COMMENT
to the

ADVISORY COMMITTEE ON EVIDENCE RULES
and its
RULE 702 SUBCOMMITTEE

WHY *LOUDERMILL* SPEAKS LOUDER THAN THE RULE: A "DNA" ANALYSIS OF RULE 702 CASE LAW SHOWS THAT COURTS CONTINUE TO RELY ON PRE-*DAUBERT* STANDARDS WITHOUT UNDERSTANDING THAT THE 2000 AMENDMENT CHANGED THE LAW

October 20, 2020

Lawyers for Civil Justice ("LCJ")[1] respectfully submits this Comment to the Advisory Committee on Evidence Rules ("Committee") and its Rule 702 Subcommittee ("Subcommittee").

> "As a general rule, the factual basis of an expert opinion goes to the credibility of the testimony, not the admissibility…"
>
> *U.S. v. Finch*, 630 F.3d 1057 (8th Cir. 2011)

INTRODUCTION

If Rule 702 requires courts to find that "the testimony is based on sufficient facts or data"[2] prior to admitting opinion testimony, why does the Eighth Circuit say just the opposite?[3] The answer,

[1] Lawyers for Civil Justice ("LCJ") is a national coalition of corporations, law firms, and defense trial lawyer organizations that promotes excellence and fairness in the civil justice system to secure the just, speedy, and inexpensive determination of civil cases. For over 30 years, LCJ has been closely engaged in reforming federal procedural rules in order to: (1) promote balance and fairness in the civil justice system; (2) reduce costs and burdens associated with litigation; and (3) advance predictability and efficiency in litigation.

[2] Fed. R. Evid. 702

[3] *United States v. Finch*, 630 F.3d 1057 (8th Cir. 2011) ("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").

which has important implications as the Committee nears a decision on whether to amend the rule, is that the Eighth Circuit's Rule 702 jurisprudence doesn't actually interpret the rule, but rather recites pre-2000 caselaw holdings. Our research—tracing the "DNA" of the *Finch* holding—demonstrates that the Eighth Circuit's rulings are direct descendants of a pre-*Daubert* opinion, *Loudermill v. Dow Chemical*, which declared in 1988 that "the factual basis of an expert opinion goes to the credibility of the testimony, not the admissibility[.]"[4] In the many courts that presently follow this statement and not Rule 702's requirement, today *Loudermill* speaks louder than the rule.

The Eighth Circuit is certainly not alone in misunderstanding *what* Rule 702 requires and *that* the rule requires it. The numerous comments submitted to the Committee and the Subcommittee's own thorough research have established that case law ostensibly interpreting Rule 702's requirements not only varies from court to court, but also is frequently inconsistent with the rule. This does not reflect the normal function of courts' arriving at different interpretations of the text. Although Rule 702 provides courts wide discretion to determine whether particular testimony satisfies its test, it does not give courts leeway to choose a *different* test. Having been promulgated pursuant to the Rules Enabling Act, Rule 702 is the law. Because many courts across federal jurisdictions are applying tests that contradict the rule, an amendment is needed to clarify both the rule's standards and that the rule *changed* the law.

I. THE REASON BEHIND TODAY'S WIDESPREAD MISUNDERSTANDING OF RULE 702'S REQUIREMENTS IS A RELIANCE ON PRE-2000 CASELAW

There is a reason that Rule 702's requirements are disconnected from much of the caselaw on expert admissibility: many widely cited descriptions of the courts' role are not interpretations of Rule 702 at all, but rather are recycled statements of law that the 2000 amendment rejected.

A ruling from just weeks ago, *Trice v. Napoli Shkolnik PLLC*,[5] is a case in point, showing how supplanted but persistent caselaw pronouncements cause courts to misunderstand their gatekeeping responsibility. Although the court in *Trice* recites that Rule 702 governs the admission of expert testimony and that the "proponent of the expert testimony bears the burden of showing by a preponderance of the evidence that the testimony is admissible,"[6] the court nevertheless employs a caselaw-based standard that is flatly irreconcilable with Rule 702:

> "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." *United States v. Finch*, 630 F.3d 1057, 1062 (8th Cir. 2011) (internal quotations and alterations omitted). "Only if the expert's opinion is so fundamentally unsupported that it can

[4] *Loudermill v. Dow Chem. Co.*, 863 F.2d 566, 570 (8th Cir. 1988).

[5] Case No. CV 18-3367 ADM/KMM, 2020 WL 4816377 (D. Minn. Aug. 19, 2020).

[6] *Id.* at *10.

> offer no assistance to the jury must such testimony be excluded." *Bonner v. ISP Techs., Inc.*, 259 F.3d 924, 929–30 (8th Cir. 2001).[7]

Perhaps this district court could reasonably expect that the Eighth Circuit's precedents on the expert admissibility standard reflect, as required, an interpretation of Rule 702, but that is not the case. Why not? Because the *Finch* holding's "DNA" is a direct descendant of pre-2000 standards:

- *Finch* quoted the statement from *United States v. Rodriguez*, 581 F.3d 775, 795 (8th Cir. 2009);
- *Rodriguez* took the quotation from *Arkwright Mut. Ins. Co. v. Gwinner Oil, Inc.*, 125 F.3d 1176, 1183 (8th Cir. 1997);
- *Arkwright Mut.* drew the sentence from *Hose v. Chicago Nw. Transp. Co.*, 70 F.3d 968, 974 (8th Cir. 1995); and
- *Hose* pulled those very same words from the 1988 pre-*Daubert* ruling in *Loudermill*, 863 F.2d at 570.

This "DNA" analysis shows that the *Trice* court's ruling, ostensibly based on the Rule 702 admissibility standard, in fact upholds a principle that Rule 702 rejected and replaced.

The *Trice* court's holding that opinion testimony is admissible unless it is "fundamentally unsupported," also descends directly from pre-Rule 702 thinking. The source it cites for that principle, the Eighth Circuit's *Bonner v. ISP Techs*.[8] opinion, derived its analysis from a 1995 decision, *Hose v. Chicago Nw. Transp. Co*.[9] Thus, neither of the legal propositions upon which the *Trice* court based its decision to dismiss challenges to proffered expert testimony as going "to the credibility of the opinion rather than its admissibility"[10] were interpretations of Rule 702.

The *Trice* court's reliance on statements that should have faded into history after adoption of the 2000 Rule 702 amendment typifies a widespread problem: courts across the country actively utilize anachronistic caselaw-derived approaches that contradict Rule 702. Courts continue using

[7] *Id.*

[8] 259 F.3d 924, 929–30 (8th Cir. 2001).

[9] 70 F.3d 968, 974 (8th Cir. 1995). The *Hose* opinion took most of this language from *Loudermill*, 826 F.2d at 570, but overembellished it by adding the word "only." Doing so dramatically changed the meaning, reconfiguring what had been a description of a situation warranting exclusion of an expert's testimony into a characterization of the admissibility test that does not depend on a showing of reliability and heavily favors allowing opinion testimony.

[10] 2020 WL 4816377 at *12.

the *Loudermill* rationale,[11] or similar pronouncements from other pre-*Daubert* decisions,[12] to dismiss challenges that should prevail under Rule 702(b). Courts are substituting pre-Rule 702 notions of the threshold showing, such as the *Hose* "not fundamentally unsupported" test, for the Rule 104(a)-derived burden of production Rule 702 requires.[13]

[11] More than 200 rulings issued since January 2015 include the quoted *Loudermill* statement, *see* Bayer Corp., *Amending Federal Rule of Evidence 702* at 1 & n.1, 20-EV-O Suggestion from Bayer – Rule 702 (Sept. 30, 2020). Reliance on the *Loudermill* assertion that "the factual basis of an expert opinion goes to the credibility of the testimony, not the admissibility" has occurred in several circuits. *See, e.g.*, *A.B. v. Count of San Diego*, Case No.: 18cv1541-MMA-LL, 2020 WL 4431982, at *9 (S.D. Cal. July 31, 2020); *Bluetooth SIG, Inc. v. FCA US LLC*, Case No. 2:18-cv-01493-RAJ, 2020 WL 3446342, at *4 (W.D. Wash. June 24, 2020); *Watkins v. Lawrence County, Arkansas*, Case No. 3:17-cv-00272-KGB, 2020 WL 2544469, at *2, *7 -*9 (E.D. Ark. May 19, 2020); *Clark v. Travelers Companies, Inc.*, No. 216CV02503ADSSIL, 2020 WL 473616, at *5 (E.D.N.Y. Jan. 29, 2020); *Patenaude v. Dick's Sporting Goods, Inc.*, Case No. 9:18-CV-3151-RMG, 2019 WL 5288077, at *2 (D.S.C. Oct. 18, 2019); *Wischermann Partners, Inc. v. Nashville Hosp. Capital LLC*, No. 3:17-CV-00849, 2019 WL 3802121, at *1, *3 (M.D. Tenn. Aug. 13, 2019); *Irish v. Fowler*, No. 1:15-CV-00503-JAW, 2019 WL 1179392, at *8 (D. Me. Mar. 13, 2019); *Thompson v. APS of Oklahoma, LLC*, No. CIV-16-1257-R, 2018 WL 4608505, at *5 n.15 (W.D. Okla. Sept. 25, 2018).

[12] Courts actively reiterate the assertion originally stated in *Viterbo v. Dow Chem. Co*., 826 F.2d 420, 422 (5th Cir. 1987) that "questions relating to the bases and sources of an expert's opinion affect the weight to be assigned that opinion rather than its admissibility." *See, e.g.*, *U.S. v. City of Houston, Texas*, Case No. H-18-0644, 2020 WL 2516603, at *12 (S.D. Tex. May 15, 2020); *Compton v. Moncla Co*., Case No. 17-2258, 2020 WL 1638287, at *3 (E.D. La. Apr. 2, 2020); *Ward v. Autozoners*, LLC, Case No. 7:15-CV-164-FL, 2018 WL 10322906, at *3 (E.D. N.C. Apr. 16, 2018); *United States v. McCarthy Improvement Co*., Case No. 3:14-CV-919-J-PDB, 2017 WL 10434414, at *5 (M.D. Fla. Feb. 3, 2017). Bayer's comment indicates that more than 150 cases announced in the period between January 2015 to the present incorporate this language from *Viterbo*. Bayer Corp., *Amending Federal Rule of Evidence 702* at 1 & n.2, 20-EV-O Suggestion from Bayer – Rule 702 (Sept. 30, 2020). Courts also continue to invoke the Tenth Circuit's statement from *Werth v. Makita Elec. Works, Ltd.*, 950 F.2d 643, 654 (10th Cir. 1991) that doubts "concerning the sufficiency of the factual basis to support [the expert's] opinion go to its weight, and not to its admissibility" and the Sixth Circuit's declaration in *United States v. L.E. Cooke Co*., 991 F.2d 336, 342 (6th Cir. 1993) that "weaknesses in the factual basis of an expert witness' opinion . . . bear on the weight of the evidence rather than its on admissibility." *See, e.g., Schlueter v. Ingram Barge Co.*, No. 3:16-CV-02079, 2019 WL 5683371, at *9 (M.D. Tenn. Nov. 1, 2019); *Mighty v. Miami-Dade Cty.*, Case No. 14-23285-CIV-MORENO-MCALILEY, 2019 WL 4306939, at *3 (S.D. Fla. Apr. 30, 2019); *United States v. Pac. Health Corp.*, Case. No. CV-12-00960-RSWL-AJW, 2018 WL 1026361, at *4 (C.D. Cal. Feb. 20, 2018); *Jorgensen v. Ritz-Carlton Hotel Co. LLC*, No. 16-CV-00795-MEH, 2017 WL 3390582, at *6 (D. Colo. Aug. 8, 2017); *Finn v. BNSF Ry. Co.*, Case No.11-CV-349-J, 2013 WL 462057, at *3 (D. Wyo. Feb. 6, 2013). *See also* Ford Motor Co., *Amending Federal Rule of Evidence 702* at 3 & n.11, 20-EV-L Suggestion from Ford – Rule 702 (Sept. 26, 2020)(discussing problematic rulings rooted in pre-*Daubert* caselaw within the Fourth Circuit).

[13] *See, e.g., Watkins v. Lawrence Cty., Ark.*, Case No. 3:17-CV-00272-KGB, 2020 WL 2544469, at *9 (E.D. Ark. May 19, 2020); *K.W.P. v. Kansas City Pub. Sch.*, 296 F. Supp. 3d 1121, 1128 (W.D. Mo. 2017); *U.S. Bank Nat. Ass'n v. PHL Variable Life Ins. Co.*, 112 F. Supp. 3d 122, 135 (S.D.N.Y. 2015); *In re Trasylol Prod. Liab. Litig.*, No. 08-MD-01928, 2010 WL 1489793, at *7 (S.D. Fla. Feb. 24, 2010). *See also* Lee Mickus, Gatekeeping Reorientation: Amend Rule 702 to Correct Judicial Misunderstanding About Expert Evidence, Wash. Legal Found. Critical Legal Issues Working Paper Series, No. 217 at 14 (May 2020)(describing additional cases that apply a presumption of admissibility inconsistent with the burden of production applicable to Rule 702, based on *dicta* from *Borawick v. Shay*, 68 F.3d 597, 610 (2d Cir. 1995), *cert. denied*, 517 U.S. 1229 (1996)).

II. BECAUSE RULE 702 WAS PROMULGATED ACCORDING TO THE RULES ENABLING ACT, COURTS DO NOT HAVE THE DISCRETION TO IMPOSE PRE-2000 CASELAW STANDARDS THAT CONFLICT WITH RULE 702

Courts addressing expert admissibility must apply Rule 702, not the conflicting case law.[14] As the Sixth Circuit recently explained, rules enacted pursuant to the Rules Enabling Act have the force of law:

> we are to be "mindful that the Rule [Fed. R. Civ. P. 26] as now composed sets the requirements [courts] are bound to enforce," and we "are not free to amend a rule outside the process Congress ordered." *Amchem* [*Prods., Inc. v. Windsor*, 521 U.S. 591,] 620 [(1997)]. That process involves careful review of a proposed amendment by the Rules Advisory Committee, the Judicial Conference, the Supreme Court, and Congress. *See* 28 U.S.C. §§ 2072–74. After the Rules Advisory Committee has recommended a change to the Judicial Conference, that body may propose that the Supreme Court promulgate the amendment. Even if the Court does so, Congress may prevent the change through statutory enactment before the new rule goes into effect. *See id.* This multi-layered review process ensures that alterations to the Rules can only be made after thorough deliberations by multiple expert bodies, which can assess the virtues and drawbacks of a proposed change as well as evaluate the possible implications of the proposed rule across the entire judicial system, rather than by individual judges facing the pressures of litigation.[15]

Rule 702 is a product of that process,[16] and courts are not free to ignore Rule 702.[17] Courts that rely on caselaw that contradicts Rule 702's requirements—including the court's duty to determine the sufficiency of the expert's factual foundation,[18] the court's obligation to assess the

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[14] *See Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 620 (1997)("The text of a rule thus proposed and reviewed limits judicial inventiveness.").

[15] *In re National Prescription Opiate Litig*., Case Nos. 19-4097/4099, 2020 WL 5701916, at *8 (6th Cir. Sept. 24, 2020).

[16] In fact, the attention paid to the Rule 702 amendments was particularly intense, given that Congress raised several alternative proposals for direct enactments of expert admissibility standards. *See* May 1, 1998 Report of the Advisory Committee on Evidence Rules, 181 F.R.D. at 132 ("The proposal is also a response to bills pending in Congress that purport to "codify" *Daubert*, but that, in the Committee's view, raise more problems than they solve.").

[17] *Cf. Hentif v. Obama*, 733 F.3d 1243, 1246 (D.C. Cir. 2013)("Where rules fall within the scope of the [Rules Enabling] Act, subject to its limitations, they have the force of law and the court is not free to ignore their interpretation of a jurisdictional requirement."); *Morel v. DaimlerChrysler AG*, 565 F.3d 20, 24 (1st Cir. 2009)(" as long as a Rule is consonant with both the Constitution and the Rules Enabling Act, 28 U.S.C. § 2072, that Rule must be given effect").

[18] *See* n.11 & n.12, *supra*.

expert's methodological application to the facts of the case,[19] or the burden of production[20]—not only misunderstand the meaning of Rule 702, but also the role of Rule 702 in our courts.

III. AMENDING RULE 702 IS NECESSARY AND APPROPRIATE TO CLARIFY THAT THE RULE REJECTS PRE-2000 CASE LAW

Courts that continue to apply discarded caselaw need clarity about what the 2000 amendment accomplished. Some courts understand "the revisions to Rule 702 were intended to simply codify the principles of *Daubert* and *Kumho*[.]"[21] From that perspective, pre-2000 caselaw is not just suggestive, but continues to apply in force because adoption of amended Rule 702 did not change the expert admissibility standard and so did not displace existing authorities.[22] That view fails to recognize that the amendment established a new standard that courts must use to assess admissibility of expert testimony.[23] In the face of inconsistent court treatment prior to 2000,[24] the inclusion of Rule 702(b) and (d) in the text of the amended rule resolved that disagreement: admitting an expert's opinions requires a showing that they must have sufficient factual foundation and arise from an adequate methodological application to the facts of the case. [25] Adoption of amended Rule 702 therefore *did* reject existing interpretations of the admissibility

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[19] *See AmGuard Ins. Co. v. Lone Star Legal Aid*, No. CV H-18-2139, 2020 WL 60247, at *8 (S.D. Tex. Jan. 6, 2020)(relying on *Viterbo* language discussed in n. 15, *supra*, to conclude that "objections [that the expert could not link her experienced-based methodology to her conclusions] are better left for cross examination, not a basis for exclusion."); *Murphy-Sims v. Owners Ins. Co.*, No. 16-CV-0759-CMA-MLC, 2018 WL 8838811, at *7 (D. Colo. Feb. 27, 2018)(relying on understanding established in *Watson v. City of Kansas City, Kan*., 857 F.2d 690, 695 (10th Cir. 1988) to rule that "Concerns surrounding the proper application of the methodology typically go to the weight and not admissibility").

[20] *See* n.13, *supra*.

[21] *Iwanaga v. Daihatsu America, Inc*., No. SA 99-CA-711 WWJ, 2001 WL 1910564, at *7 n.41 (W.D. Tex. Oct. 19, 2001).

[22] *See, e.g., Granger v. Marine*, Case No. 15-477, 2016 WL 4621501, at *2, *5 (E.D. La. Sept. 6, 2016)(indicating "Rule 702 is in effect a codification of the United States Supreme Court's opinion in *Daubert*" and relying on pre-amendment Fifth Circuit rulings, such as *Moore v. Ashland Chem*., 151 F.3d 269 (5th Cir. 1998) and *Viterbo*, 826 F.2d 420, that describe the analysis and court role in assessing proffered opinion testimony).

[23] *See* Advisory Committee Notes to the 2000 Amendments ("The amendment affirms the trial court's role as gatekeeper and provides some general standards that the trial court *must use* to assess the reliability and helpfulness of proffered expert testimony.")(emphasis added).

[24] *See, e.g., L.E. Cooke*, 991 F.2d at 342; *Werth*, 950 F.2d at 654; *Loudermill*, 863 F.2d at 570 (8th Cir. 1988); *Viterbo*, 826 F.2d at 422.

[25] *See* May 1, 1998 Report of the Advisory Committee on Evidence Rules, *in* Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure and Evidence: Request for Comment, 181 F.R.D. 18, 132 (1998)(indicating that the amendment to Rule 702 "attempts to address the conflict in the courts about the meaning of *Daubert*" and now "requires a showing of reliable methodology and sufficient basis; and provides that the expert's methodology must be applied properly to the facts of the case."). *See also* 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)(indicating the expert admissibility standard set forth in amended Rule 702 "clearly envision[s] a more rigorous and structured approach than some courts are currently employing.").

standard that were not consistent with the requirements set forth in the rule's text. A new amendment to Rule 702 is needed to clarify the rule's requirements and that the rule rejects conflicting caselaw. Although the Committee is understandably "wary about changing a rule in a way that essentially says, 'apply the rule the way it was written,'"[26] an amendment to Rule 702 similar to the suggestions set forth in the November 2020 Agenda Book would accomplish considerably more. Such an amendment would achieve two goals: clarify what the text of the rule requires, and announce that, because Rule 702 *changed the standards* for admissibility of expert evidence, inconsistent doctrines derived from earlier cases do not define Rule 702's standards.[27]

CONCLUSION

Although Rule 702 provides courts wide discretion to decide whether proffered testimony meets the rule's standards, it does not—and cannot—permit courts to *change* those standards. Much of the current confusion about what Rule 702 requires derives from caselaw that, upon careful "DNA" analysis, does not interpret the rule but rather perpetuates discarded doctrine that the rule displaced. An amendment is needed to ensure courts understand not only what Rule 702 requires, but also that Rule 702 changed the law.

[26] Hon. Debra A. Livingston, Report of the Advisory Committee on Evidence Rules (June 1, 2020) at 4, *in* COMMITTEE ON RULES OF PRACTICE AND PROCEDURE JUNE 2020 AGENDA BOOK 641 (2020).

[27] Of the several alternate draft amendments presented in the November 2020 Agenda Book, the version titled "Draft One – Making the Preponderance Standard Applicable to All Rule 702 Admissibility Requirements and Adding an Overstatement Limitation" most directly addresses the problems identified and provides the clearest guidance to the courts. The accompanying Draft Committee Note includes the following language that would go far to clarify the invalidity of caselaw that contradicts Rule 702(b) and (d): "unfortunately 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), and are rejected by this amendment." Memorandum from Daniel J. Capra and Liesa A. Richter, Reporter, Advisory Comm. on Evidence Rules, to Advisory Comm. on Evidence Rules, *Possible Amendment to Rule 702* (Oct. 1, 2020) at 54 *in* ADVISORY COMMITTEE ON EVIDENCE RULES OCTOBER 2020 AGENDA BOOK 101 (2020). The approach employed in the 2015 Advisory Committee Note to Fed.R.Civ.P. 37(e)(2), in which the Note identifies particular rulings as incompatible with the rule, would add more helpful clarity to this statement. Advisory Committee Note to 2015 Amendments to Federal Rule of Civil Procedure 37(e)(2)("[The amendment] rejects cases such as *Residential Funding Corp. v. DeGeorge Financial Corp*., 306 F.3d 99 (2d Cir. 2002, that authorize the giving of adverse-inference instructions on a finding of negligence or gross negligence.").