SENIOR JUDGE MARCIA S. KRIEGER
PROCEDURE FOR FED. R. EVID. 702 DETERMINATIONS

EFFECTIVE JANUARY 1, 2020, the Court has modified its traditional procedure for determining challenges to proffered opinion testimony under Fed. R. Evid. 702. Practitioners who have appeared before the Court in the past may recall that the Court required the parties to confer and file a skeletal Joint Rule 702 Motion that simply recited the challenged opinions and the Rule 702 objections that were interposed. The Court then resolved the objections through an evidentiary hearing, which required the testimony of the proffered expert and, potentially, other witnesses.

For various reasons, including concerns about cost and efficiency, the Court has modified its Rule 702 procedure. Beginning in 2020, the Court will consider and attempt to resolve Rule 702 motions on paper submissions, scheduling evidentiary hearings only if necessary.

Parties who seek to challenge proffered opinion testimony on Rule 702 grounds should file a motion that sets forth the legal and factual basis for that challenge, attaching any evidentiary material (*e.g.* expert disclosures or reports, deposition transcripts, treatise or academic materials, etc.) necessary to support the factual assertions in the motion. In preparing that motion, parties should confer with the proponent of the witness in an attempt to identify the precise opinions that the proponent will actually offer at trial. Expert disclosures and reports often contain many opinions that the proponent will not actually offer at trial, and it is a waste of all sides' resources to litigate the admissibility of opinions simply because they appear in a disclosure or report.

The opponent (the party proffering the challenged testimony) may respond to that motion on the schedule provided by D.C. Colo. L. Civ. R. 7.1(d), attaching whatever additional evidentiary material is necessary. The movant may file a reply brief according to the schedule set forth by Local Rule 7.1(d). Parties should not expect to have oral argument or an evidentiary hearing on the motion; if the Court concludes that further proceedings are required, it will contact the parties to schedule them.

Note that Rule 702 motions will be adjudicated only to the extent they raise the specific objections contemplated by Rule 702 – that is, challenges to the sufficiency of a witness' qualifications, the reliability of the methodology used by the witness, the sufficiency of the facts and data[1] used by the witness, and the witness' reliable application of the methodology.

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[1] Please note that, in the 10th Circuit, the question of sufficiency of facts and data is a quantitative one, not a qualitative one. *United States v. Dysart*, 705 F.2d 1247, 1252 (10th Cir. 1983); *United States v. Lauder*, 409 F.3d 1254, 1264 n.5 (10th Cir. 2005). In other words, the question is whether the witness acquired the necessary quantity of data required by the methodology (*e.g.* sufficient sample sizes to produce a required confidence interval), not whether the data the witness considered was of high quality, free from bias, etc. Issues directed to the quality of data considered by a witness in forming an opinion generally present questions of how

Objections to matters such as relevance or weight of the proffered opinions are not within the scope of Rule 702 and are deemed reserved for trial.

much weight the factfinder should give that opinion, and are therefore the province of the factfinder at trial.