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Critical Legal Issues: WORKING PAPER SERIES

STOP CALLING THEM "*DAUBERT* MOTIONS": FEDERAL RULE OF EVIDENCE 702 AND WHY WORDS MATTER

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STOP CALLING THEM "*DAUBERT* MOTIONS": FEDERAL RULE OF EVIDENCE 702 AND WHY WORDS MATTER

"*Daubert* motion" has become *de rigeur* slang among federal practitioners when referring to a motion to exclude an expert witness.[1] Courts also frequently use that nomenclature, making statements such as "Now before the Court is a *Daubert* Motion filed by Defendants to strike or limit the purported expert testimony of Plaintiffs' witnesses[.]"[2] But these descriptions are inaccurate: **Federal Rule of Evidence 702, not the *Daubert* holding,[3] sets the admissibility standard**. Many courts mistakenly take their guidance about the gatekeeping function from prior court rulings, rather than the rule. This preference has developed into a problem because, perhaps surprisingly, many district court and even some circuit court rulings describe the expert admissibility standard in ways that actually contradict Rule 702. References to "*Daubert* motions" reinforce courts' misunderstanding by incorrectly

[1] *See*, *e.g.*, *Apple Inc. v. Corellium, LLC*, No. 19-81160-CIV-Smith/Matthewman, 2021 WL 930292, At *1 (S.D. Fla. Mar. 11, 2021) (ruling on "Defendant Corellium, LLC's Daubert Motion to Preclude Certain Testimony by David B. Connelly"); *Midwest Fam. Mut. Ins. Co. v. Hari Om Rudra Hotel, LLC*, No. 17-0966-CV-W-FJG, 2019 WL 5295499, at *1 (W.D. Mo. Feb. 6, 2019) (addressing "Defendant's Daubert Motion to Preclude Certain Opinion Testimony of Brian Campbell, P.E.").

[2] *Tyson v. Nat. Specialty Ins. Co*., Civil Action No. 17-1427, 2020 WL 3547952, at *1 (W.D. La. June 29, 2020). Instances of such statements abound. *See, e.g.*, *United States v. Buntyn*, No. 1:20-CR-708-KWR, 2021 WL 1784942, at *1 (D.N.M. May 5, 2021) ("the Court held a *Daubert* hearing on the matter."); *Wilichowski v. Boston Sci. Corp*., No. 5:21-CV-5024, 2021 WL 1197795, at *11 (W.D. Ark. Mar. 29, 2021) (introducing "[t]he final *Daubert* motion before the Court"); *Gomez v. Amer. Med. Sys. Inc*., No. CV-20-0393-PHX-ROS, 2021 WL 1163087, at *1 (D. Ariz. Mar. 26, 2021) ("Pending before the Court are eight *Daubert* motions.").

[3] *Daubert v. Merrell Dow Pharmaceuticals, Inc*., 509 U.S. 579 (1993).

signaling that caselaw, rather than the text of the rule, governs the assessment of opinion-testimony admissibility.

The Committee on Rules of Practice and Procedure unanimously voted on June 22, 2021 to publish for comment and potential enactment a proposed amendment to Rule 702 clarifying that courts must follow the text of the rule and disregard inconsistent caselaw statements. Analysis undertaken in the rulemaking process shows how courts often err by relying on prior decisions that fail to apply the gatekeeping approach that Rule 702 established. To overcome this ongoing problem, courts must recognize Rule 702's authoritative status and internalize that fact. To keep attention focused on the applicable standard and avoid the distraction of outdated caselaw, litigants should describe challenges to the admissibility of opinion testimony as what they truly are: **Rule 702 motions**.

I. RULE 702 ESTABLISHES THE GATEKEEPING STANDARD—BUT JUDGES OFTEN LOOK TO CASELAW TO DEFINE COURTS' GATEKEEPING ROLE

Rule 702, and not any other source of law, provides the standard that district courts must use to determine whether a proffered expert's opinions are admissible.[4]

[4] *See Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2316-17 (2016) (addressing admissibility of expert testimony using Rule 702). Often overlooked in discussions of the *Daubert* decision is its principal holding: that Rule 702 displaced caselaw-based requirements not reflected in the text of the rule, and that Rule 702 itself requires trial judges to screen out unreliable opinion testimony. *See Daubert*, 509 U.S. at 588-89 (rejecting caselaw-derived "general acceptance" determination as admissibility prerequisite and concluding "under the Rules the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable.

The Chair of the Advisory Committee on Rules of Evidence's Rule 702 Subcommittee recently chided courts that do not center their gatekeeping analysis on Rule 702:

> a surprising number of cases start and end with *Daubert* and its progeny and fail to mention Rule 702. Of course, Rule 702 was amended in 2000, and the elements of Rule 702, not the caselaw, are the starting point for the requirements for admissibility.[5]

When courts look first to other sources of authority, they apply an analysis that deviates from Rule 702's directives. Yet elevating caselaw articulations of the admissibility standard above the text of Rule 702 has become commonplace. This preference appears most frequently in challenges to the sufficiency of the factual basis underlying an expert's opinions and the expert's application of methodology to the facts of the case.[6] Under Rule 702, courts must decide these issues as a matter of admissibility:

> In sum, the 2000 amendment [to Rule 702] specifies that sufficient basis and application of method <u>are admissibility requirements</u> – the judge must be satisfied by a preponderance of the evidence that the expert has

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<u>The primary locus of this obligation is Rule 702</u>, which clearly contemplates some degree of regulation of the subjects and theories about which an expert may testify.") (emphasis added).

[5] Thomas D. Schroeder, *Toward a More Apparent Approach to Considering the Admission of Expert Testimony*, 95 NOTRE DAME L. REV. 2039, 2060 (2020). *See also Kansas City S. Ry. Co. v. Sny Island Levee Drainage Dist.*, 831 F.3d 892, 900 (7th Cir. 2016) (stating that the litigants "should have paid more attention to Federal Rule of Evidence 702, which superseded *Daubert* many years ago"); *United States v. Parra*, 402 F.3d 752, 758 (7th Cir. 2005) (recognizing that, "[a]t this point, Rule 702 has superseded *Daubert*").

[6] Rule 702(b) mandates that proffered opinions must be "based on sufficient facts or data[,]" and Rule 702(d) requires the court to find that "the expert has reliably applied the principles and methods to the facts of the case."

> relied on sufficient facts or data, and that the expert has reliably applied the methods.[7]

Unless the court concludes by a preponderance of proof that the opinions have sufficient factual support and arise from a reliable application of the methodology, the text of Rule 702 directs that the expert's testimony should be excluded.[8]

Despite the intended function of the rule, however, courts often broadly declare that challenges to the factual basis of an expert's opinion raise issues of weight for the jury to determine, not questions of admissibility that the court must decide. The Reporter to the Advisory Committee on Evidence Rules recently lamented the frequency with which such erroneous statements appear in court decisions:

> Many opinions can be found with broad statements such as 'challenges to the sufficiency of an expert's basis raise questions of weight and not admissibility' – a misstatement made by circuit courts and district courts in a disturbing number of cases.[9]

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[7] 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 43 *in* ADVISORY COMMITTEE ON EVIDENCE RULES APRIL 2018 AGENDA BOOK 49 (2018) (emphasis added).

[8] *See* Advisory Committee Note to 2000 Amendments to Rule 702 ("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.") (emphasis added). *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) ("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).") (emphasis added).

[9] Memorandum from Daniel J. Capra, Reporter, Advisory Comm. on Evidence Rules, to Advisory Comm. on Evidence Rules, *Possible Amendment to Rule 702* (Apr. 1, 2021) at 11 *in* ADVISORY

This identification of "a disturbing number of cases" that have issued declarations of law that flatly contradict Rule 702 is no exaggeration. Rulings that misstate the admissibility requirements have become commonplace. Between January 1, 2016, and July 1, 2021:

- 170 federal decisions recited variations of the following statement: "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."[10]

- 291 federal cases reiterated a form of this statement: "[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."[11]

COMMITTEE ON EVIDENCE RULES APRIL 2021 AGENDA BOOK 90 (2021). *See also* Thomas D. Schroeder, *Toward a More Apparent Approach to Considering the Admission of Expert Testimony*, 95 NOTRE DAME L. REV. 2039 (2020) ("some trial and appellate courts misstate and muddle the admissibility standard, suggesting that questions of the sufficiency of the expert's basis and the reliability of the application of the expert's method raise questions of weight that should be resolved by a jury, where they can be subject to cross-examination and competing evidence.") (emphasis original). Notably, Judge Schroder is the Chair of the Advisory Committee on Evidence's Rule 702 Subcommittee.

[10] *E.g.*, *Cline v. Bos. Sci. Corp.*, No. 5:14-CV-5090, 2021 WL 1197794, at *7 (W.D. Ark. Mar. 29, 2021) ("The Court finds that Ms. Cline's criticism of Dr. Spiegelberg's opinions on the Mays/Gido study go to the weight and credibility of his findings rather than to their admissibility. Ms. Cline's counsel is free to cross-examine Dr. Spiegelberg regarding the bases for his scientific opinions …[.] '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.'"); *NuTech Orchard Removal, LLC v. DuraTech Indus. Int'l, Inc*., No. 3:18-CV-00256, 2020 WL 6994246, at *5 (D.N.D. Oct. 14, 2020) ("It is well settled that 'the factual basis of an expert opinion goes to the credibility of the testimony, not the admissibility.' In the Court's view, the differences between the 5064T and 5064 models can be adequately addressed during cross-examination and are not a basis for excluding [the expert's] opinions."). *See also Masters v. City of Indep., Missouri*, 998 F.3d 827, 840 (8th Cir. 2021) (quoting with approval language identified in text taken from *Hose v. Chi. Nw. Transp. Co*., 70 F.3d 968, 974 (8th Cir. 1995) and *Loudermill v. Dow Chem. Co*., 863 F.2d 566, 570 (8th Cir. 1988)).

[11] *E.g*., *Joseph v. Doe*, No. CV 17-5051, 2021 WL 2313474, at *2, *5 (E.D. La. June 7, 2021) ("As a general rule, questions relating to the bases and sources of an expert's opinion

- 104 federal rulings incorporated a statement similar to the following: "Soundness of the factual underpinnings of the expert's analysis and the correctness of the expert's conclusions based on that analysis are factual matters to be determined by the trier of fact[.]"[12]

These decisions that erroneously declare an expert's factual basis or methodological application presents an issue of weight, not admissibility, share one common thread: reliance on recycled caselaw statements traceable to pre-Rule 702 rulings that the 2000 amendment rejected.[13] For example, in *In re: Bair Hugger*

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affect the weight of the evidence rather than its admissibility and should be left for the finder of fact. . . . Any questions relating to the bases and sources of [the expert's] opinion affect the weight of the evidence rather than its admissibility and should be left for the finder of fact. The Court is confident that vigorous cross-examination will assist the jury in evaluating his testimony."); *In re 3M Combat Arms Earplug Prod. Liab. Litig.*, No. 3:19MD2885, 2021 WL 765019, at *16 (N.D. Fla. Feb. 28, 2021) ("factual disagreements with the bases and/or persuasiveness of Dr. Bielefeld's opinion bear on its weight, not its admissibility. *See Viterbo v. Dow Chem. Co.*, 826 F.2d 420, 422 (5th Cir. 1987) ('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.')").

[12] *E.g.*, *Immanuel Baptist Church v. City of Chicago*, No. 17-CV-0932, 2021 WL 1722791, at *4 (N.D. Ill. Apr. 30, 2021) ("The City might be right that Rev. Rich could have evaluated more factors discussed in the articles, accounted for the Church's demographics, or could have used a larger or different sample size of comparable churches. But '[t]he soundness of the factual underpinnings of the expert's analysis and the correctness of the expert's conclusions based on that analysis are factual matters to be determined by the trier of fact, or, where appropriate, on summary judgment.' *Smith* [*v. Ford Motor Co.*], 215 F.3d [713,] 718 [(7th Cir. 2000)]."); *Jarrett v. Wright Med. Tech., Inc.*, No. 112CV00064SEBDML, 2021 WL 1165178, at *4 (S.D. Ind. Mar. 26, 2021) ("Although Wright Medical points out several causes Dr. Waldrop failed to consider or failed to provide reasons for discounting, an expert need not eliminate all potential alternative causes for his differential diagnosis. Any such perceived insufficiencies in Dr. Waldrop's testimony can be addressed through vigorous cross-examination as it is well-established that the 'soundness of the factual underpinnings of the expert's analysis and the correctness of the expert's conclusions based on that analysis are factual matters to be determined by the trier of fact[.]'") (quoting *Smith*, 215 F.3d at 718).

[13] *See* 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)

Forced Air Warming Devices Prods. Liab. Litig., the court declared that "[a]s a general rule, the factual basis of an expert opinion goes to the credibility of the testimony, not the admissibility[,]" and reversed the district court's exclusion of opinion testimony for not following this "general rule."[14] The court took the quoted statement that an expert's factual basis is a matter of weight and not admissibility from *United States v. Coutentos*, 651 F.3d 809, 820 (8th Cir. 2011). But *Coutentos* lifted the passage from *Hartley v. Dillard's, Inc.,* 310 F.3d 1054, 1061 (8th Cir.2002), which in turn takes the language from *Hose v. Chicago Northwestern Transp. Co.,* 70 F.3d 968, 974 (8th Cir.1995), which quoted *Loudermill v. Dow Chem. Co.*, 863 F.2d 566, 570 (8th Cir. 1988). Similar "DNA analysis" reveals that, when courts present this incorrect proposition, they nearly always draw upon statements that originally appeared in opinions decided years before current Rule 702 came into being but have been carried forward in subsequent rulings.[15] Although courts may mistakenly

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("The proposed amendment and the Committee Note clearly envision a more rigorous and structured approach than some courts are currently employing.").

[14] *In re: Bair Hugger Forced Air Warming Devices Prods. Liab. Litig*., ___ F.4th ___, No. 19-2899, 2021 WL 3612753, at *5, *11 (8th. Cir. Aug. 16, 2021).

[15] *See*, *e.g*., *Trevelyn Enterprises, L.L.C. v. SeaBrook Marine, L.L.C*., No. CV 18-11375, 2021 WL 65689, at *2 (E.D. La. Jan. 7, 2021) (quotes *United States v. 14.38 Acres of Land*, 80 F.3d 1074, 1077 (5th Cir. 1996), which itself quotes *Viterbo v. Dow Chem. Co*., 826 F.2d 420, 422 (5th Cir. 1987)). *See also Acevedo v. NCL (Bahamas) Ltd.*, 317 F. Supp. 3d 1188, 1197 (S.D. Fla. 2017) ("Based upon a review of the report and Mr. Camuccio's observations which provide the basis for his conclusions, the report and testimony on the issues contained therein are admissible. As the Court of Appeals for the Eleventh Circuit has stated, '[a]ny weaknesses in the factual underpinnings of [the expert's] opinion go to the weight and credibility of his testimony, not to its admissibility.' *Sorrels*, 796 F.3d at 1285 (quoting *Hurst v. United States*, 882 F.2d 306, 311 (8th Cir. 1989).").

believe that the caselaw reflects interpretation of the current Rule 702 standard,[16] in some instances judges cite directly to the pre-Rule 702 cases.[17] Doing so demonstrates a flawed understanding that courts engaged in the gatekeeping function should take direction from judicial precedent rather than the language of Rule 702 itself, which is exactly backwards. Litigants who discuss expert admissibility inquiries as "*Daubert* motions" suggest that the issue primarily involves the application of caselaw, and thereby risk diverting the court's attention away from the

[16] The potential for the pre-Rule 702 origin of these incorrect statements to become lost in the extended citation chain can be seen in *Clark v. Travelers Companies, Inc.*, No. 216CV02503ADSSIL, 2020 WL 473616, at *5 (E.D.N.Y. Jan. 29, 2020). In that case, the court dismissed the challenge that the plaintiff's expert had an insufficient factual basis by indicating that such an argument was not an admissibility consideration: "Starting with the Defendant's contention that Scott's opinion is unsupported by sufficient facts or data, '[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.'" *Id*. The *Clark* court quoted *Chill v. Calamos Advisors LLC*, No. 15-cv-1014, 2019 WL 5067746, at *25 (S.D.N.Y. Oct. 9, 2019), which quotes *Boykin v. W. Exp., Inc.*, No. 12 Civ. 7428 (NSR) (JCM), 2015 WL 539423, at *6 (S.D.N.Y. Feb. 6, 2015), which took the language from *Hollman v. Taser Int'l Inc.*, 928 F. Supp. 2d 657, 670 (E.D.N.Y. 2013), which in turn was taken from *First Union Nat'l Bank v. Benham,* 423 F.3d 855, 862 (8th Cir. 2005), which took the statement from *Bonner v. ISP Tech., Inc.,* 259 F.3d 924, 929–30 (8th Cir. 2001), which quoted *Hose v. Chicago Northwestern Transp. Co.,* 70 F.3d 968, 974 (8th Cir. 1995), which drew the phrase from the originating case: *Loudermill v. Dow Chem. Co.,* 863 F.2d 566, 570 (8th Cir. 1988).

[17] *See*, *e.g*., *Miles v. Minor*, No. 20-410, 2021 WL 3042687, at *4 & n.29 (E.D. La. June 16, 2021) ("Generally, questions relating to the bases and sources of an expert's opinion go to its weight, not admissibility, and should be left for the jury's consideration. *Viterbo v. Dow Chem. Co.*, 826 F.2d 420, 422 (5th Cir. 1987)."); *Owen v. Union Pac. R.R. Co.*, No. 8:19CV462, 2020 WL 6684504, at *4 (D. Neb. Nov. 12, 2020) ("Although Union Pacific raises legitimate questions about some of Dr. Trangle's opinions, the Court finds the proposed evidence is not so flawed as to require its wholesale exclusion at this point. . . . '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.' *Loudermill v. Dow Chem. Co.*, 863 F.2d 566, 570 (8th Cir. 1988)."); *Citizens State Bank v. Leslie*, No. 6-18-CV-00237-ADA, 2020 WL 1065723, at *4 (W.D. Tex. Mar. 5, 2020) ("Questions relating to the bases and sources of an expert's opinion affect the weight to be assigned that opinion rather than its admissibility. *Viterbo v. Dow Chem. Co.*, 826 F.2d 420, 422 (5th Cir. 1987).").

actual governing standard, Rule 702.

II. SOME COURTS INTERPRET *DAUBERT* TO IMPLY A LEVEL OF DEFERENCE NOT CONSISTENT WITH RULE 702

The *Daubert* opinion contains divergent analytical threads. On the one hand, the ruling stresses reliance on the adversarial process, especially cross-examination, to reveal shoddy and unsubstantiated opinion testimony.[18] On the other hand, *Daubert* instructs trial courts that they must ensure that proffered expert opinions reflect a reliable methodology properly applied to the facts at issue.[19] Rule 702 reconciles these elements by recognizing the limitations of cross-examination in the context of subjects unfamiliar to jurors,[20] and establishing a trial court screening responsibility to protect against opinion testimony that is speculative, inadequately supported, or improperly reasoned:

> The key to *Daubert* is that cross-examination alone is ineffective in revealing nuanced defects in expert opinion

[18] *Daubert*, 509 U.S. 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.").

[19] *Id.* 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.").

[20] *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):

> 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.

> 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. [21]

The burden of production is a critical part of the protection Rule 702 is intended to provide. Rule 702 compels courts to determine prior to introduction whether the opinion testimony meets the preponderance standard on each criterion required for admissibility:

> 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.[22]

Courts therefore must view the Rule 702 admissibility requirements through the lens of the Rule 104(a) burden of production.[23]

Despite the importance of the burden of production to the function of Rule 702, many courts "are ignoring that standard."[24] Rather than hold the proponent to

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[21] 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).

[22] Apr. 1, 2018 Memorandum from Daniel J. Capra, Reporter, *supra* n.7, at 43 (emphasis original).

[23] The Advisory Committee Note to the 2000 Amendment to Rule 702 explicitly directs trial courts to apply the preponderance of evidence burden of production to each element Rule 702 element:

> 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).

[24] Hon. Patrick J. Schiltz, Report of the Advisory Committee on Evidence Rules (Dec. 1, 2020) at 5, *in* COMMITTEE ON RULES OF PRACTICE & PROCEDURE JANUARY 2021 AGENDA BOOK 441

meeting the burden of production, a number of courts examine opinion testimony using deferential approaches. Some have declared there is a "presumption of admissibility"[25] or mistakenly recite that exclusion should be "the exception rather than the rule."[26] Some other courts describe the admissibility hurdle as minimal, so that "[o]nly if the expert's opinion is so fundamentally unsupported that it can offer no assistance to the [trier of fact] must such testimony be excluded."[27] This mistake seems to arise from an exaggerated emphasis of the *Daubert* opinion's discussion of

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(2021). *See also* Schroeder, 95 NOTRE DAME L. REV. at 2060 ("In the vast majority of cases under question, while Rule 702 and relevant cases are cited, there is no acknowledgement that the gatekeeper function requires application of Rule 104(a)'s preponderance test, much less for each of the elements of the Rule. Instead, courts tend to defer to statements from caselaw, even if it is outdated.") (emphasis original).

[25] *See*, *e.g.*, *Price v. General Motors, LLC*, No. CIV-17-156-R, 2018 WL 8333415, at *1 (W.D. Okla. Oct. 3, 2018) ("The Federal Rules encourage the admission of expert testimony and there is a presumption under the Rules that expert testimony is admissible.") (quotations omitted); *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 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.").

[26] *See*, *e.g*., *Trice v. Napoli Shkolnik PLLC*, No. CV 18-3367 ADM/KMM, 2020 WL 4816377, at *10 (D. Minn. Aug. 19, 2020) (quotation and citations omitted); *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).

[27] *Beebe v. Colorado*, No. 18-cv-01357-CMA-KMT, 2019 WL 6044742, at *6 (D. Colo. Nov. 15, 2019) (emphasis original) (quotation omitted). *See also In re: Bair Hugger*, 2021 WL 3612753, at *5; *Thompson v. APS of Okla., LLC*, No. CIV-16-1257-R, 2018 WL 4608505, at *5 n. 15 (W.D. Okla. Sept. 25, 2018); *Trice*, 2020 WL 4816377, at *10 (similar statements). Notably, the quoted description of an exceedingly low hurdle that expert testimony must overcome comes from a decision pre-dates Rule 702 and even *Daubert*. Courts repeating this statement usually cite to *Bonner v. ISP Tech., Inc*., 259 F.3d 924, 929-30 (8th Cir. 2001). *Bonner*, however, draws that language from *Hose v. Chicago Nw. Transp. Co*., 70 F.3d 968, 974 (8th Cir. 1996), which itself quotes the 1988 *Loudermill* opinion, 863 F.2d at 570. The statement therefore constitutes an outdated approach to expert admissibility that courts have recycled, but should have discarded upon the adoption of Rule 702.

the value of cross-examination coupled with a failure to recognize that Rule 702's burden of production takes that element of *Daubert* into account.[28] Indeed, some courts take the view that, because the *Daubert* opinion "affirmed the capabilities of the jury" and the truth-revealing nature of cross-examination, courts should not pre-judge opinion testimony in considering a "*Daubert* motion."[29]

Individual courts' attempts to apply what they see as the principal thrust of the *Daubert* ruling, rather than Rule 702, end up fundamentally misstating the expert admissibility standard. It "is decidedly not the case" under Rule 702 that expert testimony can be described as "presumptively admissible."[30] When courts fail to utilize the preponderance of the evidence test and instead presume admissibility, they improperly shift the burden of production away from the proponent. The effect is to "relegate to the jury the very decisions that Rule 702 contemplates to be beyond jury consideration."[31] Using the "*Daubert* motion" nomenclature therefore

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[28] *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) ("Exclusion is disfavored because '[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.'") (citing *Daubert*, 509 U.S. at 596); *Price*, 2018 WL 8333415, at *1 (rationalizing application of presumption of admissibility by stating "Rather than excluding expert testimony, the Supreme Court encourages '[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof' to attack 'shaky but admissible evidence.' *Daubert*, 509 U.S. at 596."); *Powell*, 2015 WL 7720460, at *2 (after identifying presumption of admissibility, stating "[i]n fact, "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Daubert*, 509 U.S. at 596.").

[29] *Miles*, 2021 WL 3042687, at *4 & n.29.

[30] *See* Apr. 1, 2019 Memorandum from Daniel J. Capra, Reporter, *supra* n.8 at 11, n.4.

[31] Schroeder, 95 NOTRE DAME L. REV. at 2043.

reinforces some courts' erroneous perspective of their gatekeeping responsibility.

III. A PROPOSED AMENDMENT TO RULE 702 CREATES THE OPPORTUNITY TO RE-FOCUS COURTS AND LITIGANTS THAT THE RULE, NOT CASELAW, ESTABLISHES THE STANDARD

The pervasiveness of rulings that incorrectly articulate and apply the gatekeeping standard has convinced the Advisory Committee on Evidence that an ongoing problem exists:

> It is clear that a judge should not allow expert testimony without determining that all requirements of Rule 702 [, including that it is based on sufficient facts or data,] are met by a preponderance of the evidence. . . . It is not appropriate for these determinations to be punted to the jury, but judges often do so.[32]

At its April 30, 2021 meeting, the Advisory Committee voted to recommend a proposed amendment to Rule 702 that "would clarify that expert testimony should not be permitted unless the judge finds by a preponderance of the evidence that each of the prerequisites are met."[33] The Standing Committee on Rules of Practice

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[32] *See*, *e.g.*, Minutes - Committee on Rules of Practice & Procedure, Report of the Advisory Committee on Evidence Rules (Jan. 5, 2021) at 25, *in* ADVISORY COMMITTEE ON EVIDENCE RULES APRIL 2021 AGENDA BOOK 36 (2021) (emphasis added). *See also* Minutes - Advisory Committee on Evidence Rules (Nov. 13, 2020) at 3-4, *in* ADVISORY COMMITTEE ON EVIDENCE RULES APRIL 2021 AGENDA BOOK 15 (2021) ("Twenty years later [after adoption of current Rule 702] – when it is clear that federal judges are not uniformly finding and following the preponderance standard – the justification for a clarifying amendment exists.").

[33] Minutes - Committee on Rules of Practice & Procedure, Report of the Advisory Committee on Evidence Rules (Jan. 5, 2021) at 25, *in* ADVISORY COMMITTEE ON EVIDENCE RULES APRIL 2021 AGENDA BOOK 36 (2021) (emphasis added). The Draft Committee Note that accompanies this proposed amendment explicitly rejects those cases that describe an expert's factual foundation as an issue of weight and not admissibility:

and Procedure voted in June to publish the proposed amendment, and the public may comment on the proposed amendment beginning August 6, 2021.[34]

The draft amendment would change Rule 702 to read as follows:

> 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 witness'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.[35]

The Draft Committee Note explains that the change is intended "to clarify and emphasize that the admissibility requirements set forth in the Rule must be established to the court by a preponderance of the evidence."[36]

> But many courts have held that the critical questions of the sufficiency of an expert's basis, 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)[.]

Appendix to Report of the Advisory Committee on Evidence Rules (May 15, 2021), *in* COMMITTEE ON RULES OF PRACTICE AND PROCEDURE AGENDA BOOK JUNE 22, 2021 AGENDA BOOK 836 (2021).

[34] 86 Fed. Reg. 41087 (July 30, 2021).

[35] Appendix to Report of the Advisory Committee on Evidence Rules (May 15, 2021), *supra* n. 33. Language to be added appears in bold with underlining; text to be eliminated appears with double strike-through.

[36] *Id.* at 2.

The existence of this proposed amendment to Rule 702 should project to courts and litigants that Rule 702, not caselaw statements, sets the expert admissibility standard. To the extent that courts have based their approach to opinion testimony on judicial precedents, that analysis must be reconsidered and reconciled with the requirements of the rule. Along with the change to the language of the rule, courts and practitioners should also change the words they use to refer to expert admissibility challenges. Replacing "*Daubert* motion" with "Rule 702 motion" amounts to more than a simple word choice; it changes the focus of the discussion. Rule 702, not *Daubert* or any other case, should be the center of attention.

