



**COMMENT
to the
ADVISORY COMMITTEE ON EVIDENCE RULES**

September 1, 2021

**CLARITY AND EMPHASIS: THE COMMITTEE’S PROPOSED RULE 702
AMENDMENT WOULD PROVIDE MUCH-NEEDED GUIDANCE ABOUT THE
PROPER STANDARDS FOR ADMISSIBILITY OF EXPERT EVIDENCE AND THE
RELIABLE APPLICATION OF AN EXPERT’S BASIS AND METHODOLOGY**

Lawyers for Civil Justice (“LCJ”)¹ respectfully submits this Comment to the Advisory Committee on Evidence Rules (“Committee”) in response to the Request for Comment² on the Committee’s proposed amendment to Federal Rule of Evidence 702 (“Proposed Amendment”).

INTRODUCTION

The Committee has accurately defined the fundamental problem with current expert admissibility jurisprudence: “[M]any 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,” and “[t]hese rulings are an incorrect application of Rules 702 and 104(a).”³ The misunderstanding that underlies these rulings persists because Rule 702 assumes, but does not explicitly state, that the court should apply Rule 104(a)’s preponderance standard to the question of whether proffered evidence is admissible before allowing the jury to determine what weight to give that evidence. The caselaw is replete with decisions based on this misunderstanding that result in courts’ failure to exercise their “gatekeeping” responsibility. The Proposed Amendment, which would clarify that the proponent of expert opinion testimony must demonstrate the admissibility requirements “by a preponderance of the evidence,” is a much-needed and appropriate solution for this serious and widespread confusion. Even greater clarity would result from adding a direct reference to “the court” in the Rule’s text and identifying in the

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 Request For Comment, Preliminary Draft, Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure, and the Federal Rules of Evidence (hereinafter “Preliminary Draft”), available at https://www.uscourts.gov/sites/default/files/preliminary_draft_of_proposed_amendments_2021_0.pdf.

³ Proposed Committee Note, Preliminary Draft at 309.

Note the three rulings that are the wellsprings of the problem, as these changes would help courts fulfill the purpose of the Rule. The Proposed Amendment also includes an important emphasis on the trial judge's ongoing gatekeeping duty to ensure that "[a] testifying expert's opinion must stay within the bounds of what can be concluded by a reliable application of the expert's basis and methodology."⁴ Although this change to 702(d) is more pertinent to criminal cases than civil matters, it is nonetheless an appropriate reminder that the court's gatekeeping responsibility has not ended when the initial admissibility ruling is made.

In concert with giving air to the textual changes in the Proposed Amendment, the public comment process also serves the Committee with an important opportunity to encourage proper focus on Rule 702 by nudging the bench and bar to abandon the colloquial use of the case name "*Daubert*" as slang for expert admissibility standards. This is not a merely semantic point; the misleading jargon is undoubtedly part of the very problem that the Committee has drafted the Proposed Amendment to address.

I. The Proposed Amendment Is Needed Because There Is Widespread Misunderstanding of Rule 702

Hundreds of published opinions from courts in every federal circuit demonstrate a widespread misunderstanding of Rule 702's requirements.⁵ In fact, between January 1, 2015, and August 1, 2021:

- 179 federal cases 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."⁶
- 300 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."⁷
- 90 federal cases incorporated a statement similar to the following: "Soundness of the factual underpinnings of the expert's analysis and the correctness of the expert's

⁴ Proposed Committee Note, Preliminary Draft at 310.

⁵ Lawyers for Civil Justice, *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*, Oct. 20, 2020, available at https://www.uscourts.gov/sites/default/files/20-ev-y_suggestion_from_lawyers_for_civil_justice_-_rule_702_0.pdf.

⁶ *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.")

⁷ *See, e.g.*, *Joseph v. Doe*, No. CV 17-5051, 2021 WL 2313474, at *5 (E.D. La. June 7, 2021) ("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.").

conclusions based on that analysis are factual matters to be determined by the trier of fact[.]”⁸

Why do courts repeat these mistaken statements? An examination by Lawyers for Civil Justice into the “DNA” of these cases reveals that many misunderstandings are recycled statements traceable to pre-2000 case law that Rule 702 rejected.⁹ For example, in *In re: Bair Hugger Forced Air Warming Devices Prods. Liab. Litig.*,¹⁰ the court relied on a hand-me-down statement that an expert’s factual basis is a matter of weight and not admissibility pulled from *United States v. Coutentos*,¹¹ which cribbed the same passage from *Hartley v. Dillard’s, Inc.*,¹² which had taken the statement from *Hose v. Chicago Northwestern Transp. Co.*,¹³ which was in turn copied from *Loudermill v. Dow Chem. Co.*,¹⁴ which was written in 1988—twelve years before Rule 702 established the current standard. Reliance on this outdated articulation led the Eighth Circuit to overturn the district court’s admissibility ruling as a violation of the “‘general rule’ that deficiencies in an expert’s factual basis go to the weight and not admissibility[.]”¹⁵

Of course, not all courts are making this mistake; many courts read and apply Rule 702 as intended.¹⁶ But the inconsistency—not only between Circuits, but also within them—is, by itself, a compelling reason for a clarifying amendment. The Bayer Corporation has written to the

⁸ See, 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.).

⁹ 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 (1999) at 52, available at <https://www.uscourts.gov/rules-policies/archives/agenda-books/advisory-committee-rules-evidence-october-1999> (“The proposed amendment and the Committee Note clearly envision a more rigorous and structured approach than some courts are currently employing.”).

¹⁰ ___ F.4th ___, No. 19-2899, 2021 WL 3612753, at *5 (8th Cir. Aug. 16, 2021).

¹¹ 651 F.3d 809, 820 (8th Cir. 2011).

¹² 310 F.3d 1054, 1061 (8th Cir. 2002).

¹³ 70 F.3d 968, 974 (8th Cir. 1995).

¹⁴ 863 F.2d 566, 570 (8th Cir. 1988).

¹⁵ *In re: Bair Hugger Forced Air Warming Devices Prods. Liab. Litig.*, 2021 WL 3612753, at *11.

¹⁶ See, e.g., *Sardis v. Overhead Door Corp.*, ___ F.4th ___, No. 20-1411, 2021 WL 3699753, at *7 - *8 (4th Cir. Aug. 20, 2021) (reversing district court’s admission of opinion testimony that identified reliability challenges “as only going to weight, not admissibility,” and acknowledging Advisory Committee on Evidence Rules’ proposed amendment); *In re: Mirena IUS Levonorgestrel-related Prods. Liab. Litig.*, 982 F.3d 113, 123 (2d Cir. 2020) (“not only was it appropriate for the district court to take a hard look at plaintiffs’ experts’ reports, the court was required to do so to ensure reliability.”).

Committee that it “has observed great inconsistency in how courts assess proposed opinion testimony.”¹⁷ Bayer explains:

[A] national evidence rule should not give rise to such widely differing understandings of the admissibility standard. The divergent approaches that courts currently take on challenges to the sufficiency of an expert’s factual basis and the reliability of the expert’s methodological application demonstrate a failure in Rule 702 and the need to clarify proper gatekeeping practices.¹⁸

The lack of uniformity is “particularly troubling in the MDL context,” where “[v]ariations in the application of Rule 702 impact the broader contours of the law, in addition to the outcomes of particular cases.”¹⁹ The existence of “divergent approaches” can undermine the rationale for consolidation because “[a] core purpose of the MDL process is to promote uniformity,”²⁰ and “structural features of MDLs make it more difficult for appellate review to serve as a meaningful tool to address conflicting decisions.”²¹ The fact that MDL courts “have not been able to reach a consensus on some common questions” under Rule 702 means that “we see the same issues arise again and again.”²²

The Proposed Amendment directly addresses the key difference between Rule 702 and the caselaw it superseded by explicitly requiring the proponent of expert testimony to establish the listed requirements—including that the testimony must be the product of a sufficient factual foundation and reliable principles and methods that are reliably applied to the facts of the case—by a preponderance of the evidence. This solution is broadly supported by lawyers with frequent first-hand experience litigating expert evidence issues all around the country, including the chief legal officers of 50 companies,²³ the U.S. Chamber Institute for Legal Reform,²⁴ the Federation of Defense & Corporate Counsel,²⁵ and the International Association of Defense Counsel.²⁶

¹⁷ Letter from Scott S. Partridge, General Counsel, Bayer U.S., to Rebecca A. Womeldorf (Sept. 30, 2020) available at https://www.uscourts.gov/sites/default/files/20-ev-o_suggestion_from_bayer_-_rule_702_1_0.pdf.

¹⁸ *Id.*

¹⁹ Letter from Thomas J. Sheehan, Eva Canaan, and Joshua Glasgow to Rebecca Womeldorf (June 9, 2020) (hereinafter “Sheehan letter”) at 18, available at https://www.uscourts.gov/sites/default/files/20-ev-e_suggestion_from_thomas_sheenan_-_rule_702_0.pdf.

²⁰ *Id.* at 21.

²¹ *Id.*

²² *Id.*

²³ Letter from 50 companies to Rebecca A. Womeldorf, Secretary, Committee on Rules of Practice and Procedure, March 2, 2020, available at https://www.uscourts.gov/sites/default/files/20-ev-b_suggestion_from_50_companies_-_rule_702_0.pdf.

²⁴ Letter from Harold Kim, President, U.S. Chamber Institute for Legal Reform, to Rebecca A. Womeldorf, Secretary, Committee on Rules of Practice and Procedure, November 9, 2020, available at: https://www.uscourts.gov/sites/default/files/20-ev-cc_suggestion_from_u.s._chamber_institute_for_legal_reform_-_rule_702_0.pdf.

²⁵ Letter from Elizabeth Lorell, President, Federation of Defense & Corporate Counsel, to the Committee on Rules of Practice and Procedure, June 30, 2020, available at https://www.uscourts.gov/sites/default/files/20-ev-f_suggestion_from_federation_of_defense_and_corporate_counsel_-_rule_702.pdf.

²⁶ International Association of Defense Counsel, *Comment to the Advisory Committee on Evidence Rules and its Rule 702 Subcommittee In Support of Amending Rule 702 and Its Comments to Achieve More Robust and Consistent Gatekeeping*, July 31, 2020, available at https://www.uscourts.gov/sites/default/files/20-ev-h_suggestion_from_international_association_of_defense_counsel_-_rule_702_0.pdf.

But the Proposed Amendment would be even more effective if it expressly stated that “the court” must determine admissibility—a clarification that would directly address the caselaw’s core confusion about the Rule’s allocation of responsibility between the judge and the jury. Unfortunately, at its April 30, 2021, meeting, the Committee removed the phrase “[if] the court finds” from its draft amendment.²⁷ That change rendered the Proposed Amendment less clear. The concerns that led to that deletion were that the language was surplusage or might be interpreted to require findings even in the absence of an objection.²⁸ But stating that “the court” decides admissibility is far from redundant to the Committee’s objective of clarifying and emphasizing that it is the court’s responsibility, not the jury’s, to weigh the Rule’s admissibility factors. And as the Reporter pointed out, “none of the admissibility requirements in the Evidence Rules are triggered without objection,”²⁹ so there no reason to fear that judges will undertake unnecessary findings when admissibility is stipulated or uncontested. Reinserting the words “[if] the court finds” into the Rule’s text is the most straightforward way to state what the Proposed Amendment requires.

II. The Proposed Amendment is Needed to Correct Inaccurate Judicial Misstatements About Rule 702’s Policy Purpose

Related to, but separate from, the need to clarify Rule 702’s explicit standards, the Proposed Amendment is also necessary to correct commonly repeated judicial mischaracterizations of the Rule’s intended policy purpose. The Rules Enabling Act gives the power to make procedural rules—along with the responsibility to explain changes to those rules³⁰—to the Supreme Court³¹ and the Judicial Conference committees.³² Frequently, however, individual courts venture into the Committee’s prerogative by purporting to imbue the 2000 amendment to Rule 702 with a particular public policy purpose—one that misstates the Rule and the Committee Note. Specifically, courts frequently opine that Rule 702 reflects a policy choice in favor of permissive admission of opinion testimony. Examples are rampant, including:

- “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[.]”³³
- “Rule 702 should be applied with a ‘liberal thrust’ favoring admission[.]”³⁴

²⁷ Advisory Committee on Evidence Rules, Minutes of the Meeting of April 30, 2021, (hereinafter “Draft Minutes”), Standing Committee Agenda Book at 844.

²⁸ *Id.*

²⁹ *Id.*

³⁰ The Rules Enabling Act requires that a rule proposed by a Judicial Conference committee be accompanied by “an explanatory note on the rule, and a written report on the body’s action.” 28 U.S.C. § 2073(d).

³¹ 28 U.S.C. § 2072(a).

³² 28 U.S.C. § 2073(a) and (b).

³³ *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).

³⁴ *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*

- Courts should exclude opinion testimony “only if it is so fundamentally unsupported that it can offer no assistance to the jury.”³⁵
- “There is a presumption that expert testimony is admissible, and the rejection of such testimony is the exception rather than the rule.”³⁶
- “Rule 702 is a rule of admissibility rather than exclusion.”³⁷

Perhaps the most extreme version of this court-as-rule-policy-setter phenomenon is reflected in a recent ruling observing that, in the Ninth Circuit, district courts “must account for the fact that a wider range of expert opinions (arguably much wider) will be admissible in this circuit.”³⁸ This is not merely a judicial interpretation of Rule 702’s text; rather, it reflects a public policy decision that Rule 702’s meaning in the Ninth Circuit differs not only from the other circuits, but is also intentionally at odds with the meaning that the Committee, the Supreme Court, and Congress have established pursuant to the Rules Enabling Act.

The Committee should confront the policy dicta problem directly and declare that the preponderance test displaces any other conception of the burden of production—just as it proposes doing with the other-side-of-the-coin situation of some courts’ purporting to infuse a higher hurdle to admissibility than the Rule provides. The Proposed Note says: “Unfortunately,

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 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).

³⁵ See, e.g., *MPAY Inc. v. Erie Custom Computer Apps., Inc.*, No. 19-704, 2021 WL 3661507, at *1 (D. Minn. Aug. 18, 2021) (quoting *Bonner v. ISP Techs., Inc.*, 259 F.3d 924, (29-30 (8th Cir. 2001)); *Owen*, 2020 WL 6684504, at *4 -*5 (quoting *Loudermill*, 863 F.2d at 570); *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 v. Benham*, 423 F.3d 855, 862 (8th Cir. 2005)).

³⁶ *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”).

³⁷ *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).

³⁸ *In re Roundup Products Liability Litigation*, 358 F. Supp. 2d 956, 960 (N.D. Cal. 2019).

some courts have required the expert’s testimony to ‘appreciably help’ the trier of fact. Applying a higher standard than helpfulness to otherwise reliable expert testimony is unnecessarily strict.” If the Note is going to address the (relatively rare) issue of courts’ putting too strict of a gloss on the Rule, it is equally, if not even more, important for the Note to correct the much more pervasive problem of courts’ spinning the Rule’s policy balance to favor overly permissive admission. This is fundamental to the Committee’s intended effect of the Proposed Amendment, which will not be achieved if courts continue to opine that Rule 702 reflects a policy judgment favoring admissibility.

III. A Plainspoken Committee Note Is Necessary to Help Readers “Get it Right”—And That Means Identifying the Three Wellsprings of Inaccurate Rule 702 Application

The Rules Enabling Act requires the Committee to provide “an explanatory note on the rule” whenever it recommends a rule change.³⁹ Explaining amendments in plainspoken language, of course, helps courts, practitioners, and parties understand and follow the rules. But there is a particularly compelling reason why the Note accompanying the Proposed Amendment should be precise: clarification is the purpose of the Proposed Amendment, and the need for clarification comes from the very fact that the current Rule and Note have proven too complicated. As the Reporter described to the Committee in November 2020, readers of the current Note become lost by the need consult several sources to piece together the Rule’s meaning:

Litigants and judges need to look to a footnote in *Daubert* providing that FRE 104(a) governs Rule 702 determinations and then to FRE 104(a) (which does not actually explicitly set out a preponderance of the evidence standard) and then to the Supreme Court’s decision in *Bourjaily* (which interprets Rule 104(a) as requiring a preponderance) to learn that such findings are to be made by the trial judge by a preponderance of the evidence. The Reporter explained that this circuitous route to the preponderance standard is a subtle one that has been missed by many courts and that an amendment to Rule 702 could improve decision making by expressly stating the applicable standard of proof.⁴⁰

Although the Proposed Amendment and Note are certainly an improvement over the status quo, readers will still have to travel a “circuitous route” to find the Rule’s meaning unless the Note plainly states that the Proposed Amendment rejects the caselaw that led the Committee to amend the Rule. If the Committee intends the Proposed Amendment to reject that caselaw – and it does⁴¹ – then it should say so straightforwardly in the Note, and include citations to the three most common sources of that caselaw: *Loudermill v. Dow Chem. Co.*,⁴² *Viterbo v. Dow Chem. Co.*,⁴³ and *Smith v. Ford Motor Co.*⁴⁴ Doing so would place the Proposed Amendment’s meaning in one place and where it belongs: the Note. Without this honesty, the Note will fail to serve those who turn to it for understanding—and may not resolve the problem that is so

³⁹ 28 U.S.C. § 2073(d).

⁴⁰ Advisory Committee on Evidence Rules, Minutes of the Meeting of November 13, 2020, April 30, 2021 Agenda Book at 18.

⁴¹ Draft Minutes, Standing Committee Agenda Book at 845 (“It was those incorrect applications that led to a draft amendment emphasizing the Rule 104(a) standard that already governed the Rule.”).

⁴² 863 F.2d 566 (8th Cir. 1988).

⁴³ 826 F.2d 420 (5th Cir. 1987).

⁴⁴ 215 F.3d 713 (7th Cir. 2000).

pervasive that courts in every federal circuit have failed to comprehend it.⁴⁵ As recently as August 16, 2021—weeks after the Proposed Amendment was made public—the Eighth Circuit relied squarely on the archaic and inaccurate *Loudermill* opinion to reverse a district court’s determination that proffered expert testimony failed to meet Rule 702’s standards.⁴⁶

The Note should not sacrifice accuracy for the sake of preventing unintentional slights. When the Committee removed draft rule language clarifying that incorrect rulings “are rejected by this amendment,” it did so not for the sake of clarity, but rather out of a sentiment not to “come down

⁴⁵ 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, 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*).

⁴⁶ See *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).

too hard on federal judges” or to “treat federal judges too harshly in connection with their application of Rule 702.”⁴⁷ The Committee also declined the suggestion⁴⁸ to specify the three wellsprings of errant caselaw by name “for that very reason.”⁴⁹ There are three very compelling reasons to revisit that decision. First, it is simply accurate, not harsh, to state that the Proposed Amendment rejects those cases. Second, it is axiomatic in law that identifying errors is not only necessary to avoiding them, but is the way to avoid them.⁵⁰ Third, the Note should be written for people who are looking to “get it right” by providing the information they need to do so. Specifying the three viral sources of incorrect Rule 702 application serves the future-facing purpose of alerting readers how to avoid perpetuating error, not any rearward-looking notion of placing blame. There is nothing new about citing cases in committee notes; it is a proven, effective practice.⁵¹ The Note has only one (congressionally required) purpose—to explain the intent of the Proposed Amendment—and the Committee should honor and fulfill that purpose without making unnecessary compromises for the sake of optics. Leaving unstated that following *Loudermill*, *Viterbo* or *Smith* is error would compromise the readers’ understanding of the Proposed Amendment.

IV. The Proposed Amendment Is the Appropriate Way to Address “Overstatement”

Although the proposed change to 702(d) is “slight,”⁵² and applies mostly to the subset of experts known as forensic experts,⁵³ it is nevertheless a worthwhile and appropriate reminder that the court’s gatekeeping function does not cease once an initial admissibility ruling is made. The Proposed Note explains the rule change by clarifying and emphasizing the current standard that: “a trial judge must exercise gatekeeping authority with respect to the opinion ultimately expressed by a testifying expert. A testifying expert’s opinion must stay within the bounds of what can be concluded by a reliable application of the expert’s basis and methodology.”⁵⁴ This is a clear statement of current law that, together with the modest textual changes to the Rule, will be helpful to courts and counsel alike.

⁴⁷ Draft Minutes, Standing Committee Agenda Book at 845, 846-67.

⁴⁸ Lawyers for Civil Justice, *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*, available at https://www.uscourts.gov/sites/default/files/21-cv-a_suggestion_from_lcj_-_rule_702_0.pdf.

⁴⁹ Draft Minutes, Standing Committee Agenda Book at 845.

⁵⁰ The legal aphorism, “*Errores ad sua principia referre, est refellere*” means “To refer errors to their sources is to refute them” or “To bring errors to their beginning is to see their last.” Black’s Law Dictionary.

⁵¹ See, e.g., Fed. R. Civ. P. 37, Notes of Advisory Committee on 2015 Amendment:

Subdivision (e)(2). This subdivision ... 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)

⁵² Memo from the Honorable Patrick J. Schiltz, Chair, Advisory Committee on Evidence Rules, to the Honorable John D. Bates, Chair, Committee on Rules of Practice and Procedure, May 15, 2021, Preliminary Draft at 297.

⁵³ Proposed Note, Preliminary Draft at 311.

⁵⁴ *Id.*

V. In Keeping with the Committee’s Educational Function, It Should Nudge the Bench and Bar to Abandon the Jargon of “*Daubert*” in Favor of Referring to “Rule 702”

The nearly ubiquitous use of the case name “*Daubert*” as slang for expert evidence standards is undoubtedly part of the problem that the Committee’s Proposed Amendment is designed to address. Words matter, and the inaccurate nomenclature of “*Daubert* motions” and “*Daubert* hearings” misdirects judges and lawyers alike from the actual source of those standards: Rule 702.⁵⁵ Although the Committee (alas!) has no dominion over legal slang, it nevertheless has an important opportunity consistent with its educational mission to improve the understanding of, and adherence to, the Rule by urging stakeholders to make reference to “Rule 702” rather than “*Daubert*” in the appropriate context. As the amendment process proceeds, discussions about expert evidence are taking place in courts, law firms, bar meetings, and virtual classrooms all around the country. People are noticing the vernacular of expert evidence and some of them are changing their phrasing.⁵⁶ In a profession known for its precise use of words, our language should reflect that Rule 702, not a single case or even case law generally, sets the standards for admissibility of expert evidence. The Committee explained in 2000 that Rule 702 is not simply a “codification” of *Daubert*, but in fact was drafted to remedy the widely differing approaches courts were taking under *Daubert* and its progeny.⁵⁷ The public comment process and (presumably) subsequent adoption of an amendment provide the Committee an important opportunity to encourage proper understanding of the Rule by nudging the bench and bar to say “Rule 702” rather than “*Daubert*” to reference expert admissibility standards.

CONCLUSION

The Committee has correctly concluded that “emphasizing the preponderance standard in Rule 702 specifically was made necessary by the courts that have failed to apply correctly the reliability requirements of that Rule.”⁵⁸ The Committee’s Proposed Amendment is a much-needed clarification that will help courts and counsel alike to understand and adhere to the Rule’s standards, particularly in jurisdictions where courts have erroneously characterized Rule 702 as reflecting a policy choice favoring a “presumption of admissibility.” Although the Proposed Amendment as written would effect a substantial improvement, the Committee should improve it by expressly stating that “the court” makes the admissibility determination and clarifying in the Note that the amendment rejects contrary case law, specifically including the three wellspring cases that underly most of the recent rulings that are inconsistent with the Rule. In the meantime, the Committee should take advantage of the attention garnered by the amendment process to educate the bench and bar how abandoning the slang use of “*Daubert*” would help everyone focus on, and understand, Rule 702.

⁵⁵ Alex R. Dahl, *Amend Rule 702 To Clarify Expert Witness Standards*, Law360 (July 12, 2012), available at <https://www.law360.com/articles/1401793>.

⁵⁶ See, e.g., Bexis, *Don’t Say Daubert*, Drug and Device Blog, Aug. 16, 2021, available at <https://www.druganddeviceblog.com/2021/08/dont-say-daubert.html>.

⁵⁷ Fed. R. Evid. 702 Committee Note.

⁵⁸ Proposed Note, Standing Committee Agenda Book at 837.