New Rule 702: Everything You Need to Know About the Admissibility of Expert Testimony

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Federal Rule of Evidence 702 was amended effective December 1, 2023 to clarify how judges, as gatekeepers, should analyze expert admissibility issues. This article provides an overview of the amendments, their interpretation by the courts, and best practices for leveraging the new rule in litigation.

What is Rule 702?
Federal Rule of Evidence 702 governs the admissibility of expert testimony in federal courts. First enacted in 1975, its original construction was brief: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." 28 USC app Fed. R. Evid. 702 (1975). The rule sat untouched for decades until 2000, when it was modified to codify the Daubert trilogy of decisions issued by the U.S. Supreme Court in the 1990s, which clarified the judiciary's gatekeeping role in ensuring all expert testimony be reliable. See Fed. R. Evid. 702 advisory committee's note to 2000 amendment; Daubert v. Merrell Dow Pharma., Inc., 509 U.S. 579 (1993); General Elec. Co. v. Joiner, 522 U.S. 136 (1997); and Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999). The 2000 amendments "affirm[ed] the trial court's role as gatekeeper and provide[d] some general standards that the trial court must use to assess the reliability and helpfulness of the proffered expert testimony." Fed. R. Evid. 702 advisory committee's note to 2000 amendment. The Advisory Committee noted, however, that the amendments were not intended to be a "sea change over federal evidence law" and that the court's gatekeeping role "is not intended to serve as a replacement for the adversary system." See Id. (quoting United States v. 14.38 Acres of Land, More of Less Situated in Leflore Cnty., State of Miss., 80 F.3d 1074, 1078 (5th Cir. 1996).

Why was Rule 702 Amended?
Starting in 2017, the Judicial Conference Advisory Committee on Evidence Rules again sought to amend Rule 702 in response to continued concern that some federal court judges were not properly fulfilling their gatekeeping function. See Symposium, Forensic Expert Testimony, Daubert, and Rule 702, 86 Fordham L. Rev. 1463 (2017). Among other topics, critics of the rule noted that wayward courts were misinterpreting the rule's requirements to focus exclusively on the reliability of a proposed expert's methodology, while ignoring whether that methodology was reliably applied to the facts of any given case. David E. Bernstein & Eric G. Lasker, Defending Daubert: It's Time to Amend Federal Rule of Evidence 702, 57 Wm. & Mary L. Rev. 1, 43 (2015).CITE. As one early critic noted, "courts have been, at best, lackadaisical and, at worst, disingenuous, in carrying out their gatekeeping duties," particularly in more technical cases involving complicated forensic evidence. David L. Faigman et al., Modern Scientific Evidence: The Law and Science of Expert Testimony, § 1:30 (2014).

One illustrative case is the Ninth Circuit's decision in City of Pomona v. SQM N. Am. Corp., an action brought by the City of Pomona, California against SQM, a company that imported sodium nitrate for use as fertilizer that allegedly contaminated the City's drinking water. 750 F.3d 1036 (9th Cir. 2014). The lynchpin of the City's case was expert opinion identifying the sodium nitrate imported by SQM as the "dominant source" of the drinking water contamination based on a stable isotope analysis that compared oxygen and chlorine isotopic analyses taken from groundwater samples to a reference database to determine the probable source. Id. at 1042. Ultimately, the district court excluded the expert's opinion, reasoning, among other things, that he had failed to properly follow his own specified methodologies when testing the samples at issue. Id. at 1043-48. Upon appeal, the Ninth Circuit overruled the exclusion, reasoning "[t]he district court did not apply the correct rule of law: only a faulty methodology or theory, as opposed to imperfect execution of laboratory techniques, is a valid basis to exclude expert testimony." Id. at 1048.

The Advisory Committee agreed with the critics. In its final report to the Judicial Conference Committee on Rules of Practice and Procedure in May 2022, the Advisory Committee noted that the proposed amendments were "made necessary by the decisions that have failed to apply . . . the reliability requirements of Rule 702." Committee on Rules of Practice and Procedure (May 17, 2022) (Memorandum from the Honorable Patrick J. Schiltz, Chair, Advisory Comm. on Evidence Rules, to the Honorable John D. Bates, Chair, Standing Comm. on Rules of Prac. & Proc.). Additionally, the Advisory Committee sought to clarify the standard by which reliability must be established:

> Finally, the Committee resolved to respond to the fact that many courts have declared that the reliability requirements set forth in Rule 702(b) and (d) --- that the expert has relied on sufficient facts or data and has reliably applied a reliable methodology --- are questions of weight and not admissibility, and more broadly that expert testimony is presumed to be admissible. These statements misstate Rule 702, because its admissibility requirements must be established to a court by a preponderance of the evidence.

Id. at 6.

After years of discussion, public input—and even a report to then-President Barack Obama (President's Council of Advisors on Sci. & Tech., Exec. Office of the President, REPORT TO THE PRESIDENT, Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods 1, (Sept. 2016))—the U.S. Supreme Court submitted the amendments to the Senate in April 2023, and they ultimately took effect December 1, 2023.

How was Rule 702 Amended?

Rule 702 in its amended form states:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the proponent demonstrates to the court that it is more likely than not that:
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
> (b) the testimony is based on sufficient facts or data;
> (c) the testimony is the product of reliable principles and methods; and
> (d) the expert has reliably applied expert's opinion reflects a reliable application of the principles and methods to the facts of the case.

Fed. R. Evid. 702.

As the Advisory Committee noted, "[n]othing in the amendment imposes any new, specific procedure Fed. R. Evid. 702 advisory committee's note to 2023 amendment. Rather, the amendments are intended to highlight two main points regarding how Rule 702 should be applied to increase consistency across the judiciary. First, the amendments clarify and emphasize that the proponent of the proffered testimony must demonstrate that it meets the rule's admissibility requirements by the preponderance of the evidence standard—i.e., it is "more likely than not" that each criterion is satisfied. This amendment makes clear that Rule 702's requirements, like most admissibility requirements, are governed by Federal Rule of Evidence 104(a), which requires the court to determine admissibility by the preponderance of the evidence, and not by the more permissive 104(b), which requires only "proof . . . sufficient to support a finding that the fact does exist." Compare Fed. R. Evid. 104(a) with 104(b). The Advisory Committee also emphasized that questions about the sufficiency of an expert's basis and the application of the expert's methodologies are questions of admissibility (and thus subject to Rule 104(a)) and not weight—but only to a point. According to the Advisory Committee, once a court has determined it is more likely than not that an expert has a sufficient basis to support his or her opinion, a question of admissibility governed by Rule 104(a), arguments that, for example, the expert has not read all relevant studies go to weight.

Second, the amendment "emphasize[s] 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." Id. In other words, experts must not only use valid methodology, but reliably apply those methodologies to the case at hand. This amendment strengthens the mandate that judges serve as gatekeepers to prevent unreliable testimony from being presented to the jury. As the Advisory Committee wrote, "[j]udicial gatekeeping is essential because just as jurors may be unable, due to lack of specialized knowledge, to evaluate meaningfully the reliability of scientific and other methods underlying expert opinion, jurors may also lack the specialized knowledge to determine whether the conclusions of an expert go beyond what the expert's basis and methodology may reliably support." Id. Although the genesis for the amendment was feature comparisons by forensic experts (e.g. fingerprint comparisons, etc.), it has the potential for a much broader impact, including, for example medical causation in product liability matters.

What is the Impact?

The amended rule has been cited by hundreds of courts over the past five months. Although this body of case law is in early days, two things are clear: First, in amending the rule, the federal judiciary was seeking to toughen up

Rule 702 to emphasize the court's gatekeeping function in keeping unreliable evidence out of the courtroom. Second, the lack of controlling case law creates room for smart advocacy to effect outcomes.

Several courts applying amended Rule 702 have explicitly acknowledged that the amendments require more robust judicial diligence. See, e.g., Boyer v. City of Simi Valley, 219CV00560DSFJPR, 2024 WL 993316, at *1 (C.D. Cal. Feb. 13, 2024) ("The Court is required to analyze the expert's data and methodology at the admissibility stage more critically than in the past."); Optical Solutions, Inc., v. Nanometrics, Inc., 18-CV-00417-BLF, 2023 WL 8101885, at *1 (N.D. Cal. Nov. 21, 2023) (noting that expert opinion must "meet[] the more stringent standard under the amendment to Rule 702(d)."); see also Post v. Hanchett, 21-2587-DDC, 2024 WL 474484, at *2 (D. Kan. Feb. 7, 2024) ("[T]he 2023 Amendments to Rule 702 make clear that reliability, both in theory and application, is the hallmark of admissible expert testimony."); Burdess v. Cottrell, 4:17-CV-01515-JAR, 2024 WL 864127, at *3 (E.D. Mo. Feb. 29, 2024) ("The Advisory Committee Notes to the 2023 amendments to Rule 702 underscore that the proponent of an expert's testimony must first demonstrate that the admissibility requirements have been met before the testimony may be tested by the adversary process.") Some courts have made this proclamation more implicitly via extensive citing of the Advisory Committee Note emphasizing the need for active judicial involvements. See Allen v. Foxway Transportation, Inc., 4:21-CV-00156, 2024 WL 388133, at *3 (M.D. Pa. Feb. 1, 2024); Ballew v. StandardAero Bus. Aviation Svsc., LLC, 2:21-CV-747-JLB-NPM, 2024 WL 245803, at *3-4 (M.D. Fla. Jan. 23, 2024); Johnson v. Packaging Corp. or Amer., CV 18-613-SDD-EWD, 2023 WL 8649814, at *2 (M.D. La. Dec. 14, 2023); Cleaver v. Transnation Title & Escrow, Inc., 1:21-CV-00031-AKB, 2024 WL 326848, at *2 (D. Idaho Jan. 29, 2024).

Other courts have found the amendments had no impact or—confoundingly—failed to acknowledge the amendment and continue to cite the outdated version of the rule. See, e.g., Rodriguez v. Hosp. San Cristobal, Inc., 91 F.4th 59, 70 n.6 (1st Cir. 2024) ("[T] he application of the rule to this case is not affected by the 2023 changes."; Taylor v. Garrett, 17-CV-2183, 2024 WL 1177744, at *1-2 (C.D. Ill. Mar. 19, 2024) (applying outdated version of Rule 702 without acknowledging amendment); McKeon v. Bank of Amer., 21-CV-03264-RM-KAS, 2024 WL 810023, at *3 (D. Colo. Feb. 27, 2024) (same); Fort Worth Partners, LLC v. Nilfisk, Inc., 5:22-CV-05181, 2024 WL 734527, at *4 (Feb. 22, 2024) (same). Similarly, although Rule 702 now explicitly incorporates the preponderance of the evidence standard regarding questions of admissibility, many courts continue to cite to and rely on pre-amendment case law stating admissibility is favored. See, e.g., Regents of the Univ. of Minnesota v. AT&T Mobility LLC, CV 14-4666 (JRT/TNL), 2024 WL 844579, at *8 (D. Minn. Feb. 28, 2024) ("[T]he Court is to resolve disputes in favor of admission. . . ."); United States v. .55 Acres of Land, 2024 WL 960941, at *3 ("Doubt regarding whether an expert's testimony will be useful should generally be resolved in favor of admissibility.") (internal citation and quotation omitted); ; United States v. Dyncorp. Int'l LLC, 2024 WL 604923, at *3 (D.D.C. Jan. 25, 2024) ("'In general, Rule 702 has been interpreted to favor admissibility.'") (internal citation omitted)); Blue Buffalo Co., Ltd. v. Wilbur-Ellis Co. LLC, 4:14 CV 859 RWS, 2024 WL 111712, at *4 (E.D. Mo. Jan. 10, 2024) ("'Rule 702 reflects an attempt to liberalize the rules governing the admission of expert testimony' and favors admission over exclusion.") (internal citation omitted).

A handful of courts have relied upon Rule 702's new emphasis to exclude experts whose opinions do not reflect a reliable application of his or her methodology to the facts of the case—sometimes explicitly citing the Advisory Committee Note to do so. In In re Acetaminophen - ASD-ADHD Prod. Liab. Litig., MDL plaintiffs sought to establish that use of certain over-the-counter products containing acetaminophen in utero could increase the risk of autism spectrum disorder and attention-deficit/ hyperactivity disorder. --- F. Supp. 3d ---, 2023 WL 8711617, at *1 (S.D.N.Y. Dec. 18, 2023). The court granted defendants' motions to exclude each of plaintiffs' five general causation experts, explaining that while "[n]othing in the amendment imposes any new specific procedures," that "one purpose of the amendment was to emphasize" that "judicial gatekeeping is essential" to prevent jurors from being misled by "the conclusions of an expert [that] go beyond what the expert's basis and methodology may reliably support." In re Acetaminophen – ASD – ADHD Prods. Liab. Litig., --- F. Supp. 3d. ---, 2023 WL 8711617, at *16, n. 27 (S.D.N.Y. Dec. 18, 2023) (quoting Advisory Committee Note). This decision is currently being appealed to the Second Circuit. For its part, the Sixth Circuit recently cited the amended Rule 702 to affirm the dismissal of plaintiff's general causation expert under similar circumstances, reasoning that, by cherry-picking data to support his outcome and inconsistently applying several of the Bradford Hill factors used to establish general medical causation, he had not reliably applied his methodology to the facts of the case. In re Onglyza (Saxagliptin) & Kombiglyze (Saxagliptin & Metformin) Prods. Liab. Litig., 93 F4th 339, 347-48 (6th Cir. 2024).

Less clear cut is how courts have implemented the Advisory Committee's directive that "critical questions of the sufficiency of an expert's basis" go to admissibility, not

weight, and thus must established by the preponderance of the evidence standard. Several post-amendment cases have recognized the sufficiency of the expert's factual basis to be an admissibility criterion. See, e.g., Harris v. Fedex Corp. Svcs., Inc., 92 F.4th 286, 303 (5th Cir. 2024) ("By allowing [plaintiff's expert] to testify without a proper foundation, the district court abdicated its role as gatekeeper."); Moncayo v. United Parcel Service, Inc., 23-161-CV, 2024 WL 461694, at *1 (2nd Cir. Feb. 7, 2024) (rejecting argument that deficiencies in proffered expert's factual basis go to weight not admissibility); Boyer v. Citi of Simi Valley, 219CV00560DSFJPR, 2024 WL 993316, at *2 (C.D. Cal. Feb. 13, 2024) (excluding expert testimony as being based on insufficient facts and data in reliance on the Advisory Committee Note); United States v. Uchendu, 2:22-CR-00160-JNP-2, 2024 WL 1016114, at *2 (D. Utah Mar. 8, 2024) (summarizing the Advisory Committee Note as stating that "questions as to the sufficiency of the basis for an expert's opinion and the application of his methodology go to admissibility rather than weight.")

Others continue to follow pre-amendment case law holding that critiques of an expert's factual basis go to weight. See, e.g. Hosp. San Cristobal, 91 F.4th at 70 (relying on pre-amendment case law to state that "the focus of the inquiry into the admissibility of expert testimony under Rule 702 must be solely on principles and methodology . . . when the factual underpinning of an expert's opinion is weak, it is a matter affecting the weight and credibility of the testimony") (internal quotations and citations omitted); BAE Systems Norfolk Ship Repair, Inc. v. United States, 2:22CV230, 2024 WL 1057773, at *4 (E.D. Va. Feb. 23, 2024) ("Plaintiff is questioning the 'factual underpinnings' of [the expert's] opinion which 'affect[s] the weight and credibility of the witness' assessment, not its admissibility.") (internal citation omitted).); Sher v. Amica Mut. Ins. Co., 22-CV-02470-NYW-NRN, 2024 WL 1090588, at *4 (D. Colo. Mar. 8, 2024) (finding the defendant's challenges to sufficiency of expert's data and/or assumptions fail to address expert's methodology or application of the methodology to the data, "and thus go to weight, rather than admissibility," of expert's opinions); Garza-Insausti v. United States, CV211578JAGHRV, 2024 WL 531270, at *4 (D.P.R. Feb. 8, 2024) (refusing to exclude an expert because, among other things, "the extensive caselaw holding that issues related to the factual basis of an expert's opinion go to credibility of the testimony as opposed to its admissibility.")

Best Practices

Given the disparate impact of the Rule 702 amendments, litigators should take care to follow these five tips for leveraging the rule in their briefs:

1. Flag the Amendment—It Happened! Briefs citing to Rule 702 should flag that it was recently amended. Do not assume the Court is aware of the amendment, as many courts have quoted the language of the prior rule when issuing rulings.

2. Let the Rule Be Your Guide. Focus the legal standard on the text of the updated rule, as opposed to prior versions or case law. Federal rules are binding law. While this guidance is always applicable, it is particularly so here, where Rule 702 was explicitly amended due to misapplication of the rule by the courts.

3. Dig Into Legislative Intent. The Advisory Committee Notes to Rule 702 set forth an intent to change federal judicial practice as to how Rule 702 should be interpreted and best encapsulate the legislative intent as to the rule's correct interpretation. Although the Advisory Committee Notes are relatively brief, the Committee's publicly-available reports and hearing transcripts are much longer.

4. Carefully Parse Precedent. Given the corrective purpose of the amendment, practitioners should carefully review precedent against the amended rule. Use the Advisory Committee Notes to help determine which holdings are still good law. Case law is suspect if it does not apply the preponderance of the evidence standard, refuses to apply it to each Rule 702 element, or cites precedent suggesting a presumption toward admissibility. Do not be afraid to call out bad decisions.

5. Going to the Mat? Ask for Help. Although Rule 702's impact extends across different areas of practice, many of them have a shared goal of predictable, uniform application that excludes unreliable testimony from the purview of the jury. If your client finds itself embroiled in an expert issue with potentially significant ramifications, do not be afraid to look for amicas curie support.

Conclusion

In the five months following its amendment on December 1, 2023, Rule 702 has been analyzed and applied in hundreds of courts across the country with varying approaches and results. Understanding the amendment, its purpose, and interpretation, is critical to using the new rule effectively in your cases.

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Stephanie Laws is a practical problem solver who represents businesses in product liability and complex civil litigation in federal and state courts nationwide. She also conducts internal investigations and helps companies respond to government enforcement actions. Stephanie's product liability bandwidth spans multiple industries, with particular focus on defense of FDA-regulated products. She is an experienced litigator who has handled cases from fact investigation through jury verdict. She has significant experience managing large-scale document collections and productions as well as e-discovery issues, both in one-off cases and across coordinated portfolios. Stephanie leverages insights from multiple client secondments to develop efficient legal strategies that are custom tailored to fit business needs.

Stephanie is also deeply engaged with pro bono work. She partnered with Maslon attorney Steve Schleicher in his role as special prosecutor for the state of Minnesota in the trial of former Minneapolis police officer Derek Chauvin for the murder of George Floyd, providing integral support to the state's use-of-force case. Stephanie also serves on Maslon's Pro Bono Committee and maintains an active practice, including representing victims of domestic violence seeking orders for protection against their abusers and representing asylum seekers, among other endeavors.

Prior to joining Maslon, Stephanie was a litigation defense attorney at two large national firms. Stephanie graduated cum laude from the University of Pennsylvania Law School in 2012 and earned her bachelor's degree, magna cum laude, from the University of Wisconsin, Madison.

Areas of Practice

- Litigation Toggle Display of Child Services
- Business Litigation
- Investigations & White Collar Defense
- Tort & Product Liability

Honors

- Selected for inclusion in Best Lawyers: Ones to Watch, 2021-2024 (These awards recognize attorneys, who are earlier in their careers, for outstanding professional excellence in private practice in the United States.)
- Invited to join the International Association of Defense Counsel, 2023
- Up & Coming Attorney, Minnesota Lawyer, 2022
- Recognized on Minnesota Super Lawyers® list, 2023 (Minnesota Super Lawyers® is a designation given to only 5% of Minnesota attorneys each year, based on a selection process that includes the recommendation of peers in the legal profession.)
- Recognized on Minnesota Rising Stars list as part of the Super Lawyers® selection process, 2018-2022 (Minnesota Rising Stars is a designation given to only 2.5% of Minnesota attorneys each year, based on a selection process that includes the recommendation of peers in the legal profession.)
- Light of Justice Award, Texas Defender Service, 2018
- Top Women Attorneys in Minnesota® list, 2019-2023 (The annual edition of the Top Women Attorneys in Minnesota list features attorneys selected for the previous year's Minnesota Super Lawyers® and Rising Stars lists.)

Education

- University of Pennsylvania Law School - J.D., cum laude, 2012
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