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Critical Legal Issues: WORKING PAPER SERIES

AMENDED F.R.E. 702:
ONE YEAR IN, TEN THEMES EMERGE

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AMENDED F.R.E. 702: ONE YEAR IN, TEN THEMES EMERGE

INTRODUCTION

Amended Federal Rule of Evidence 702 became effective on December 1, 2023 after years of consideration and debate. The Advisory Committee's internal research, as well as information conveyed in written comments and public hearings, established that changes were needed because federal judges were not uniformly following the preponderance standard at the root of the judicial gatekeeping requirement. Additionally, some courts were overlooking Rule 702 subsections (b) and (d) and improperly treating experts' factual basis and methodological application as credibility considerations, rather than admissibility matters that the judge must decide. Also, some experts were allowed to express an exaggerated degree of confidence or precision in their opinions that their analysis could not support. These practices were erroneous, and the amendment sought to render these misunderstandings incompatible with the language of the rule.

Now that amended Rule 702 has been in place for a full year, decisions applying the new rule show how the courts have adjusted course to account for the changes. Ten themes signaling recognition of the corrective purposes of the amendment have emerged.

1. THE AMENDMENT MANDATES A DIFFERENT AND MORE RIGOROUS APPROACH TO GATEKEEPING.

Although the amendment is sometimes described as "clarifying" the judicial role, courts should not mistake that term to mean they should continue using the same approach to expert admissibility employed previously. The amendment purposefully rendered several deferential practices obsolete by making them irreconcilable with Rule 702's text. As a result, courts are now "required to analyze the expert's data and methodology at the admissibility stage more critically than in the past." *Boyer v. City of Simi Valley*, 2024 WL 993316, at *1 (C.D. Cal. 2024). For example, the revision to Rule 702(d) requiring that expert opinions "reflect a reliable application of the principles and methods" is a "more stringent standard under the amendment." *Optical Solutions, Inc. v. Nanometrics, Inc.*, 2023 WL at 8101885, *1 (N.D. Cal. Nov. 21, 2023).

The corrective purpose of the amendment should be taken as a signal that judges should rethink how they consider admissibility challenges. One MDL judge who inherited ongoing litigation that had already passed the Rule 702 motion stage saw the amendment as a reason to revisit previous rulings to ensure that the gatekeeping analysis was performed properly:

> As the PSC vigorously maintains, Rule 702 did not change evidentiary standards, but clarified them. The Court agrees with PSC's contention, but rejects PSC's conclusion that therefore the Rule 702 amendments do not allow *Daubert* motions to be refiled. The fact that Rule 702 is not a change in the law but a clarification is precisely *why* it would be inappropriate for this Court to *preclude* Defendants from challenging this Court's previous *Daubert* holdings.

In re Johnson & Johnson Talcum Powder Prods. Marketing, Sales Prac. & Prods. Liab. Litig., 2024 WL 1914881, at *3 (D.N.J. Apr. 30, 2024) (emphasis original). The amendment rejects the overly deferential approach that some courts had previously taken, and so is properly seen to "reflect an intent to empower courts to take seriously their role as gatekeepers of expert evidence[.]" *U.S. v. Diaz*, 2024 WL 758395, at *5 (D.N.M. Feb. 23, 2024).

2. THE EXTENSIVE ADVISORY COMMITTEE NOTE PROVIDES USEFUL GUIDANCE ON HOW COURTS SHOULD APPLY RULE 702.

The Advisory Committee issued a detailed Note identifying several systemic errors that courts had been making and explaining the corrective purposes of the amendment. The Note provides a powerful foundation for an approach to gatekeeping that seriously explores whether an expert has met the Rule 702 admissibility requirements. The following example demonstrates how defense attorneys can utilize the Note to overcome prior misunderstandings about the rule's requirements:

> Because 'expert evidence can be both powerful and quite misleading,' courts have recognized that 'the importance of the gatekeeping function cannot be overstated.' A recent amendment to Rule 702 'clarif[ied] and emphasize[d] 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 rule.' The amendment was motivated by the Advisory Committee's observation that in 'a number of federal cases … judges did not apply the preponderance standard of admissibility to Rule 702's requirements of sufficiency of basis and reliable application of principles and methods, instead holding that such issues were ones of weight for the jury.' The Committee emphasized that rulings which have held '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' 'are an incorrect application of Rules 702 and 104(a).'

Allen v. Foxway Transportation., Inc., 2024 WL 388133, at *3 (M.D. Pa. Feb. 1, 2024).

Other courts have embraced the Advisory Committee's direction that it is incorrect for courts to start the admissibility analysis from the presumption that a proposed expert's testimony is admissible. Prior decisions that declare a preference for admitting experts "misstate Rule 702, because its admissibility requirements must be established to a court by a preponderance of the evidence." *U.S. v. Diaz*, 2024 WL 758395, at *4 (D.N.M. Feb. 23, 2024).

The Sixth Circuit actually began drawing on the Advisory Committee's insights even before the amendment was officially enacted, using comments from the rulemaking process to underscore that courts must perform complete gatekeeping assessments and determine admissibility in accordance with the rule's text:

> On April 30, 2021, the Committee unanimously approved a proposal to amend Rule 702, part of which is motivated by its observation that in 'a number of federal cases . . . judges did not apply the preponderance standard of admissibility to [Rule 702's] requirements of sufficiency of basis and reliable application of principles and methods, instead holding that such issues were ones of weight for the jury.' Advisory Comm. on Evidence Rules, *Agenda for Committee Meeting* 17 (Apr. 30, 2021). . . . Consistent with that existing law – and in accordance with the Committee's pending rule – we confirm once again the indispensable nature of district courts' Rule 702 gatekeeping function in all cases in which expert testimony is challenged on relevance and/or reliability grounds.

Sardis v. Overhead Door Corp., 10 F. 4th 268, 283-84 (4th Cir. 2021). The Advisory Committee's description of what the amendment does and how courts should apply Rule 702 provides strong justification for courts to perform a probing analysis.

3. COURTS NEED TO BE SUSPICIOUS OF PRE-AMENDMENT CASELAW.

The amendment became necessary because a large number of rulings simply got the Rule 702 analysis wrong. As the Advisory Committee Note puts it, "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 questions of weight and not admissibility. These rulings are an incorrect application of Rules 702 and 104(a)." Because "the amendments are intended to correct some courts' prior, inaccurate application of Rule 702," courts must be hesitant to take guidance from decisions that pre-date the 2023 rule change. *Cleaver v. Transnation Title & Escrow, Inc.*, 2024 WL 3326848, at *2 (D. Idaho Jan. 29, 2024). Even the Sixth Circuit has acknowledged that the amendment necessarily draws into question the validity of "some court decisions" that incorrectly held an expert's factual basis and methodological application to be "questions of weight and not admissibility." *In re Onglyza*, 93 F.4th 339, 348 n.7 (6th Cir. 2024).

The Supreme Court adopted amended Rule 702 pursuant to the Rules Enabling Act, and so "[a]ll laws in conflict with" the rule "shall be of no further force or effect after such rules have taken effect." 28 U.S.C. § 2072(b). Accordingly, courts are "not obliged to follow precedent which represents an erroneous application of Rule 702" and in fact should look with skepticism on caselaw that does not square with the terms of the rule. *Knight v. Avco Corp.*, 2024 WL 3746269, at *7 (N.D. Ill. Aug. 9, 2024). An example of a court disregarding a prior authority that is inconsistent with amended Rule 702 is *West v. Home Depot, U.S.A., Inc.*, 2024 WL 1834112 (N.D. Ill. Apr. 26, 2024). In response to the plaintiff's reliance on a pre-amendment case allowing a medical expert to offer opinion testimony that relies on a patient's self-reported history, even where that history is found to be inaccurate, the court observed that "this is the precise type of weight v. admissibility distinction the recent amendment to Rule 702 aimed to correct." *Id.* at *4. In rejecting a subsequent motion for reconsideration, the court explained that the Seventh Circuit rulings

on which the plaintiff relied had been displaced by amended Rule 702:

> [T]he Seventh Circuit sidestepped an analysis of whether the expert's opinion was 'based on sufficient facts or data' because the testimony was 'the product of reliable principles and methods.' Rule 702(b)-(c). The text of the operative Rule 702 and accompanying Committee comments make clear this is insufficient. Now, courts must ensure the proponent of expert testimony establishes that each of the four elements of Rule 702 are satisfied by a preponderance of the evidence. A proper methodology is not enough if the expert did not rely on sufficient facts or data.

2024 WL 2845988, at *3 (N.D. Ill. June 5, 2024). The amendment was enacted to correct misconceptions that had taken hold in the caselaw, and now some influential pre-amendment rulings are no longer good law.

4. THE RULE ITSELF PROVIDES THE ROADMAP OF WHAT THE COURT MUST DETERMINE.

Rule 702, and not caselaw, governs the admissibility of proposed expert testimony. It identifies five criteria the expert must meet—qualifications, helpfulness, sufficient factual basis, reliable methodology, and reliable methodological application to the facts of the case. It places on the sponsoring party the burden of demonstrating by a preponderance of proof that the expert meets these requirements. And because the Rules Enabling Act, 28 U.S.C. § 2072(b), gives Rule 702 supremacy over any conflicting authority, a judge need not look for guidance beyond the rule itself.

Judge David G. Campbell, who chaired the Judicial Conference Committee on Rules of Practice and Procedure for much of the period during which the Rule 702 amendment was under consideration, described how Rule 702 provides an instruction manual for proper gatekeeping:

> As made clear in recent amendments to Rule 702, the proponent of expert testimony must show by a preponderance of the evidence that the proposed testimony satisfies each of the rule's requirements. The trial court – not the jury – applies this standard, acting as a gatekeeper to ensure expert testimony satisfies Rule 702[.]

Farmers Ins. Co. of Ariz. v. DNS Auto Glass Shop LLC, 2024 WL 1256042, at *7 (D. Ariz. Mar. 25, 2024). Judge Campbell followed Rule 702's direction and laid out his conclusions about the expert opinions at issue:

> [The expert] does not sufficiently explain how his experiences led to the prevailing competitive price ranges he identified, why this was a sufficient basis for his opinions, or how these experiences were reliably applied to the facts. . . . Because Defendants have not shown by a preponderance of the evidence that Mr. Hart's opinion meets the requirements of Rule 702, his opinion is not admissible.

Id. at *10. Judge Campbell recently reiterated that proper judicial gatekeeping calls for a direct application of Rule 702's elements: "The proponent of expert testimony must show by a preponderance of the evidence that the testimony satisfies each of the rule's requirements." *Jensen v. Camco Mfg., LLC*, 2024 WL 4566781, at *1 (D. Ariz. Oct. 24, 2024).

When the proponent fails to show by a preponderance of the evidence that the expert fulfills any of the admissibility criteria, Rule 702 compels exclusion of the opinion testimony. *Id*. at *7. For good reason, courts have applied the straightforward, rule-focused analysis championed by Judge Campbell. *See*, *e.g*., *Colwell v. Sig Sauer, Inc.*, 2024 WL 4216047, at *5, *6 (N.D.N.Y. Sept. 17, 2024); *James v. Thompson/Center Arms, Inc.*, 2024 WL 1328738, at *3 (N.D. Ohio Mar. 28, 2024); *McKee v. Chubb Lloyds Ins. Co.*, 2024 WL 1055122, at *7 (W.D. Tex. Mar. 11, 2024); *Owners Ins. Co. v. Security Nat. Ins. Co.*, 2024 WL 531260, at *8 (D. Colo. Feb. 9, 2024).

5. COURTS HAVE AN ONGOING RESPONSIBILITY TO MONITOR EXPERTS' OPINION TESTIMONY AND ENSURE IT STAYS WITHIN THE METHODOLOGY'S LIMITS.

Although the wording change may seem subtle, the Advisory Committee had a specific purpose for the Rule 702(d) revisions: "to 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." This change reels in unsubstantiated or exaggerated opinions, including expressions of certainty that have no basis. For example, an expert who expressed a "high degree of confidence" regarding "the accuracy of his opinions" was excluded because such testimony "is inconsistent with the 2023 commentary to Rule 702, which cautions against forensic experts making 'assertions of absolute or one hundred

percent certainty or a reasonable degree of scientific certainty' when, as here, expert opinions or the bases for opinions are subjective and 'thus potentially subject to error.'" *State Automobile Mut. Ins. Co. v. Freehold Mgt., Inc.*, 2023 WL 8606773, at *18 (N.D. Tex. Dec. 12, 2023).

Short of excluding the expert's testimony entirely, courts applying Rule 702(d)'s prohibition against overstatement may determine that "some limitations are necessary" on what the expert may tell the jury:

> An examiner who is called to testify regarding her source identification conclusion shall not assert that: 'two toolmarks originated from the same source to the exclusion of all other sources,' 'examinations conducted in the forensic firearms/toolmarks discipline are infallible or have a zero error rate,' or 'two toolmarks originated from the same source with absolute or 100% certainty[.]'

United States v. Graham, 2024 WL 688256, at *16 (W.D. Va. Feb. 20, 2024). The amendment to Rule 702(d) thus directs courts to assess the admissibility not just of the expert's overall analysis, but also how the expert expresses conclusions.

Amended Rule 702(d) is particularly concerned with protecting the jury against exaggerations. Policing opinion testimony to ensure expert witnesses do not stray beyond the limits of their methodology consequently requires judicial monitoring of evidentiary presentations throughout the life of the case—including during trial—to prevent "any undue influence on the jury." *United States v. Briscoe*, 2023 WL 8096886, at *13 (D.N.M. Nov. 21, 2023). Courts cannot let their gatekeeping guard down after issuing pre-trial admissibility rulings. Unless judges monitor the testimony as experts speak from the witness stand, they cannot fulfill Rule 702(d)'s requirement that "each expert opinion" actually "stay[s] within the bounds of what can be concluded from a reliable application of the expert's basis and methodology." *Irvine v. Cook*, 2024 WL 4027947 (D. Idaho Sept. 3, 2024).

6. THE SUFFICIENCY OF AN EXPERT'S FACTUAL BASIS FOR THE OPINIONS EXPRESSED IS A MATTER OF ADMISSIBILITY FOR THE COURT TO DETERMINE.

The amendment resolves a longstanding judicial misconception about how courts should address an expert's factual foundation, which was a problem that had influenced hundreds of admissibility rulings across the country. The amendment confirmed that the question of whether an expert's opinions "have a sufficient factual basis" goes "to the admissibility and not the weight of [the expert's] opinions" and so is for the judge to resolve "instead of a jury." *Davidson Surface/Air, Inc. v. Zurich Amer. Ins. Co.*, 2024 WL 1674519, at *6 (E.D. Mo. Apr. 18, 2024). The "intent of the rule change is to focus and direct district courts" to recognize that they must reject the idea that "the bases and sources of an expert's opinion affect the weight to be assigned that opinion rather than its admissibility." *Johnson v. Packaging Corp. of Amer.*, 2023 WL 8649814, at *2 (M.D. La. Dec. 14, 2023). Rule 702(b) establishes the sufficiency of experts' factual basis as a reliability element for the court to assess, and so "the burden is on [the proponent] to establish" that the opinions rest on an adequate factual foundation. *Milltown-Ford Avenue Redevelopment Agency v. SB Building Asso., L.P.*, 2024 WL 3690774, at *29-*30 (D.N.J. Aug. 7, 2024). Exclusion of the expert is the necessary outcome if the sponsor fails to carry this burden of proof. *Id.*

This aspect of the amendment has caused a major shift. The Fifth Circuit, which previously had been deferential to the jury on experts' factual basis, declared that a district court had "abdicated its role as gatekeeper" by allowing an expert "to testify without a proper foundation," in contravention of Rule 702(b). *Harris v. Fedex Corp. Svcs., Inc.*, 92 F.4th 286, 303 (5th Cir. 2024). District courts have taken direction from *Harris* and now incorporate the requirements of Rule 702(b) into the admissibility assessment. For example, the court in *Nehal LLC v. Accelerant Specialty Ins. Co.* excluded an expert who had failed to consider facts drawing into doubt his conclusion about what caused certain damages. 2024 WL 1134967, at *3 (W.D. Tex. Feb. 29, 2024). And in *McKee v. Chubb Lloyds Ins. Co.*, the court acknowledged that Rule 702 specifies an expert's testimony must be "based on sufficient facts or data" and barred the opinion testimony because "Plaintiffs have not provided adequate evidence to ensure the Court" that the standard was met. 2024 WL 1055122, at *6 (W.D. Tex. Mar. 11, 2024), *aff'd*, 2024 WL 2720450 (W.D. Tex. May 28, 2024).

7. THE EXPERT'S METHODOLOGICAL APPLICATION TO THE FACTS OF THE CASE IS AN ADMISSIBILITY ISSUE THAT THE COURT MUST DECIDE.

Determining whether the expert has reliably applied the methodology to the facts of the case is part of the court's gatekeeping responsibilities. The amendment clarifies that "the application of the expert's methodology" cannot be considered "merely a question of weight, to be decided by a jury. The expert's proponent bears the burden of demonstrating to *me*, by a preponderance of the evidence[.]" *James v. Thompson/Center Arms*, 2024 WL 1328738, at *2 (N.D. Ohio Mar. 28, 2024) (emphasis original). Put succinctly, questions as to "the application of [the expert's] methodology go to admissibility rather than weight." *United States v. Uchendu*, 2024 WL 1016114, at *2 (D. Utah Mar. 8, 2024).

Courts must perform a probing examination of how the expert employed the methodology to form conclusions. In particular, courts must guard against experts who invoke well-established methodologies, such as differential diagnosis or the Bradford-Hill causation analysis, but in actuality only gloss over the methodology's necessary steps. So, for example, an expert's use of an acceptable methodology nonetheless was inadmissible under Rule 702(d) where that method was not "reliably deployed" and instead was used "to dress up" the expert's subjective views about the defendant's practices "rather than shape them." *A.M.C. v. Smith*, 2024 WL 3956315, at *42 (M.D. Tenn. Aug. 26, 2024). Similarly, the Eleventh Circuit affirmed a district court's exclusion of an expert who claimed to follow the Bradford-Hill methodology but really only paid lip service to its elements:

> [The expert] discussed most of the factors, in a sentence or two for each. But his assessments missed the mark. And he offered little to no explanation or support for conclusory statements about dose-response relationships or chain of causation between the acute and chronic symptoms. No abuse of discretion occurred when the district court concluded that his analysis d[id] not represent a reliable application of the Hill factors.

In re Deepwater Horizon Belo Cases, 119 F, 4th 937, 947 (11th Cir. 2024).

It has been understood since at least 1997, when the Supreme Court decided *General Electric Co. v. Joiner*, 522 U.S. 136, that courts should exclude

opinions separated by an "analytical gap" from the underlying data. This type of concern about an expert's analysis is now accurately described as a failure to meet Rule 702(d). The First Circuit made this observation in affirming a district court's exclusion order where there was "too great an analytical gap to ignore" because the expert failed to address significant "aspects of the record." *Doucette v. Jacobs*, 2024 WL 3271906, at *9 (1st Cir. July 2, 2024). Mapping the district court's findings onto Rule 702, the Eleventh Circuit noted that the expert's "failure to ground her conclusions in the specifics of the record – or even to consider key aspects of the record – meant that the report fell short of Rule 702[d]'s requirements that . . . she 'reliabl[y] appl[y] the principles and methods to the facts of the case.'" *Id.*

8. THERE IS NO PRESUMPTION THAT AN EXPERT'S OPINIONS SHOULD BE FOUND ADMISSIBLE.

Rule 702 does not prefer admission over exclusion. For years, courts had perceived that the "liberal" nature of the Federal Rules of Evidence implied a preference for admitting an expert's testimony. That was never an accurate understanding, and the amendment to Rule 702 "clarifies that expert testimony is not to be considered presumably admissible, but is instead subject to a preponderance of the evidence standard." *Power v. Hewlett-Packard Co.*, 2024 WL 4040432, at *4 (W.D. Pa. July 19, 2024). The rule's changed text now specifies that "courts must ensure the proponent of expert testimony establishes that each of the four elements of Rule 702 are satisfied by a preponderance of the evidence." *West v. Home Depot U.S.A., Inc.*, 2024 WL 2845988, at *3 (N.D. Ill. June 5, 2024).

Of course, the addition of the preponderance standard as an explicit element of Rule 702 renders any notion that there is a "presumption that expert testimony is admissible" incompatible with the language of the amended rule. *United States v. Briscoe*, 2023 WL 8096886, at *4 (D.N.M. Nov. 21, 2023). As one court put it, that "is the point" of the 2023 amendment: "an expert's opinions must be shown by a preponderance of the evidence to be supported by the evidence on which they ostensibly are based." *Hellen v. Amer. Fam. Ins. Co.*, 2024 WL 1832451, at *3 (D. Colo. Mar. 19, 2024).

9. THE PREPONDERANCE OF PROOF STANDARD IS A REAL BURDEN THAT THE PROPONENT MUST CARRY.

The proponent's obligation to demonstrate, "more likely than not," that the proffered expert fulfills each of the admissibility criteria enumerated in Rule 702 establishes a substantial hurdle. It is decidedly not the case that the party opposing admission of the opinion testimony is "required to come forward with any evidence or legal authority regarding alternative methodologies or to establish that [the expert's chosen approach] is an unacceptable method . . .; rather, the burden of establishing the reliability" of the expert's opinions lies solely with the sponsoring party. *DeWolff, Boberg & Asso. v. Pethick*, 2024 WL 1396267, at *13 (N.D. Tex. Mar. 31, 2024). The proponent consequently needs to bring forth materials and information supporting the conclusion that the expert meets all of the Rule 702 elements. Witness sponsors who do not present the necessary foundation for admitting the expert, or who raise "vague and conclusory arguments," simply fail "to carry their burden" under Rule 702's preponderance standard. *Zaragoza v. County of Riverside*, 2024 WL 663235, at *4 (C.D. Cal. Jan. 18, 2024).

The amendment's inclusion of the preponderance standard in the text of Rule 702 sets the admissibility bar at a level that is demonstrably higher than what some courts had been using, which again signals the danger of relying on pre-amendment caselaw. As one court observed, the "not that high" standard formerly directed by the Third Circuit "appears to reflect the misapplication of Rule 702 identified by the Rules Committee." *Knight v. Avco Corp.*, 2024 WL 3746269, at *6 (M.D. Pa. Aug. 9, 2024). Now that the amendment has been adopted, the proponent of expert testimony must overcome the preponderance hurdle by making an affirmative showing sufficient to tip the scales for each admissibility element.

10. THE INTEGRITY OF JURY TRIALS DEPENDS ON PROBING JUDICIAL GATEKEEPING.

Cross examination alone will not protect jurors from being misled by unreliable expert testimony. Underlying the Rule 702 amendment is the recognition that "jurors may be unable, due to lack of specialized knowledge, to evaluate meaningfully the reliability of scientific and other methods underlying expert opinion," or to "determine whether the conclusions of an expert go

beyond what the expert's basis and methodology may reliably support." *In re Acetaminophen ASD-ADHD Prods. Liab. Litig.*, 707 F. Supp. 3d 309, 335 n.27 (S.D.N.Y. 2023). Courts consequently must function as gatekeepers "to protect the judicial process from the potential pitfalls of junk science." *State Farm Fire & Cas. Ins. Co. v. Techtronic Indus. N. Amer., Inc.*, 2024 WL 4188705, at *2 (D. Md. Sept. 13, 2024). Judicial gatekeeping has been an important court responsibility since at least 1993, when the Supreme Court decided *Daubert*, and the amendment recognizes it to be "essential." *In re Acetaminophen*, 707 F. Supp. 3d at 335 n.27.

One court considering the opinions of a proffered expert in firearms and toolmark analysis explained why unreliable or exaggerated opinions jeopardize the truth-seeking purpose of jury trials:

> Because expert witnesses are given greater leeway than lay witnesses, a certain patina attaches it to the testimony, running the risk that the jury, labeling it 'scientific,' will give it more credence than it deserves. The impact of expert testimony on juror decision-making has been studied extensively. . . With respect to firearm and toolmark analysis testimony, at least one study found that where experts phrased their findings in terms of a 'match,' or opine that it was a 'practical impossibility' for casings to come from different firearms, jurors were more certain of the expert's findings. . . . The same study further found that experts carried significant persuasive authority with jurors even where they qualified their findings by saying that the casings were a match 'to a reasonable degree of certainty,' or that casings were more likely than not' to be a match.

United States v. Briscoe, 2023 WL 8096886, at *12 (D.N.M. Nov. 21, 2023). A court that ducks its gatekeeping responsibility and allows expert opinions that are not shown to meet the Rule 702 admissibility criteria risks exposing jurors to dubious, even deceptive testimony that can ultimately sway their verdict. Rule 702, as strengthened by the amendment, stands as a bulwark protecting the justice system.

CONCLUSION

Since it became effective one year ago, amended Rule 702 has re-invigorated judicial gatekeeping. The amendment clarifies the analysis and the standard courts must use, and in doing so corrects prior erroneous judicial

practices. To be sure, achieving the promise of the amendment depends on judges understanding and implementing its changes. Some courts have failed even to appreciate that Rule 702 has changed, and they continue to quote the version adopted in 2000. A few other courts continue to rely on superseded caselaw that suggests a presumption of admissibility, or defers questions about the expert's factual basis or methodological application to the jury. Ultimately, the appellate direction will be needed to bring wayward courts into alignment with the amendment's direction. But when viewed in its entirety, the first year of amended Rule 702 has brought substantial positive change to judicial gatekeeping practice in the federal courts.

