplication of Rule 702,⁴⁵ the Advisory Committee’s then-Chair, Judge Debra Ann Livingston of the U.S. Court of Appeals for the Second Circuit, stated there was “strong interest” in potential amendments to Rule 702.⁴⁶ As specific rule amendment proposals started taking shape, Chair Livingston reported the Committee had determined “that a free-standing evidence rule on ‘forensic evidence’ would be ill-advised,” so the Committee would instead focus on a Rule 702 amendment to limit overstatement by experts—forensic or otherwise.⁴⁷ As a result, by late 2020, the Committee narrowed its focus on amendments that would (1) “clarify the application of the [Rule] 104(a) preponderance standard of admissibility to [Rule] 702 inquiries” and (2) “prevent an expert from ‘overstating’ her conclusions.”⁴⁸

In 2021, the Advisory Committee approved proposed amendments to Rule 702 and the accompanying Committee Notes.⁴⁹ The Standing Committee on Rules of Practice and Procedure then approved publication of the following proposed amendments for public comment:

43. *Id.*; see also NAT’L RSCH. COUNCIL, STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD xix (2009); Exec. Off. President, President’s Council Advisors on Sci. & Tech., *Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods*, OBAMA WHITE HOUSE ARCHIVES 1 (Sept. 2016), https://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/PCAST/pcast_forensic_science_report_final.pdf [<https://perma.cc/V4FR-QP6H>]. The PCAST report provided “an exhaustive analysis of why certain forensic comparison methods are questionable” with particular attention paid “to the problem of experts overstating their results.” Daniel J. Capra, *Foreword: Symposium on Forensic Expert Testimony, Daubert, and Rule 702*, 86 FORDHAM L. REV. 1459, 1459–60 (2018).

44. Memorandum from Daniel J. Capra, *supra* note 40, at 271.

45. See Behrens & Trask, *supra* note 1, at 54–58 (discussing Rule 702 symposiums at Boston College Law School in 2017 and the University of Denver Sturm College of Law in 2018).

46. Advisory Comm. on Evidence Rules: *Minutes of the Meeting of Oct. 19, 2018*, U.S. CTS. 15 (May 3, 2019), <https://www.uscourts.gov/sites/default/files/2019-05-evidence-agenda-book.pdf> [<https://perma.cc/8TG8-ANWL>].

47. Advisory Comm. on Evidence Rules: *Minutes of the Meeting of May 3, 2019*, U.S. CTS. 25 (Oct. 25, 2019), https://www.uscourts.gov/sites/default/files/advisory_committee_on_rules_of_evidence_-_final_draft_agenda_book.pdf [<https://perma.cc/TV9M-X4Z9>].

48. Advisory Comm. on Evidence Rules: *Minutes of the Meeting of Nov. 13, 2020*, U.S. CTS. 17 (Apr. 30, 2021), https://www.uscourts.gov/sites/default/files/advisory_committee_on_evidence_rules_-_agenda_book_spring_2021.pdf [<https://perma.cc/3HP6-SYAY>].

49. Memorandum from Hon. Patrick J. Schiltz, Chair, Advisory Comm. on Evid. Rules, on Report of the Advisory Comm. on Evid. Rules 1 (May 15, 2021), https://www.uscourts.gov/sites/default/files/evidence_rules_report_-_may_2021_0.pdf.

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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 has demonstrated by a preponderance of the evidence 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 expert’s opinion reflects a reliable application of the principles and methods to the facts of the case.⁵⁰

The Advisory Committee received over 530 comments on the proposed amendments.⁵¹ Defense lawyers and groups such as Lawyers for Civil Justice, which expressed early support for the amendments, were joined by the Innocence Project and Democracy Forward Foundation, among others, in supporting the proposed amendments.⁵² Most of the public comments opposing the proposed amendments came from “lawyers and law firms representing plaintiffs.”⁵³ According to Professor Capra and his

50. Memorandum from Hon. John D. Bates, Chair, Comm. on Rules of Prac. & Proc., on the Request for Comments on Proposed Amendments to Federal Rules and Forms to the Bench, Bar, & Public 308–09 (Aug. 6, 2021), https://www.uscourts.gov/sites/default/files/preliminary_draft_of_proposed_amendments_-_august_2021_0.pdf [<https://perma.cc/7T23-2GZN>].

51. *See* Memorandum from Daniel J. Capra & Liesa L. Richter on Possible Amendment to Rule 702 to the Advisory Comm. on Evidence Rules 1 (Apr. 1, 2022), https://www.uscourts.gov/sites/default/files/evidence_agenda_book_may_6_2022.pdf [<https://perma.cc/N468-DSMG>].

52. *See id.* at 15 (“The Innocence Project, together with a coalition of public interest organizations and legal scholars (EV-2021-0005-0121) supports the proposed amendment to Rule 702, emphasizing ‘the importance of amending Federal Rule of Evidence 702 to bring scientific integrity to proceedings in which life and liberty are at stake.’”); *id.* at 44 (“The Democracy Forward Foundation (EV-2021-0005-0443), an organization working to show that independent science can inform public decisionmaking without political interference, supports the proposed amendment to Rule 702.”).

53. *Id.* at 4.

fellow Advisory Committee Reporter, Professor Liesa Richter, a “large number” of these comments were “based on misunderstandings of the existing law on expert testimony under Rule 702.”⁵⁴

For example, “many comments complained that the amendment would shift the burden of proof on reliability to the proponent of the experts,” but “the burden has been on the proponent to establish reliability at least since *Daubert*, and definitely since the 2000 amendment.”⁵⁵ Many comments also asserted “that the amendment conflicts with *Daubert* because it requires the court to evaluate whether the expert’s methodology was reliably applied.”⁵⁶ But, the *Daubert* opinion’s “infamous statement that the gatekeeper must look only at the expert’s methodology and not at the conclusion” was “abandoned by the Court itself in its decision in *Joiner*” and “completely rejected by the 2000 amendment to Rule 702, which added Rule 702(d), specifically requiring the judge to find by a preponderance that the expert’s methodology was properly applied.”⁵⁷ The Reporters added:

The fact that so many good lawyers misstate the intent and meaning of Rule 702 provides cause for clarifying that: 1) the proponent has the burden of demonstrating reliability; and [2)] the court must consider whether the expert’s opinion reflects a reliable application of the methodology. That’s exactly what the amendment does.⁵⁸

Professors Capra and Richter also noted that “organizations considered to be neutral submitted public comment in favor of the amendment.”⁵⁹

Following the comment period, the Advisory Committee made a few tweaks to the proposed amendments. The Committee clarified that proponents must demonstrate “to the court,” not the jury, whether each of the reliability requirements of the Rule have been met.⁶⁰ The Committee also replaced the “preponderance of the evidence” language with the phrase “more likely than not” to assuage opponent concerns that courts

54. *Id.*

55. *Id.*

56. *Id.* at 5.

57. *Id.*

58. *Id.*

59. *Id.* at 8 (listing the Federal Magistrate Judges’ Association, the Association of the Bar of the City of New York, and the Federal Bar Association, among others).

60. Memorandum from Hon. Patrick J. Schiltz, Chair, Standing Comm. on Rules of Prac. & Proc., on the Report of the Advisory Committee on Evidence Rules to Hon. John D. Bates, Chair Advisory Comm. on Evidence Rules 872 (May 15, 2022), https://www.uscourts.gov/sites/default/files/2022-06_standing_committee_agenda_book_final.pdf [<https://perma.cc/P3VD-YEF3>].

might misinterpret the amendment to “limit the court to considering only *admissible* evidence” at a Rule 702 hearing.⁶¹ The Committee disagreed with this concern, but determined the substituted phrase “would achieve the same purpose while not raising the concerns (valid or not) mentioned by many commentators.”⁶²

In 2022, the Standing Committee unanimously approved the proposed amendments to Rule 702.⁶³ Later that year, the amendments were approved by the Judicial Conference of the United States and transmitted to the U.S. Supreme Court.⁶⁴ Chief Justice John Roberts, Jr. then transmitted the proposed amendments to Congress, which made no changes, and the amendments became effective December 1, 2023.⁶⁵

As the Committee Note explains, the 2023 version of Rule 702 emphasizes the “essential” importance of judicial gatekeeping through two key changes.⁶⁶ First, to address incorrect decisions by “many courts” stating 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,” the amendments emphasize that a proponent of expert testimony must demonstrate by a preponderance of evidence that each of the Rule’s admissibility requirements are satisfied.⁶⁷ Second, to address overstatements by experts, the amendments “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.”⁶⁸

61. *Id.*

62. *Id.* The Advisory Committee described the “more likely than not” standard as “substantively identical to preponderance of evidence, but it avoids any reference to ‘evidence’ and thus addresses the concern that the term ‘evidence’ means only admissible evidence.” *Id.*

63. See Comm. on Rules of Prac. & Proc., *Minutes of the Meeting of June 7, 2022*, U.S. CTS. 38 (Jan. 4, 2023), https://www.uscourts.gov/sites/default/files/2023-01_standing_committee_meeting_agenda_book_final_0.pdf [<https://perma.cc/83P2-FZZA>].

64. See Memorandum from the Hon. John D. Bates, Chair, Comm. Rules of Prac. & Proc., on the Summary of Proposed New and Amended Federal Rules of Procedure to Scott S. Harris, Clerk, U.S. Sup. Ct. 1 (Oct. 19, 2022), https://www.uscourts.gov/sites/default/files/2022_scotus_package_0.pdf [<https://perma.cc/T9V2-MJYJ>].

65. Letter from John G. Roberts, Jr., U.S. Sup. Ct. Chief J., to Hon. Kevin McCarthy, Speaker, U.S. House of Reps., and Hon. Kamala Harris, President, U.S. Senate 198 (Apr. 24, 2023), https://www.uscourts.gov/sites/default/files/2023_congressional_package_april_24_2023_0.pdf [<https://perma.cc/V8WU-G5AU>].

66. FED. R. EVID. 702 advisory committee’s note to 2023 amendment.

67. *Id.*

68. *Id.*; see also Edward J. Imwinkelried, *A Preemptive Strike Against the Misinterpretation of the 2023 Amendment to Federal Rule of Evidence 702(D): The Importance of Preserving the Requirement for a Showing That The Expert Has Properly Applied His or Her Methodology*, 78 OKLA. L. REV. 367 (2026) (stating that, under Rule 702(d), “the proper application of the expert’s methodology is a condition to admissibility.”); Erin Sheley, *Courts Must, As Recently Reminded, Follow the Law in Rule 702 Expert Testimony Determinations*, 28-7 MEALEY’S DAUBERT REP. 23 (July 2024) (stating “Justice and the preponderance of evidence standard both require that courts test proffered expert testimony on each of the criteria of Rule 702, as expanded upon by *Daubert*, and exclude that which cannot meet them.”).

Together, these amendments target the most common errors regarding the admissibility of expert testimony since the 2000 amendments. The question then, and topic of the next Section, is whether these changes have produced their intended effect of promoting uniform application of Rule 702 by courts.

II. COURTS' APPLICATION OF AMENDED RULE 702

A. Initial Response by District Courts

At the time of the 2023 amendments' adoption, many courts habitually relied on case law rather than the Rule itself.⁶⁹ Additionally, the errors that led to adoption of the 2023 amendments were “made by circuit courts and district courts in a disturbing number of cases.”⁷⁰ It is perhaps not surprising then that the new version of Rule 702 initially received a mixed reaction from the frontline judges charged with putting it into practice.⁷¹ Some courts refused to stop relying on those problematic circuit decisions that had long shaped their gatekeeping practices.

For example, one district court concluded that, because “the Eighth Circuit has held that expert testimony should be liberally admitted,” Rule 702 should still be applied to “favor admission over exclusion.”⁷² Further, despite the 2023 amendments' change to Rule 702's text to state that the factual basis for expert opinions must be established “to the court” by a preponderance of proof, some judges have found the change insufficient to overcome longstanding circuit precedent that “the factual

69. See, e.g., *Hardeman v. Monsanto Co.*, 997 F.3d 941, 961 (9th Cir. 2021) (“Monsanto contends that, by relying on a misguided reading of *Wendell* [*v. GlaxoSmithKline LLC*, 858 F.3d 1227 (9th Cir. 2017)] and *Messick* [*v. Novartis Pharms. Corp.*, 747 F.3d 1193 (9th Cir. 2014)], the district court misinterpreted *Daubert* to be more forgiving of experts' extrapolations than this circuit allows. But, in reaching its conclusions, the district court followed this court's precedent and thus cannot be faulted for following binding case law.”).

70. Memorandum from Daniel J. Capra & Liesa L. Richter on Possible Amendment to Rule 702 to Advisory Comm. on Evidence Rules 11 (Apr. 21, 2021), https://www.uscourts.gov/sites/default/files/advisory_committee_on_evidence_rules_-_agenda_book_spring_2021.pdf [<https://perma.cc/CLX2-6XJ5>].

71. See Lee Mickus, *Amended F.R.E. 702: One Year In, Ten Themes Emerge* 13 (Wash. Legal Found., Working Paper, No. 232, Dec. 2024), <https://www.wlf.org/wp-content/uploads/2024/11/Mickus-Dec-2024-WP2.pdf> [<https://perma.cc/V34R-KLC5>].

72. *Blue Buffalo Co. v. Wilbur-Ellis Co.*, No. 4:14 CV 859 RWS, 2024 WL 111712, at *4 (E.D. Mo. Jan. 10, 2024); see also *Novartis Pharma Ag v. Incyte Corp.*, No. 1:20-cv-400-GHW, 2024 WL 3608338, at *5 (S.D.N.Y. July 29, 2024) (finding that due to the “liberal admissibility standards of the Federal Rules of Evidence” identified in Second Circuit precedent, “exclusion of expert testimony is warranted only when the district court finds serious flaws in reasoning or methodology”); *Swinomish Indian Tribal Cmty. v. BNSF Ry. Co.*, No. C15-0543RSL, 2024 WL 2279215, at *2 (W.D. Wash. May 20, 2024) (relying on Ninth Circuit precedent to assert that the Rule 702 analysis “should be applied with a ‘liberal thrust’ favoring admission.”).

basis of an expert 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.”⁷³

Other district judges, however, recognized that the 2023 amendments changed the analysis that courts had been utilizing. As a result of the revisions, courts are “required to analyze the expert’s data and methodology at the admissibility stage more critically than in the past.”⁷⁴ In addition, the corrective purposes of the amendments signal the need for caution when relying on case law pre-dating the 2023 rule change, because some of those rulings present “the precise type of weight v. admissibility distinction the recent amendment to Rule 702 aimed to correct.”⁷⁵ For these courts, the amendments clarify that gatekeeping should not attempt to follow confused and problematic case law, but instead should apply the test set out in the Rule’s text: “the proponent of expert testimony must show by a preponderance of the evidence that the proposed testimony satisfies each of the Rule’s requirements.”⁷⁶

Several opinions issued in the wake of the Rule change have provided critical direction on how district courts must apply Rule 702 and the extent to which the 2023 amendments change existing practices.

73. Jason M. Hatfield, *P.A. v. Ornelas*, No. 5:22-cv-5110, 2024 WL 1555019, at *5 (W.D. Ark. Apr. 10, 2024); *see also* Swanson v. Schindler Elevator Corp., No. 21-CV-10306 (JMF), 2024 WL 967331, at *7 (S.D.N.Y. Mar. 6, 2024) (denying motion to exclude expert testimony because Second Circuit authority finds “contentions that the assumptions are unfounded go to the weight, not the admissibility, of the testimony”); *Beyenhof v. Schwan’s Consumer Brands, Inc.*, No. 222CV00192HDVRAOX, 2024 WL 1135098, at *4 (C.D. Cal. Feb. 14, 2024) (rejecting challenge because Ninth Circuit precedent establishes that “[t]he factual basis of an expert opinion goes to the credibility of the testimony, not the admissibility.”).

74. *Boyer v. City of Simi Valley*, No. 2:19-cv-00560-DSF-JPR, 2024 WL 993316, at *1 (C.D. Cal. Feb. 13, 2024); *see also* *Optical Sols., Inc. v. Nanometrics, Inc.*, No. 18-cv-00417-BLF, 2023 WL 8101885, at *1 (N.D. Cal. Nov. 21, 2023) (change to text of Rule 702(d) produced a “more stringent standard under the amendment.”).

75. *West v. Home Depot, U.S.A., Inc.*, No. 24 CV 1145, 2024 WL 1834112, at *4 (N.D. Ill. Apr. 26, 2024); *see also* *Cleaver v. Transnation Title & Escrow, Inc.*, No. 1:21-cv-00031-AKB, 2024 WL 326848, at *2 (D. Idaho Jan. 29, 2024) (“[T]he amendments are intended to correct some courts’ prior, inaccurate application of Rule 702.”); *Johnson v. Packaging Corp. of Am.*, No. CV 18-613-SDD-EWD, 2023 WL 8649814, at *2 (M.D. La. Dec. 14, 2023) (“The intent of the rule change is to focus and direct district courts to . . . refrain from bypassing the admissibility determination in favor of a question of weight to be decided by a fact finder.”).

76. *Farmers Ins. Co. of Arizona v. DNS Auto Glass Shop LLC*, No. CV-21-01390-PHX-DGC, 2024 WL 1256042, at *7 (D. Ariz. Mar. 25, 2024), *opinion clarified*, No. CV-21-01390-PHX-DGC, 2024 WL 1961837 (D. Ariz. May 3, 2024).

A. Important Circuit Decisions Applying Amended Rule 702

1. Eighth Circuit

One of the earliest circuit decisions to address the 2023 amendments in a substantive manner came in *Sprafka v. Medical Device Business Services*.⁷⁷ In *Sprafka*, the Eighth Circuit acknowledged the 2023 amendments and the corrective purpose underlying their adoption. Consequently, the Eighth Circuit significantly shifted its conception of how the expert admissibility standard must be applied.

Before the 2023 amendments, the Eighth Circuit considered judicial gatekeeping to be a limited undertaking. In particular, Eighth Circuit authorities “call[ed] for the liberal admission of expert testimony.”⁷⁸ With the standard tilted from the outset, exclusions were justified only in those extreme situations in which the “expert’s opinion is so fundamentally unsupported that it can offer no assistance to the jury[.]”⁷⁹ The Eighth Circuit also held a narrow view of what courts should consider in assessing reliability, adopting a “general rule” that specifically discounts “the factual basis of an expert opinion” as merely going “to the credibility of the testimony, not the admissibility.”⁸⁰ This explicit rejection of opinions’ factual foundation as a gatekeeping consideration had been repeated numerous times since its original appearance in a pre-*Daubert* decision, and thus did not arise from interpretation of Rule 702.⁸¹

Against this longstanding misconception of the admissibility standard, the Eighth Circuit in *Sprafka* addressed the 2023 amendments.⁸² The case involved product liability claims directed at the design of a total knee replacement device.⁸³ The plaintiff’s expert presented opinions that the medical device was defectively designed, inadequately tested, and failed to incorporate safer alternatives that existed when the device was developed.⁸⁴ The manufacturer moved to exclude the plaintiff expert’s

77. *Sprafka v. Medical Device Bus. Servs., Inc.*, 139 F.4th 656 (8th Cir. 2025).

78. *In re Bair Hugger Forced Air Warming Devices Prods. Liab. Litig.*, 9 F.4th 768, 777 (8th Cir. 2021).

79. *United States v. Finch*, 630 F.3d 1057, 1062 (8th Cir. 2011).

80. *In re Bair Hugger*, 9 F.4th at 778 (citing *United States v. Coutentos*, 651 F.3d 809, 820 (8th Cir. 2011)).

81. *See* *Loudermill v. Dow Chem. Co.*, 863 F.2d 566, 570 (8th Cir. 1988); *see, e.g., Bonner v. ISP Techs., Inc.*, 259 F.3d 924, 929–30 (8th Cir. 2001) (“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.” (quoting *Hose v. Chicago Nw. Transp. Co.*, 70 F.3d 968, 974 (8th Cir. 1995)). *Hose*, in turn, takes the quoted language from *Loudermill*).

82. *See Sprafka*, 139 F.4th at 660–61 and n.3.

83. *See id.* at 559–60.

84. *See Sprafka v. Med. Device Bus. Servs., Inc.*, No. 22-331 (DWF/TNL), 2024 WL 1269226, at *3 (D. Minn. Mar. 26, 2024), *aff’d*, 139 F.4th 656 (8th Cir. 2025).

opinions, contending that, although the expert was qualified, the opinions did not rest on sufficient technical or test data showing that changing the product's design would produce a different clinical performance.⁸⁵ In response, the plaintiff trumpeted the Eighth Circuit's "general rule" and argued that these challenges went only to the weight, and not the admissibility, of the opinion testimony.⁸⁶

The district court's analysis was caught between the case law-driven approach followed by the Eighth Circuit prior to the 2023 amendments and the new direction required by amended Rule 702. The district court recognized the 2023 amendments to Rule 702, but characterized the changes as affecting only the Rule's language and not the substantive law.⁸⁷ In the eyes of the district court, the amendments merely clarified that the preponderance of the evidence applies to the admission of expert testimony.⁸⁸ Yet, the court also quoted the Advisory Committee's Note that prior decisions finding "questions of the sufficiency of an expert's basis" to be matters of "weight and not admissibility" are "an incorrect application of Rules 702 and 104(a)."⁸⁹ The district court juxtaposed the amended Rule 702 against the Eighth Circuit's longstanding directives that Rule 702 "favors admissibility over exclusion"⁹⁰ and that exclusion of an expert is reserved for the extreme circumstance in which "the expert's opinion is so fundamentally unsupported that it can offer no assistance to the jury."⁹¹

Next, the district court evaluated the expert's opinions and found that they were "not tested or supported by reliable data," and that the expert did "not have the information she needs to make reliable conclusions[.]"⁹² Based on these glaring gaps, the plaintiff could not show "by a preponderance of the evidence the reliability of" the expert's opinions, and so the court excluded the expert's testimony.⁹³

On appeal, the Eighth Circuit measured the district court's ruling against the standard set forth in Rule 702. The court noted that Rule 702 governs the admissibility standard, and it requires an expert's opinions "must be based upon sufficient facts or data and must be the product of reliable principles and methods that have been reliably applied to the facts

85. *See id.*

86. *Id.*

87. *See id.* at *2.

88. *See id.*

89. *Id.* (quoting FED. R. EVID. 702 advisory committee's note to 2023 amendment).

90. *Id.* (citing *Lauzon v. Senco Prods., Inc.*, 70 F.3d 681, 686 (8th Cir. 2001)).

91. *Id.* (quoting *Bonner v. ISP Techs., Inc.*, 259 F.3d 924, 929–30 (8th Cir. 2001)).

92. *Id.* at *6, *8.

93. *Id.* at *6.

of the case.”⁹⁴ The court also observed that the 2023 amendments became necessary precisely because many courts had incorrectly held “the sufficiency of an expert’s basis, and the application of the expert’s methodology, are questions of weight and not admissibility.”⁹⁵ Going even further, the Eighth Circuit concluded that expert opinions “lack reliability” and warrant exclusion if the trial court finds that they do not have an adequate factual basis.⁹⁶

The *Sprafka* ruling effectively rejects the Eighth Circuit’s legacy “general rule” that an expert’s factual basis is not a proper gatekeeping consideration.⁹⁷ The circuit court did not explicitly overrule its older case law, but *Sprafka*’s finding that an insufficient factual basis justifies excluding an expert opinion represents a new direction that is incompatible with the court’s approach taken prior to the 2023 amendment. The Eighth Circuit subsequently built upon the foundation laid in *Sprafka*, signaling that this new gatekeeping approach based on the text of amended Rule 702 has taken root.⁹⁸

2. Fifth Circuit

The Fifth Circuit’s response to amended Rule 702 has been even more pronounced than the Eighth Circuit’s change of direction in *Sprafka*. The Fifth Circuit had routinely reiterated its own “general rule,” rooted in a pre-*Daubert* decision, that “questions relating to the bases and sources of an expert’s opinions affect the weight to be assigned that opinion rather than its admissibility” and so must be left for the jury to decide.⁹⁹ This narrow conception of the admissibility standard restricted judicial gatekeeping and allowed expert opinion testimony to go before juries without being scrutinized for the full range of Rule 702 requirements.

The Fifth Circuit’s understanding of the admissibility standard changed with adoption of the 2023 amendments. The initial break came shortly after the amendments became effective. In *Harris v. Fedex Corp.*

94. *Sprafka v. Medical Device Bus. Servs., Inc.*, 139 F.4th 656, 660 (8th Cir. 2025).

95. *Id.* at 660 n.3 (quoting FED. R. EVID. 702 advisory committee’s note to 2023 amendment).

96. *Id.* at 661.

97. *See id.*

98. *See Bliv, Inc. v. Charter Oak Fire Ins. Co.*, 159 F.4th 539, 542–44 (8th Cir. 2025) (quoting *Sprafka*’s recitation of showing required for admission and affirming exclusion of opinion testimony due to insufficient factual basis because expert “failed to consider or account for critical information when forming his opinions.”).

99. *Viterbo v. Dow Chem. Co.*, 826 F.2d 420, 422 (5th Cir. 1987). Examples of cases relying on *Viterbo* include *Smith v. Starr Indem. & Liab. Co.*, 807 F. App’x 299, 302 (5th Cir. 2020), *Puga v. RCX Sols., Inc.*, 922 F.3d 285, 294 (5th Cir. 2019), and *United States v. Hodge*, 933 F.3d 468, 478 (5th Cir. 2019). As with the Eighth Circuit’s repetition of the *Loudermill* “general rule,” this language carried forward from *Viterbo* pre-dates the 2000 version of Rule 702 and even *Daubert* and so cannot reflect an analysis of what the rule requires.

Servics, Inc.,¹⁰⁰ the court declared that expert opinion testimony must “be based on sufficient facts or data,” and that the trial court “abdicate[s] its role as gatekeeper” by allowing an expert “to testify without a proper foundation.”¹⁰¹ Whether *Harris* truly represented a changed direction, however, was clouded by the court’s conclusion that the district court’s error in admitting the unsupported expert testimony was harmless.¹⁰²

The Fifth Circuit’s full embrace of amended Rule 702 became apparent in 2025 in *Nairne v. Landry*,¹⁰³ which involved an election redistricting challenge. The expert at issue offered opinions about voting trends and candidate preferences in Louisiana.¹⁰⁴ The plaintiffs’ motion to exclude the opinions focused on the limited data the expert considered. The expert’s proponents responded by highlighting the Fifth Circuit’s longstanding “general rule” that the “bases and sources” of the expert’s opinion only “affect the weight to be assigned that opinion rather than its admissibility and should be left for the jury’s consideration.”¹⁰⁵ Referencing the forthcoming 2023 amendment, the district court observed that the practice encouraged by the proponents “is expressly disapproved by the imminent rules’ changes.”¹⁰⁶ The district court found the opinions inadmissible because Rule 702(b) requires that an expert’s conclusions must be based on “sufficient facts or data,” but the expert relied on “insufficient facts or data from which to draw such far reaching conclusions.”¹⁰⁷

On appeal, the Fifth Circuit gave full-throated approval to the district court’s reliance on Rule 702’s explicit requirements. The court observed 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 [R]ule.”¹⁰⁸ Distancing itself from pre-*Daubert* precedents, the Fifth Circuit heeded the Advisory Committee on Evidence Rules’ guidance that prior decisions declaring the sufficiency of an expert’s basis, and the application of the expert’s methodology, to be questions of weight were “an incorrect application of Rules 702 and 104(a).”¹⁰⁹ Contrary to the defendants’ arguments that factual foundation is merely a credibility

100. *Harris v. Fedex Corp. Servs., Inc.*, 92 F.4th 286 (5th Cir. 2024).

101. *Id.* at 303–04.

102. *See id.* at 304.

103. *Nairne v. Landry*, 151 F.4th 666 (5th Cir. 2025).

104. *Nairne v. Ardoin*, No. 3:22-cv-00178-SDD-SDJ, 2023 WL 7388850, at *4 (M.D. La. Nov. 8, 2023).

105. *Id.* at *6.

106. *Id.*

107. *Id.*

108. *Nairne*, 151 F.4th at 697, 698 n.20.

109. *Id.* at 697–98 (quoting FED. R. EVID. 702 advisory committee’s note to 2023 amendment).

issue, the “strictures of Rule 702” mandate that the expert’s testimony must be “based on sufficient data or facts” and “reflect a reliable application of principles and methods to the facts of the case.”¹¹⁰ The court held that exclusion was necessary because the opinions at issue were based on insufficient data.¹¹¹

With *Nairne*, the Fifth Circuit took the substantial step of relying on Rule 702(b) as an independent prerequisite to admissibility. This shift is irreconcilable with the court’s prior “general rule” and effectively renders obsolete cases following that approach. Consistent with *Nairne*, the Fifth Circuit has also ruled that trial courts must enforce the mandate that an expert’s opinion “reflects a reliable application of principles and methods to the facts of the case,” and exclude the testimony when it “cannot meet Rule 702(d)’s requirement for expert witnesses.”¹¹² These outcomes indicate that the Fifth Circuit has, in response to the 2023 amendments, changed its conception of what trial judges must consider to fulfill their gatekeeping responsibilities.

3. Federal Circuit

The Federal Circuit’s *en banc* ruling in *EcoFactor, Inc. v. Google LLC* provides perhaps the most emphatic guidance from a federal appellate court during the 2023 amendments’ first two years in effect, emphasizing that trial courts must adhere to the gatekeeping requirements of revised Rule 702.¹¹³ *EcoFactor* involved patent infringement claims, and the expert opinions at issue valued the damages resulting from the alleged infringement.¹¹⁴ The district court rejected Google’s admissibility challenge and allowed the plaintiff’s expert to present his damages opinions at trial, after which the jury returned a verdict exceeding twenty million dollars.¹¹⁵ A panel of the Federal Circuit reviewing the lower court’s ruling made no reference to Rule 702. Instead, it drew on prior case law specific to infringement damages approximations: “Testimony is inadmissible when it is based only on speculation or guesswork, such that the jury is left to fill in the gaps when calculating a damages award.”¹¹⁶ Applying this deferential admissibility standard, the panel

110. *Id.* at 698.

111. *Id.*

112. *Williams v. BP Exploration & Prod., Inc.*, 143 F.4th 593, 597, 600 (5th Cir. 2025).

113. *EcoFactor, Inc. v. Google LLC*, 137 F.4th 1333 (Fed. Cir. 2025).

114. *See id.* at 1336–37.

115. *See id.*

116. *EcoFactor, Inc. v. Google LLC*, 104 F.4th 243, 252 (Fed. Cir. 2024) (citing *Whitserve, LLC v. Comput. Packages, Inc.*, 694 F.3d 10, 30–33 (Fed. Cir. 2012)).

found the opinions “sufficiently reliable for admissibility purposes.”¹¹⁷

The Federal Circuit subsequently granted Google’s petition for *en banc* review to address “the district court’s adherence to [Rule] 702” in admitting the damages opinions.¹¹⁸ Unlike the district court and appellate panel, the *en banc* majority opinion focused its attention on Rule 702’s text. The court observed that the Rule, not case law, “governs the admissibility of expert testimony.”¹¹⁹ It stated that judicial gatekeeping to check that Rule 702’s enumerated requirements are met “is essential” to prevent an expert from expressing conclusions at trial that “go beyond what the expert’s basis and methodology may reliably support.”¹²⁰

Like the Fifth and Eighth Circuits, the Federal Circuit *en banc* majority acknowledged that the 2023 amendments changed Rule 702 to remedy the ongoing problem identified by the Advisory Committee. Previously, courts had undertaken “an incorrect application of Rules 702 and 104(a)” when they discounted “questions of the sufficiency of an expert’s basis, and the application of the expert’s methodology” as being only “questions of weight and not admissibility.”¹²¹ The Federal Circuit stated that, under the 2023 amendments, compliance with Rule 702(b) is “an essential prerequisite” for admissibility, and so “the gatekeeping function of the court” requires it “to ensure that there are sufficient facts or data for [the expert’s] testimony.”¹²² When the expert’s factual foundation is found lacking, the opinions are “unreliable and therefore inadmissible under Rule 702.”¹²³

Applying this understanding of the governing admissibility standard to the damages valuation opinions at issue, the *en banc* majority in *Ecofactor* found that the expert’s opinion “was not based on sufficient facts or data, as required by Rule 702(b).”¹²⁴ The district court failed to analyze whether the expert actually had factual support for the opinions expressed, and failed “to fulfill its responsibility as gatekeeper” by admitting the expert’s testimony.¹²⁵ Because the opinions should have been excluded under Rule 702, their erroneous admission necessitated remand for a new trial on damages.¹²⁶

A key aspect of *EcoFactor* is the appellate court’s emphasis on

117. *Id.* at 254.

118. *EcoFactor*, 137 F.4th at 1337.

119. *Id.* at 1338.

120. *Id.* at 1339 (quoting FED. R. EVID. 702 advisory committee’s note to 2023 amendment).

121. *Id.* (quoting FED. R. EVID. 702 advisory committee’s note to 2023 amendment).

122. *Id.* at 1339, 1343.

123. *Id.* at 1346.

124. *Id.* at 1345.

125. *Id.* at 1346.

126. *See id.* at 1346–47.

Rule 702’s text in directing the findings that a trial judge must make before admitting opinion testimony. The *en banc* majority in *EcoFactor* noted that the 2023 amendments did not change the admissibility standard—those substantive requirements have been present since at least Rule 702’s amendment in 2000.¹²⁷ Instead, the 2023 amendments put a spotlight on deficient gatekeeping practices and reset the Rule’s language so erroneous practices overlooking prerequisites to admission will not conform.¹²⁸ In addition, the court vacated a substantial jury verdict, sending a powerful statement that trial judges must take their admissibility assessments seriously.

4. Ninth Circuit

In *Engilis v. Monsanto Co.*,¹²⁹ the 2023 amendments caused the Ninth Circuit to change its approach to judicial gatekeeping dramatically, both with respect to the proponent’s burden of proof and the admissibility standard itself. Prior to enactment of the 2023 amendments, Ninth Circuit rulings directed district courts to assess admissibility using a standard of the Ninth Circuit’s own making rather than Rule 702 as written.¹³⁰ That test diminished the significance of the expert’s methodological application, such that “[i]mperfect application of methodology may not render expert testimony unreliable[.]”¹³¹

Ninth Circuit precedent also leaned heavily on the observation in *Daubert* that Rule 702 embodied a more liberal approach to opinion testimony than had been employed in the past, such as the *Frye* “general acceptance” requirement.¹³² From this comparison, the Ninth Circuit

127. *See id.* at 1339, 1339 n.8.

128. *See id.*

129. *Engilis v. Monsanto Co.*, 151 F.4th 1040 (9th Cir. 2025).

130. *See* Thomas D. Schroeder, *Toward a More Apparent Approach to Considering the Admission of Expert Testimony*, 95 NOTRE DAME L. REV. 2039, 2051 (2020) (“The Ninth Circuit appears to set its own standard for assessing admissibility of expert opinion apart from Rule 702.”). Judge Schroeder was Chair of the Advisory Committee on Evidence Rules’ Subcommittee on Rule 702 during the rulemaking process that produced the 2023 amendment. *See id.* at 2039 n.1.

131. *Hardeman v. Monsanto Co.*, 997 F.3d 941, 962 (9th Cir. 2021) (citing *City of Pomona v. SQM N. Am. Corp.*, 750 F.3d 1036, 1047-48 (9th Cir. 2014)); *see also* Schroeder, *supra* note 130, at 2051 (“The issue is whether the deviations from the proper method are enough to render the principles and methods not reliably applied--and that’s a determination that Rule 702(d) requires the trial judge to make.”).

132. *See* Schroeder, *supra* note 130, at 2050 (“Ninth Circuit caselaw appears to interpret *Daubert* as liberalizing the admission of expert testimony, which may explain decisions from that circuit that set it apart from most others.”). The *Daubert* description of Rule 702 as “liberal” comes in a passage addressing whether the Rule mandates an expert’s opinions to have attained “general acceptance” before they can be admitted:

Nothing in the text of this Rule establishes “general acceptance” as an absolute prerequisite to admissibility. Nor does respondent present any clear indication that Rule 702 or the Rules as a whole were intended to incorporate a “general acceptance” standard. The drafting history

jumped to the conclusion that Rule 702 “should be applied with a ‘liberal thrust’ favoring admission.”¹³³ In operation, this amounted to a presumption of admissibility in which experts with “borderline opinions” would receive “deference” from the district court, so that “shaky” evidence was placed “in the hands of the jury” and “the safeguards of the adversary system.”¹³⁴ The Ninth Circuit also expressed confidence that its framework reflected proper gatekeeping, declaring that “[t]he Supreme Court has not directed courts to follow a different rule since it first decided *Daubert* almost [twenty eight years] ago.”¹³⁵

The 2023 amendments gave the guidance the Ninth Circuit needed to move away from reliance on its own case law pronouncements and instead align with the language of Rule 702. In *Engilis*, the Ninth Circuit examined whether the district court properly excluded an expert’s differential etiology opinion that exposure to a glyphosate-based herbicide caused the plaintiff’s blood cancer (non-Hodgkin lymphoma).¹³⁶ This is the same topic that the Ninth Circuit considered only a few years earlier in *Hardeman v. Monsanto Co.*, wherein the Ninth Circuit allowed the plaintiff’s expert’s specific causation opinion testimony.¹³⁷ With this subject matter overlap, the impact of the intervening 2023 amendments on prior case law became a central focus of the Ninth Circuit’s analysis.¹³⁸

Addressing the purpose of the 2023 amendments, the Ninth Circuit observed that the changes “sought to ‘clarify and emphasize’ that proffered expert testimony must meet the admissibility requirements of Rule 702 by a preponderance of the evidence.”¹³⁹ These requirements include not only the use of a reliable methodology, but also a sufficient factual basis and a reliable application of the principles and methods to the facts of the case.¹⁴⁰ Whether these criteria have been met is a decision the court must make itself, and it cannot “delegate that role to the jury.”¹⁴¹

makes no mention of *Frye*, and a rigid “general acceptance” requirement would be at odds with the “liberal thrust” of the Federal Rules and their “general approach of relaxing the traditional barriers to ‘opinion’ testimony.”

Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 594 (1993) (quoting *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 169 (1988)).

133. *Wendell v. GlaxoSmithKline LLC*, 858 F.3d 1227, 1232 (9th Cir. 2017); *Messick v. Novartis Pharms. Corp.*, 747 F.3d 1193, 1196 (9th Cir. 2014) (same).

134. *Hardeman*, 997 F.3d at 962 (quoting *Wendell*, 858 F.3d at 1237).

135. *Id.*

136. *Engilis v. Monsanto Co.*, 151 F.4th 1040, 1144–45 (9th Cir. 2025).

137. *See Hardeman*, 997 F.3d at 960.

138. *See Engilis*, 151 F.4th at 1047 (“[T]he parties dispute the significance of the 2023 amendment to Rule 702 and the effect of that amendment on our existing precedent.”).

139. *Id.* at 1049 (quoting FED. R. EVID. 702 advisory committee’s note to 2023 amendment).

140. *See id.* at 1048–49.

141. *Id.* at 1050 (quoting *Hardeman*, 997 F.3d at 960 n.11).

When Rule 702 is properly applied, challenges go to the weight of the evidence only if the trial court first finds it more likely than not that the opinions satisfy the Rule's elements.¹⁴²

The 2023 amendments' incorporation of the "more likely than not" standard into the text of Rule 702 also rendered untenable the belief that the Rule constitutes "a liberal standard that favors admission."¹⁴³ Despite acknowledging that the Ninth Circuit had previously made this declaration in multiple cases,¹⁴⁴ the court somewhat disingenuously suggested that these statements did not really mean what they said, "Our caselaw should not be understood to suggest a presumption of admission. There is no such presumption, as a proponent of expert testimony must always establish the admissibility requirements of Rule 702 by a preponderance of the evidence."¹⁴⁵

Determining admissibility is, therefore, a straightforward set of inquiries established by the text of Rule 702: "a proponent of expert testimony must always establish the admissibility criteria by a preponderance of the evidence[.]"¹⁴⁶ Because the plaintiff in *Engilis* failed to carry that burden of demonstrating the expert's conclusion was "based on sufficient facts or data" as Rule 702(b) requires, the Ninth Circuit found that the district court "properly exercised its gatekeeping function" by excluding the opinion testimony.¹⁴⁷

The *Engilis* decision immediately influenced district courts' gatekeeping practices. Within weeks following its publication, several rulings quoted the *Engilis* direction that "there is no presumption in favor of admission."¹⁴⁸ A number of district courts have also followed the *Engilis* instruction that expert opinions may be admitted only if the proponent demonstrates to the court that the Rule 702 elements are all satisfied.¹⁴⁹ This reaction suggests that the Ninth Circuit's move from its

142. *See id.* at 1049.

143. *Id.* (citation omitted).

144. *Id.* at 1049–50 (quoting *Messick*, 747 F.3d at 1996; *Wendell*, 858 P.3d at 1232).

145. *Id.* at 1050 (citing FED. R. EVID. 702).

146. *Id.*

147. *Id.* at 1055. Shortly after issuing *Engilis*, the Ninth Circuit solidified its commitment to gatekeeping based on the text of Rule 702 with its ruling in *Bulone v. Monsanto Co.*, No. 24-4241, 2025 WL 2730843 (9th Cir. Sept. 25, 2025). In *Bulone*, the court emphasized that Rule 702 contemplates not only that district courts may exclude opinion testimony where the expert employed unreliable methods, but also when the expert's "application of those methods" is unreliable. *Id.* at *2 (emphasis original).

148. *E.g.*, *Oatway v. Experian Info. Sols., Inc.*, No. 2:24-cv-00523-LK, 2025 WL 2689029, at *7 (W.D. Wash. Sept. 19, 2025); *Gorney v. Safeway Inc.*, No. CV-23-01413-PHX-SHD, 2025 WL 2586133, at *2 (D. Ariz. Sept. 8, 2025).

149. *See, e.g.*, *Lieberman v. Target Corp.*, No. CV-24-00450-PHX-DGC, 2025 WL 3062617, at *5 (D. Ariz. Nov. 3, 2025) (citing *Engilis* for proposition that "proponent must show by a preponderance of the evidence that the testimony satisfies each of the Rule's requirements"); *Church of the Gardens v. Quality Loan Servs. Corp.*, No. No. 3:23-cv-06193-TMC, 2025 WL 2524463, at *8 (W.D. Wash. Sept. 2,

previous case law-driven approach to an analysis centered on Rule 702—as indicated by *Engilis*—is likely to bind district courts going forward.

5. Fourth Circuit

Although most of the circuit-level decisions addressing expert gatekeeping in the aftermath of the 2023 amendments have recognized that Rule 702 sets the admissibility standard courts must apply, a surprising exception is the Fourth Circuit’s ruling in *Sommerville v. Union Carbide Corp.*¹⁵⁰ There, the court relied on problematic pre-amendment case law to overturn a district court’s exclusion of key opinion testimony. In doing so, the appellate court overlooked the Rule’s status as the governing authority, as well as the corrective purposes of the 2023 amendments.

In *Sommerville*, the plaintiffs brought a class action claiming that a manufacturing facility operated by the defendants had released a substantial amount of ethylene oxide, leading to potentially injurious toxic exposures.¹⁵¹ At issue were the opinions of an engineer estimating emissions and modeling their dispersal into the areas surrounding the plant.¹⁵² The trial court began its analysis by rejecting the plaintiffs’ contention that the defendants did “not mount a true *Daubert* challenge” to the opinions and that the motions only “raise questions affecting *the weight and credibility* of [the expert’s] opinions rather than their *admissibility*[.]”¹⁵³ Observing that Rule 702(b) mandates courts to “verify that expert testimony is ‘based on sufficient facts or data’ and that Rule 702(d) requires reliable application of the expert’s methodology to the facts of the case, the court concluded that a motion aimed at “the validity of the underlying data” and the expert’s “methods in applying that data to the facts of the case” raises gatekeeping considerations for the court to decide.¹⁵⁴ After extensively reviewing the foundational materials addressed in the expert’s report and how he executed the methodology, the district court concluded that the opinions were “not based upon sufficient facts or data” and that the expert’s “*application* of the data to

2025) (citing *Engilis* in excluding opinion testimony because “Plaintiffs here have not established that [the expert’s] opinion reflects a reliable application of the principles and methods to the facts of the case by a preponderance of evidence.”).

150. *Sommerville v. Union Carbide Corp.*, 149 F.4th 408 (4th Cir. 2025), *petition for cert. filed*, No. 24-1491 (U.S. Feb. 4, 2026).

151. *See* *Sommerville v. Union Carbide Corp.*, No. 2:19-cv-00878, 2024 WL 1204094, at *1 (S.D. W.Va. Mar. 20, 2024), *rev’d*, 149 F.4th 408 (4th Cir. 2025), *petition for cert. filed*, No. 24-1491 (U.S. Feb. 4, 2026).

152. *See id.* at *2–*4.

153. *Id.* at *4, *6 (emphasis in original).

154. *Id.* at *5–*7.

the facts of this case was methodologically flawed, full of unsubstantiated assumptions, and not scientifically sound.”¹⁵⁵ In other words, the opinions did not fulfill either Rule 702(b) or Rule 702(d).

On appeal, the *Sommerville* majority opinion found the district court erred in excluding the expert because its analysis “was not a true critique of [the expert’s] ‘methodology,’” but rather a “credibility determination.”¹⁵⁶ The majority reached this conclusion without acknowledging the 2023 amendments and gave only passing reference to Rule 702 itself.¹⁵⁷ Instead, the *Sommerville* majority based its conclusion on the Fourth Circuit’s pre-amendment decision in *Bresler v. Wilmington Trust Co.*,¹⁵⁸ which indicates that “questions regarding the factual underpinnings of the [expert witness’s] opinion affect the weight and credibility of the witness’ assessment, not its admissibility.”¹⁵⁹ The majority opinion quoted this statement from *Bresler* three times in explaining its reversal of the district court, eliminating any doubt that this prior case law and not Rule 702 formed the centerpiece of its gatekeeping conception.¹⁶⁰

The *Sommerville* opinion drew a strong dissent from Chief Judge Albert Diaz. He observed that, in light of the text of Rule 702(b), the majority opinion “can’t possibly mean that district courts may not decide that an expert’s opinion lacks sufficient support in the record.”¹⁶¹ To the contrary, Rule 702 requires district courts to address whether opinions are “based on sufficient facts or data,” and they would be properly faulted for “abdicating their responsibility with respect to expert testimony.”¹⁶² He explained that by holding an expert’s factual foundation is not an admissibility consideration, “the majority wrongly invites district courts

155. *Id.* at *19 (emphasis in original).

156. *Sommerville*, 149 F.4th at 423.

157. *See id.* at 421-22.

158. *Bresler v. Wilmington Trust Co.*, 855 F.3d 178, 195 (4th Cir. 2017).

159. *Sommerville*, 149 F.4th at 423 (quoting *Bresler*, 855 F.3d at 195). Although the quoted language appears in *Bresler*, its lineage pre-dates *Daubert*. *Bresler* quotes *Structural Polymer Grp. v. Zoltek Corp.*, 543 F.3d 987, 997 (8th Cir. 2008). *Structural Polymer* cites to and slightly paraphrases *South Cent. Petroleum, Inc. v. Long Bros. Oil Co.*, 974 F.2d 1015, 1019 (8th Cir. 1992) (“Any weaknesses in the factual underpinnings of (the expert’s) opinion go to the weight and credibility of his testimony, not to its admissibility.”) (quoting *Hurst v. United States*, 882 F.2d 306, 311 (8th Cir. 1989)). Given this history, the *Bresler* statement relied on by the *Sommerville* majority cannot be said to analyze what Rule 702 requires.

160. *Sommerville*, 149 F.4th at 423, 424, 427 n.7. Judge Schroeder observed that *Bresler* was among the “illustrative cases that have been identified to the Advisory Committee as evidence that courts are abdicating their gatekeeper role,” and he criticized the very statement reiterated by the *Sommerville* majority as having “effectively vitiated the application of Rule 104(a) to Rule 702(b).” Schroeder, *supra* note 130, at 2044, 2050.

161. *Sommerville*, 149 F.4th at 431 (Diaz, C.J., dissenting).

162. *Id.* at 430-31 (quoting FED. R. EVID. 702(b)).

to ‘delegate their gatekeeping responsibility to the jury.’”¹⁶³

Sommerville represents a step backwards for the Fourth Circuit. The court’s holding that judicial gatekeeping does not involve assessing whether the expert’s opinions have a sufficient factual basis flies in the face of the Fourth Circuit’s 2021 decision in *Sardis v. Overhead Door Corp.*¹⁶⁴ and that decision’s embrace of the then-imminent Rule 702 amendments. *Sardis* quoted the Advisory Committee on Evidence Rules’ Agenda Book on the principal reason the amendment was deemed necessary:

[U]nfortunately many courts have held that 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. These rulings are an incorrect application of Rules 702 and 104(a) and are rejected by this amendment.¹⁶⁵

In the eyes of the *Sardis* court, the Advisory Committee’s statement “clearly echoes the existing law on the issue.”¹⁶⁶ But with *Sommerville*, the Fourth Circuit turned its back on the 2023 amendments and the Rule 702-focused approach the court previously approved.

The Fourth Circuit will need to reconcile its inconsistent guidance about gatekeeping responsibilities and align its practice with the text of Rule 702. Until it does so, district courts will be left struggling.¹⁶⁷

III. CONCLUSION

Federal Rule of Evidence 702 was amended in 2023 because courts’

163. *Id.* at 432 (quoting *Nease v. Ford Motor Co.*, 848 F.3d 219, 231 (4th Cir. 2017)).

164. *Sardis v. Overhead Door Corp.*, 10 F.4th 268 (4th Cir. 2021).

165. *Id.* at 284 (quoting Advisory Comm. on Evidence Rules, *Drafts of a Possible Amendment to Rule 702*, U.S. CTS. 105, 107 (April 30, 2021), https://www.uscourts.gov/sites/default/files/advisory_committee_on_evidence_rules_-_agenda_book_spring_2021.pdf [<https://perma.cc/CLX2-6XJ5>]). With minor modification, the referenced Draft Committee Note was adopted as the final Advisory Committee’s Note to the 2023 amendments.

166. *Id.*

167. *Compare* *Moore v. Barnes*, No. 2:23-CV-56-D, 2025 WL2841495, at *10 (E.D.N.C. Sept. 30, 2025) (despite *Sommerville*, “[t]he proponent of an expert witness, however, must first demonstrate by a preponderance of the evidence that the expert’s testimony answers the critical questions of the sufficiency of an expert’s basis, and the application of the expert’s methodology.”), *with* *Michael’s Fabrics, LLC v. Donegal Mut. Ins. Co.*, No. 1:24-cv-01585-JRR, 2025 WL 2624280, at *4 (D. Md. Sept. 11, 2025) (citing *Sommerville* and rejecting challenge to expert’s factual basis as affecting “the weight and credibility of the witness’ assessment, not its admissibility.”).

gatekeeping analysis often failed to conform to the admissibility standard set forth in the Rule's text. Courts frequently overlooked gatekeeping considerations, especially the expert's factual foundation and methodological application to case facts, leading to the admission of opinion testimony that had not been properly screened. Some courts also employed a presumption of admissibility, effectively tilting the standard. By explicitly incorporating the preponderance standard into Rule 702 and identifying the court as the agent that will decide if the admissibility criteria have been satisfied, these erroneous practices became irreconcilable with the Rule's language.¹⁶⁸

Most circuit-level decisions applying Rule 702 in the first two years following adoption of the 2023 amendments have held that district courts must fulfill their gatekeeping responsibility as the Rule now directs, although the holdings have not been entirely consistent. The Advisory Committee's observation that "many courts" were "incorrect" when they brushed aside challenges to the sufficiency of an expert's basis or the application of the expert's methodology as "questions of weight" has garnered considerable judicial attention and caused courts to expand the issues they include within courts' gatekeeping responsibility.¹⁶⁹ Because the 2023 amendments have influenced most circuit courts to move away from problematic practices of the past and direct trial courts to align expert admissibility assessments with Rule 702, the amendments should be viewed as largely accomplishing their purpose.¹⁷⁰

All courts, however, are obligated to follow the text of the revised Rule. Where misapplication of the Rule continues, the United States Supreme Court should correct those rulings to promote uniformity and the rule of law.¹⁷¹

168. See Memorandum from Daniel J. Capra & Liesa L. Richter, *supra* note 51, at 24-25 (The amendments make "quite clear" as "a simple matter of textual analysis" that it is "wrong" to state "[t]here is a presumption in favor of admitting expert testimony." It is also "certainly incorrect" for a court to declare that "[t]he sufficiency of facts or data supporting an expert opinion is a question for the jury, not the court.").

169. See *Nairne v. Landry*, 151 F.4th 666, 697-98 (5th Cir. 2025) (quoting FED. R. EVID. 702 advisory committee's note to 2023 amendment); *Engilis v. Monsanto Co.*, 151 F.4th 1040, 1049 (9th Cir. 2025) (same); *Sprafka v. Medical Device Bus. Servs., Inc.*, 139 F.4th 656, 661 n.3 (8th Cir. 2025) (same); *EcoFactor, Inc. v. Google LLC*, 137 F.4th 1339 (Fed. Cir. 2025) (same).

170. See William Anderson & Mark Behrens, *Review of Expert Causation Testimony Under Federal Rule of Evidence 702: An Early Assessment of the 2023 Amended Rule*, 28-6 MEALEY'S DAUBERT REP. 27 (June 2024) (stating that lenient rulings by courts that conflict with the text of Rule 702 are increasingly in the minority).

171. See Mark A. Behrens & Andrew J. Trask, *The Rule of Science and the Rule of Law*, 49 SW. U. L. REV. 436, 438 (2021) (stating that "science in courtrooms should track mainstream science and not change in outcome-determinative ways based on location. When the rule of science is lost in the courts, so is the rule of law."); Victor E. Schwartz, *Expert Evidence: The Gatekeeper Role of Justice*, 18 BROOK. J. CORP. FIN. & COM. L. 69, 71 (2023) (stating, "With verdicts in tort cases increasing in frequency and amount, it is more important than ever that judges . . . act as gatekeepers against misleading and unreliable

expert evidence.”).