



**COMMENT
to the
ADVISORY COMMITTEE ON EVIDENCE RULES
and its
RULE 702 SUBCOMMITTEE**

**A NOTE ABOUT THE NOTE: SPECIFIC REJECTION OF ERRANT CASE LAW IS
NECESSARY FOR THE SUCCESS OF AN AMENDMENT CLARIFYING RULE 702'S
ADMISSIBILITY REQUIREMENTS**

February 8, 2021

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

INTRODUCTION

As the Subcommittee prepares its draft Rule 702 amendments for Committee consideration in April, the language of the proposed Note is critical. Because the contemplated textual change to the Rule is modest, the Note will likely determine whether the draft amendment package will achieve the Committee’s purpose of focusing courts on the Rule’s admissibility standards in contrast to certain caselaw statements that are inconsistent with the Rule. The only unambiguous way for the Note to convey the intent of the amendment is to reject the specific offending caselaw by name.

I. THE NOTE SHOULD SPECIFICALLY REJECT THE THREE MOST FREQUENTLY CITED CASES THAT ARE INCOMPATIBLE WITH RULE 702

The central problem that the amendment aims to cure—courts’ incorrect determinations that an expert’s factual basis and application of methodology are matters of weight rather than

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.

admissibility²—exists largely because courts rely on statements originating from older decisions that were not interpreting Rule 702’s requirements.³ Three cases in particular, *Loudermill v. Dow Chem. Co.*,⁴ *Viterbo v. Dow Chem. Co.*,⁵ and *Smith v. Ford Motor Co.*,⁶ are frequent sources of incorrect statements about Rule 702’s standards. Research shows that, between January 1, 2015, and September 14, 2020:

- 212 federal cases recited 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.”⁷
- 152 federal cases recited 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.”⁸

² Hon. Patrick J. Shiltz, Report of the Advisory Committee on Evidence Rules (Dec. 1, 2020) at 5, in COMMITTEE ON RULES OF PRACTICE AND PROCEDURE JANUARY 2021 AGENDA BOOK 441 (2021), https://www.uscourts.gov/sites/default/files/2021-01_standing_agenda_book.pdf (“The Committee has determined that in a fair number of cases, the courts have found expert testimony admissible even though the proponent has not satisfied the Rule 702(b) and (d) requirements by a preponderance of the evidence. . . . [A]t the November meeting, there was general agreement that adding the preponderance of the evidence standard to the text of Rule 702 would be a substantial improvement that would address an important conflict among the courts.”).

³ See, e.g., *Zamora v. Hays Consol. Indep. Sch. Dist.*, No. 1:19-CV-1087-SH, 2020 WL 6528077, at *1 (W.D. Tex. Nov. 5, 2020) (“The Court finds that all of Defendant’s objections to Garza’s testimony can be addressed at trial. ‘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 [trier of fact’s] consideration.’ *Viterbo v. Dow Chem. Co.*, 826 F.2d 420, 422 (5th Cir. 1987).”). See also Thomas D. Schroeder, *Toward a More Apparent Approach to Considering the Admission of Expert Testimony*, 95 NOTRE DAME L. REV. 2039, 2045 (2020)(discussing failure of First Circuit to apply Rule 702(b) in *Milward v. Acuity Specialty Prods. Grp., Inc.*, 639 F.3d 11 (1st Cir. 2011) and noting that the “court of appeals’s error may have resulted in part from the fact that it cited cases decided before the 2000 amendment to Rule 702, a problem not unique to this case.”).

⁴ 863 F.2d 566 (8th Cir. 1988).

⁵ 826 F.2d 420 (5th Cir. 1987).

⁶ 215 F.3d 713 (7th Cir. 2000).

⁷ *Loudermill*, 863 F.2d at 570. Bayer’s recent comment identified 212 federal cases issued in the period Jan 1, 2015 through Sept. 14, 2020 that recite this 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). In the period following Bayer’s search, the *Loudermill* language has appeared in an additional 20 rulings. See, e.g., *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.”)(quoting *Sappington v. Skyjack, Inc.*, 512 F.3d 440, 450 (8th Cir. 2008), which takes the quoted passage from *Triton Corp. v. Hardrives, Inc.*, 85 F.3d 343, 347 (8th Cir.1996), which in turn draws the language from *Loudermill*).

⁸ *Viterbo*, 826 F.2d at 422. Bayer found 152 federal cases decided between Jan 1, 2015 and Sept. 14, 2020 incorporating this assertion. See Bayer Corp., *Amending Federal Rule of Evidence 702* at 1 & n.2, 20-EV-O Suggestion from Bayer – Rule 702 (Sept. 30, 2020). Since then, 18 more rulings have relied on the *Viterbo*

- 79 cases incorporated the following statement: “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[.]”⁹

The reliance on these archaic cases is so pervasive that courts in every federal circuit have cited them in analyzing challenges to the admissibility of opinion testimony within the last few years.¹⁰ A cure will not automatically follow from the (appropriately) modest textual

language. 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) (“With respect to defendants’ argument that Boulon’s testimony is based upon unsupported factual and legal conclusions and speculation, this challenge goes to the bases for Boulon’s opinion. ‘[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 and should be left for the [fact-finder’s] consideration.’”) (quoting *United States v. 14.38 Acres of Land*, 80 F.3d 1074, 1077 (5th Cir. 1996), which itself quotes *Viterbo*).

⁹ *Smith*, 215 F.3d at 719 (7th Cir. 2000). Since January 2015, 79 federal rulings have incorporated or closely paraphrased this statement from *Smith*. See, e.g., *Stapleton v. Union Pac. R.R. Co.*, No. 16-CV-00889, 2020 WL 2796707, at *6 (N.D. Ill. May 29, 2020) (“these and Stapleton’s other factual criticisms go to the weight of Mathias’s opinions, not their admissibility. See *Smith*, 215 F.3d at 718 (‘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.’)”). Courts also repeat a similar statement from *Hurst v. United States*, 882 F.2d 306, 311 (8th Cir. 1989): “Any weaknesses in the factual underpinnings of [the expert’s] opinion go to the weight and credibility of his testimony, not to its admissibility.” See, e.g., *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.’ *Sorreles*, 796 F.3d at 1285 (quoting *Hurst v. United States*, 882 F.2d 306, 311 (8th Cir. 1989).”).

¹⁰ **First Circuit:** See, e.g., *Milward v. Acuity Specialty Prods. Grp., Inc.*, 639 F.3d 11, 22 (1st Cir. 2011) (quoting *Smith*); *Coffin v. AMETEK, Inc.*, No. 2:18-CV-472-NT, 2020 WL 5552113, at *2 (D. Me. Sept. 16, 2020) (reiterating *Loudermill* language); *Irish v. Fowler*, No. 1:15-CV-00503-JAW, 2019 WL 1179392, at *8 (D. Me. Mar. 13, 2019) (same). **Second Circuit:** See, e.g., *Feliciano v. CoreLogic Saferent, LLC*, No. 17 CIV. 5507 (AKH), 2020 WL 6205689, at *3 (S.D.N.Y. June 11, 2020) (referencing *Loudermill* pronouncement); *Chill v. Calamos Advisors LLC*, 417 F. Supp. 3d 208, 246 (S.D.N.Y. 2019) (same); *Clark v. Travelers Companies, Inc.*, No. 216CV02503ADSSIL, 2020 WL 473616, at *5 (E.D.N.Y. Jan. 29, 2020) (same). **Third Circuit:** See, e.g., *First Union Nat. Bank v. Benham*, 423 F.3d 855, 862 (8th Cir. 2005) (quoting language that originated in *Loudermill*); *United States v. Kraynak*, No. 4:17-CR-00403, 2020 WL 6561897, at *7 (M.D. Pa. Nov. 9, 2020) (same); *UPMC v. CBIZ, Inc.*, No. 3:16-CV-204, 2020 WL 2736691, at *5 (W.D. Pa. May 26, 2020) (paraphrasing *Loudermill* statement). **Fourth Circuit:** See, e.g., *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) (referencing language that originated in *Loudermill*); *Ward v. Autozoners, LLC*, Case No. 7:15-CV-164-FL, 2018 WL 10322906, at *3 (E.D. N.C. Apr. 16, 2018) (*Viterbo* statement); *Krakauer v. Dish Network, L.L.C.*, No. 1:14-CV-333, 2015 WL 5227693, at *11 (M.D.N.C. Sept. 8, 2015) (quoting *Smith*). **Fifth Circuit:** See, e.g., *Hale v. Denton Cty.*, No. 4:19-CV-00337, 2020 WL 4431860, at 4 (E.D. Tex. July 31, 2020) (quoting *Viterbo*); *Trevelyn Enterprises, L.L.C. v. SeaBrook Marine, L.L.C.*, No. CV 18-11375, 2020 WL 6822555, at *2 (E.D. La. Nov. 20, 2020) (quoting statement that originated in *Viterbo*); *Fogleman v. O’Daniels*, No. 1:16-CV-210-JCG, 2017 WL 11319287, at *2 (S.D. Miss. Dec. 5, 2017) (quoting *Viterbo*). **Sixth Circuit:** See, e.g., *Cent. Transp., LLC v. Thermofluid Techs., Inc.*, No. 3:18-CV-80-TWP-DCP, 2020 WL 50393, at *8 (E.D. Tenn. Jan. 3, 2020) (referencing statement that originated in *Loudermill*); *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) (quoting language that originated in *Loudermill*). **Seventh Circuit:** See, e.g., *Hostetler v. Johnson Controls, Inc.*, No. 3:15-CV-226 JD, 2020 WL 5959811, at *4 (N.D. Ind. Oct. 8, 2020) (quoting *Smith*); *Stapleton v. Union Pac. R.R. Co.*, No. 16-CV-00889, 2020 WL 2796707, at *6 (N.D. Ill. May 29, 2020) (same); *Bakov v. Consol. World Travel, Inc.*, No. 15 C 2980,

amendment the Subcommittee is expected to propose *unless* that purpose is specifically explained in the Note. Such an approach has proven successful in similar amendment packages, including the Note to the 2015 amendment of Federal Rule of Civil Procedure 37(e), which explicitly rejected prior caselaw that was inconsistent with the amendment’s intent.¹¹ As with that rule amendment, the only clear way to communicate the purpose of the expected Rule 702 amendment proposal is to state that certain cases—here, *Loudermill*, *Viterbo*, *Smith*, and their progeny—are rejected as incompatible with the rule. Express reference to rejected cases is even more important here than in FRCP 37(e) because the purpose of the expected Rule 702 proposal is to clarify rather than re-write the rule; it is easy to foresee that judges and litigants will not perceive the addition of the familiar “preponderance of the evidence” phrase as displacing these all-too-well-established precedents. A number of recent rulings show that even when courts correctly recite the preponderance standard, they nevertheless confuse it with inconsistent language from prior cases. Examples include:

- “The proponent of the expert testimony bears the burden of showing by a preponderance of the evidence that the testimony is admissible. Rejection of expert testimony is the exception rather than the rule, and expert testimony should be admitted if it advances the

2019 WL 1294659, at *12 (N.D. Ill. Mar. 21, 2019)(same). Eighth Circuit: See, e.g., *David E. Watson, P.C. v. United States*, 668 F.3d 1008, 1014 (8th Cir. 2012)(quoting statement that originated in *Loudermill*); *Nebraska Plastics, Inc. v. Holland Colors Am., Inc.*, 408 F.3d 410, 416 (8th Cir.2005) (same); *Owen v. Union Pac. R.R. Co.*, No. 8:19CV462, 2020 WL 6684504, at *4 (D. Neb. Nov. 12, 2020) (quoting *Loudermill*); *Jayne v. City of Sioux Falls*, No. 4:18-CV-04088-KES, 2020 WL 2129599, at *7 (D.S.D. May 5, 2020)(same). Ninth Circuit: See, e.g., *Hangarter v. Provident Life & Acc. Ins. Co.*, 373 F.3d 998, 1017 at n.14 (9th Cir. 2004) (referencing statement that originated in *Loudermill*); *A.B. v. Cty. of San Diego*, Case No.: 18cv1541-MMA-LL, 2020 WL 4431982, at *9 (S.D. Cal. July 31, 2020)(same); *In re Crash of Aircraft N93PC on July 7, 2013 at Soldotna, Alaska*, No. 3:15-cv-0112-HRH, 2020 WL 1956823, at *6 (D. Alaska Apr. 22, 2020)(same). Tenth Circuit: See, e.g., *Beebe v. Colorado*, No. 18-CV-01357-CMA-KMT, 2019 WL 6044742, at *6 (D. Colo. Nov. 15, 2019)(quoting statement that originated in *Loudermill*); *Thompson v. APS of Oklahoma, LLC*, No. CIV-16-1257-R, 2018 WL 4608505, at *5 n.15 (W.D. Okla. Sept. 25, 2018)(same). Eleventh Circuit: See, e.g., *Ocasio v. C.R. Bard, Inc.*, No. 8:13-CV-1962-T-36AEP, 2020 WL 7586930, at *7 (M.D. Fla. Dec. 22, 2020) (referencing statement that originated in *Loudermill*); *Banks v. McIntosh Cty.*, No. 2:16-CV-53, 2020 WL 6873607, at *6 (S.D. Ga. Nov. 23, 2020)(quoting *Viterbo*); *Garcia v. Scottsdale Ins. Co.*, No. CV 18-20509-CIV, 2019 WL 1318090, at *2 (S.D. Fla. Mar. 22, 2019)(same); *Ward v. Carnival Corp.*, No. 17-24628-CV, 2019 WL 1228063, at *11 (S.D. Fla. Mar. 14, 2019)(quoting *Smith*). D.C. Circuit: See, e.g., *Sherrod v. McHugh*, 334 F. Supp. 3d 219, 261 (D.D.C. 2018)(quoting *Viterbo*). Federal Circuit: *Apple Inc. v. Motorola, Inc.*, 757 F.3d 1286, 1320 (Fed. Cir. 2014), *overruled on other grounds by Williamson v. Citrix Online, LLC*, 792 F.3d 1339 (Fed. Cir. 2015)(quoting *Smith*).

¹¹ See, e.g., Notes of Advisory Committee on 2015 Amendment to Federal Rule of Civil Procedure 37:

Subdivision (e)(2). This subdivision authorizes courts to use specified and very severe measures to address or deter failures to preserve electronically stored information, but only on finding that the party that lost the information acted with the intent to deprive another party of the information’s use in the litigation. It is designed to provide a uniform standard in federal court for use of these serious measures when addressing failure to preserve electronically stored information. It 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. (emphasis added)

trier of fact's understanding to any degree."¹²

- “The proponent of expert testimony bears the burden of establishing by a preponderance of the evidence that the admissibility requirements are met. Although there is a presumption of admissibility, the trial court is obliged to act as a ‘gatekeeper’ with regard to the admission of expert scientific testimony under Rule 702.”¹³
- “The party seeking to introduce the expert testimony bears the burden of establishing by a preponderance of the evidence that the proffered testimony is admissible. There is a presumption that expert testimony is admissible[.]”¹⁴

To ensure that courts and lawyers understand that the draft amendment’s purpose in articulating the preponderance standard within Rule 702 is to end reliance on errant caselaw, the Note should explicitly identify and reject the most-cited rulings. Exhibit A suggests edits that would accomplish that goal.

II. THE NOTE SHOULD REJECT CASES PURPORTING TO IMBUE RULE 702 WITH A POLICY PREFERENCE IN FAVOR OF ADMITTING OPINION TESTIMONY

Separately from substantive misstatements declaring that an expert’s basis and application are not subject to the burden of production, some courts have incorrectly re-framed the admissibility criteria by speculating about the policy purpose of Rule 702—specifically, stating that Rule 702 reflects a policy choice in favor of admitting opinion testimony. Examples are rampant, including:

- “Rule 702 is a rule of admissibility rather than exclusion.”¹⁵
- “Rule 702 should be applied with a ‘liberal thrust’ favoring admission[.]”¹⁶

¹² *Trice v. Napoli Shkolnik PLLC*, No. CV 18-3367 ADM/KMM, 2020 WL 4816377, at *10 - *11 (D. Minn. Aug. 19, 2020)(quotation and citations omitted)(emphasis added).

¹³ *Cyntec Co., Ltd. v. Chilisin Elecs. Corp.*, No. 18-CV-00939-PJH, 2020 WL 5366319, at *3 (N.D. Cal. Sept. 8, 2020)(citations omitted)(emphasis added).

¹⁴ *S.E.C. v. Yorkville Advisors, LLC*, 305 F. Supp. 3d 486, 503-04 (S.D.N.Y. 2018)(emphasis added).

¹⁵ *Lampton v. C. R. Bard, Inc.*, No. 4:19-CV-00734-NKL, 2020 WL 7081107, at *2 (W.D. Mo. Dec. 3, 2020)(quoting *Lauzon v. Senco Prods., Inc.*, 270 F.3d 681, 686 (8th Cir. 2001)); *Metro Sales, Inc. v. Core Consulting Grp., LLC*, 275 F. Supp. 3d 1023, 1062 (D. Minn. 2017)(same).

¹⁶ *Wendell v. GlaxoSmithKline LLC*, 858 F.3d 1227, 1232 (9th Cir. 2017)(quoting *Messick v. Novartis Pharm. Corp.*, 747 F.3d 1193, 1196 (9th Cir. 2014)); *Parks v. Ethicon, Inc.*, No. 20-CV-989 TWR (RBB), 2020 WL 6118774, at *2 (S.D. Cal. Oct. 16, 2020)(quoting *Wendall*); *McMorrow v. Mondelez Int'l, Inc.*, No. 17-CV-2327-BAS-JLB, 2020 WL 1237150, at *4 (S.D. Cal. Mar. 13, 2020)(quoting *Messick*). See also *Fed. Energy Regulatory Comm'n v. Silkman*, No. 1:16-CV-00205-JAW, 2019 WL 6467811, at *5 (D. Me. Dec. 2, 2019)(When the “adequacy of the foundation for the expert testimony is at issue, the law favors vigorous cross-examination over exclusion.”)(citation omitted); *Hogland v. Town & Country Grocer of Fredericktown Missouri, Inc.*, No. 3:14CV00273 JTR, 2015 WL

- “The standards governing admissibility under Rule 702 have been described as ‘liberal and flexible,’ embracing a general presumption of admissibility, pursuant to which rejection of expert testimony is the exception rather than the rule[.]”¹⁷
- Courts should exclude opinion testimony only when an expert’s opinion “is so fundamentally unsupported that it can offer no assistance to the jury.”¹⁸
- “There is a presumption that expert testimony is admissible, and the rejection of such testimony is the exception rather than the rule.”¹⁹

These statements are not only incorrect, but also improper. It is the Note’s job, not the courts’, to explain the Committee’s intent in promulgating a rule. If the Note fails to do so, courts are more likely to make inaccurate statements about the amendment’s purpose. This is more than a semantic point; the purpose of the anticipated Rule 702 amendment will likely be lost if courts continue to opine that Rule 702 reflects a policy judgment favoring admission. Unless specifically rejected, erroneous statements of an outcome preference will undermine the clarity and effectiveness of the Rule 702 amendment under contemplation. Exhibit A suggests edits that would accomplish that goal.

3843674, at *1 n.4 (E.D. Ark. June 22, 2015)(“Rule 702 favors admissibility if the testimony will assist the trier of fact, and doubts regarding whether an expert’s testimony will be useful should generally be resolved in favor of admissibility.”)(citation omitted).

¹⁷ *Zsa Zsa Jewels, Inc. v. BMW of N. Am., LLC*, 419 F. Supp. 3d 490, 511-12 (E.D.N.Y. 2019)(quotations and citations omitted)(emphasis added).

¹⁸ See, e.g., *Owen*, 2020 WL 6684504, at *4 -*5 (quoting *Loudermill*, 863 F.2d at 570); *Kraynak*, 2020 WL 6561897, at *7 (quoting *First Union Nat. Bank v. Benham*, 423 F.3d 855, 862 (8th Cir. 2005)); *Coffin*, 2020 WL 5552113, at *2 (quoting *Brown v. Wal-Mart Stores, Inc.*, 402 F. Supp. 2d 303, 309 (D. Me. 2005)); *Cent. Transp., LLC v. Thermofluid Techs., Inc.*, No. 3:18-CV-80-TWP-DCP, 2020 WL 50393, at *8 (E.D. Tenn. Jan. 3, 2020)(quoting *Hartley v. Dillard's, Inc.*, 310 F.3d 1054, 1061 (8th Cir. 2002)); *Beebe v. Colorado*, No. 18-CV-01357-CMA-KMT, 2019 WL 6044742, at *6 (D. Colo. Nov. 15, 2019)(quoting with emphasis *First Union Nat. Bank*, 423 F.3d at 862).

¹⁹ *Cates v. Trustees of Columbia Univ.*, 16 Civ. 6524 (GBD)(SDA), 2020 WL 1528124, at *6 (S.D.N.Y. Mar. 30, 2020)(citing *Borawick v. Shay*, 68 F.3d 597, 610 (2d Cir. 1995)). See also *Rella v. Westchester BMW, Inc.*, No. 7:16-CV-916 (JCH), 2019 WL 10270223, at *5 (D. Conn. Sept. 30, 2019)(“This gatekeeping function ‘is tempered by the liberal thrust of the Federal Rules of Evidence and the ‘presumption of admissibility.’”)(quoting *Bunt v. Altec Indus., Inc.*, 962 F. Supp. 313, 317 (N.D.N.Y. 1997) and *Borawick*, 68 F.3d at 610); *Price v. General Motors, LLC*, No. CIV-17-156-R, 2018 WL 8333415, at *1 (W.D. Okla. Oct. 3, 2018)(“[T]here is a presumption under the Rules that expert testimony is admissible.”)(quotation omitted); *Chapman v. Tristar Prods., Inc.*, No. 1:16-CV-1114, 2017 WL 1718423, at *1 (N.D. Ohio Apr. 28, 2017)(“Under this liberal approach, expert testimony is presumptively admissible.”); *Advanced Fiber Techs. Tr. v. J & L Fiber Servs., Inc.*, No. 1:07-CV-1191 LEK/DEP, 2015 WL 1472015, at *20 (N.D.N.Y. Mar. 31, 2015) (“In assuming this [gatekeeper] role, the Court applies a ‘presumption of admissibility.’”)(quoting *Borawick*, 68 F.3d at 610); *Martinez v. Porta*, 598 F. Supp. 2d 807, 812 (N.D. Tex. 2009)(“Expert testimony is presumed admissible”).

CONCLUSION

The Note to the anticipated Rule 702 amendment proposal will bear an unusually high burden in communicating the Committee's purpose. That burden is complicated by the very phenomenon motivating the amendment: widespread misunderstanding in the case law. It is therefore critical for the Note to leave no doubt that the amendment rejects specific case law inconsistent with Rule, including the three most widely cited cases that are perpetuating an erroneous weight-versus-admissibility standard as well as cases that purport to give Rule 702 a policy preference in favor of admission. Absent such clarity, the Note will invite the "Rulemakers' Lament"²⁰ of noncompliance as readers who see only a rule clarification will fail to connect the dots that the amendment displaces some widely followed case law. The promise of the expected amendment is to articulate the admissibility standards in a single place rather than requiring readers to consult several sources; *a fortiori*, the Note explaining the amendment should be the unambiguous authority on its meaning.

²⁰ Richard Marcus, *The Rulemakers' Laments*, 81 Fordham L. Rev. 1639, 1643 (2013) ("The rulemakers may endorse one view and disapprove another; for a judge who embraced the disapproved view, there may be a tendency to resist the rule, or at least not to embrace its full impact.").

Exhibit A

Draft Committee Note (from Nov. 13, 2020, Agenda Book, at 157-58) With Suggested Edits in Redline

Rule 702 has been amended in ~~two~~ three respects. First, the Rule has been amended to clarify and emphasize that the admissibility requirements set forth in the Rule must be established by a preponderance of the evidence. ~~See Rule 104(a). Of course the Rule 104(a) standard applies to most of the admissibility requirements set forth in the Evidence Rules. See *Bourjaily v. United States*, 483 U.S. 171 (1987). But unfortunately~~ Unfortunately, many courts have ~~held~~ misstated that the critical questions of the sufficiency of an expert's basis, and the application of the expert's methodology to the facts of the case, are generally questions of weight and not admissibility. ~~These rulings~~ Such statements are an incorrect application of Rules 702 and 104(a), and are rejected by this amendment, including in *Loudermill v. Dow Chem. Co.*, 863 F.2d 566, 570 (8th Cir. 1988) (“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.”); *Viterbo v. Dow Chem. Co.*, 826 F.2d 420, 422 (5th Cir. 1987) “[Q]uestions relating to the bases and source of an expert's opinion affect the weight to be assigned that opinion rather than its admissibility.”; and *Smith v. Ford Motor Co.*, 215 F.3d 713, 719 (7th Cir. 2000) (“Soundness of the factual underpinnings of the expert’s analysis . . . are factual matters to be determined by the trier of fact[.]”).

Second, the amendment is intended to clarify that Rule 702 is to be applied neutrally and sets forth the complete admissibility standard applicable to proposed opinion testimony, rejecting cases that project a policy preference onto the rule such as *Wendell v. GlaxoSmithKline LLC*, 858 F.3d 1227, 1232 (9th Cir. 2017) (“Rule 702 should be applied with a ‘liberal thrust’ favoring admission”) and *Martinez v. Porta*, 598 F. Supp. 2d 807, 812 (N.D. Tex. 2009) (“Expert testimony is presumed admissible”), and cases that would add standards that are inconsistent with rule’s requirements such as *Hose v. Chicago Nw. Transp. Co.*, 70 F.3d 968, 974 (8th Cir. 1995) (“Only if an expert's opinion is ‘so fundamentally unsupported that it can offer no assistance to the jury’ must such testimony be excluded.”).

Although the clarifying amendment emphasizes the application of the preponderance standard to the requirements of sufficiency of basis and application of the expert's methodology where some courts have failed to apply it, the Rule 104(a) preponderance standard continues to govern a trial judge's determination of the expert's qualifications as well. Of course the Rule 104(a) standard applies to most of the admissibility requirements set forth in the Evidence Rules. See *Bourjaily v. United States*, 483 U.S. 171 (1987). ~~Likewise~~ There is no intent to raise any negative inference as to the applicability of the Rule 104(a) standard of proof for other rules by clarifying the standard with respect to Rule 702. The Committee concluded that emphasizing the preponderance standard in Rule 702 specifically was made necessary by the courts that have ignored it when applying that Rule.

Of course some challenges to expert testimony will raise matters of weight rather than admissibility even under the Rule 104(a) standard. For example, if the court finds by a preponderance of the evidence that an expert has relied on sufficient studies to support an opinion, the fact that the expert has not read every single study that exists will raise a question of weight and not admissibility. But this does not mean, as certain courts have held, that arguments about the sufficiency of an expert's basis *generally* go to weight and not admissibility. Rather it means that once the court has found the admissibility requirement to be met by a preponderance of the evidence, any attack by the opponent will go only to the weight of the evidence.

Third, Rule 702 has also been amended to provide [The "overstatement" section of the draft Note is omitted here as LCJ does not have suggestions on that portion at this time.]