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## Proposed Amendments to FRE 702: The Court as Gatekeeper to Expert Testimony

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The Advisory Committee on Civil Rules (“the Committee”) of the Federal Judicial Conference, recently approved two important amendments to Rule 702 of the Federal Rules of Evidence concerning expert witness testimony. The first proposed amendment seeks to clarify and emphasize that existing law requires the proponent of the expert to establish all of the admissibility requirements of Rule 702 by a preponderance of evidence. The second proposed amendment to Rule 702(d) is intended to remind courts that in exercising their gatekeeping role, they must ensure that the expert’s opinion reflects a “reliable application” of the principles and methods to the facts of the case. The public comment period for the proposed amendments remains open until Feb. 16, 2022, and are, therefore, subject to change. If enacted as proposed, the role of the trial judge as gatekeeper to determine the admissibility of expert testimony should be crystal clear.

### History of Rule 702

In *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993), the U.S. Supreme Court held that Rule 702, and not the “general acceptance” standard of *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), governed the admissibility of expert testimony in federal court. At that time, Rule 702 provided: “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.”

Among other things, the *Daubert* court determined that “[n]othing in the text of [Rule 702] establishes ‘general acceptance’ as an absolute prerequisite to admissibility. Nor does respondent present any clear indication that Rule 702 or the Rules as a whole were intended to incorporate a ‘general acceptance’ standard .... That austere standard, absent from, and incompatible with, the Federal Rules of Evidence, should not be applied in federal trials.” 509 U.S. at 588-89. The *Daubert* court set forth numerous factors to be considered by courts when assessing the reliability of scientific expert testimony, but did not set out a “definitive checklist or test.” *Id.* at 593-94.



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**Beth S. Rose**



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**Charles J. Falletta**

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**Beth S. Rose** is a partner at *Sills Cummis & Gross P.C.*, where she chairs the *Product Liability Practice Group*. **Charles J. Falletta** is a partner in the *Product Liability Practice Group*.

*The opinions expressed in this article are those of the authors and not necessarily those of the Firm or its clients.*

In response to *Daubert* and subsequent cases including *General Electric Co. v. Joiner*, 522 U.S. 136 (1997), and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), Rule 702 was amended effective Dec. 1, 2000, for the purpose of resolving conflicting decisions concerning the *Daubert* decision. As explained by the Committee's 2000 Notes, the "[a]mendment affirms the trial court's role as gatekeeper and provides some general standards that the trial court must use to assess the reliability and helpfulness of proffered expert testimony. The Committee's 2000 Notes further explain: "Consistently with *Kumho*, the Rule as amended provides that all types of expert testimony present questions of admissibility for the trial court in deciding whether the evidence is reliable and helpful. Consequently, the admissibility of all expert testimony is governed by the principles of Rule 104(a) ..., [in which] the proponent has the burden of establishing that the pertinent admissibility requirements are met by a preponderance of the evidence."

In its analysis of the judiciary's application of Rule 702, the Committee recognized that many courts have either failed to properly apply the rule by continuing to rely on caselaw pre-*Daubert* or on post-*Daubert* case law before the 2000 amendment. In particular, as set forth in the proposed Committee Notes, "[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. These rulings are an incorrect application of Rules 702 and 104(a)." Although the Committee Notes do not cite to any specific examples, many commentators have cited to these cases as examples of courts that have not stayed true to the current version of Rule 702. See *Puga v. RCX Solutions*, 922 F.3d 285, 294 (5th Cir. 2019) ("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."); *In re Zyprexa Prods. Liab. Litig.*, No. 04-MD-1596, 2009 U.S. Dist. LEXIS 40125, at \*23 (E.D.N.Y. May 12, 2009) ("The parties are aware of the analytical criteria required by Rule 702. They include: (1) a 'liberal standard of admissibility' ...."); *In re Scrap Metal Antitrust Litig.*, 527 F.3d 517, 530 (6th Cir. 2008) ("But 'rejection of expert testimony is the exception, rather than the rule,' and we will generally permit testimony based on allegedly erroneous facts when there is some support for those facts in the record."); *Smith v. Ford Motor Co.*, 215 F.3d 713, 718 (7th Cir. 2000) ("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."); *Loudermill v. Dow Chemical Co.*, 863 F.2d 566, 570 (8th Cir. 1988) ("The factual basis of an expert opinion goes to the credibility of the testimony, not the admissibility."); *Viterbo v. Dow Chemical Co.*, 826 F.2d 420, 422 (5th Cir. 1987) ("Questions relating to the bases and sources of an expert's opinion affect the weight to be assigned that opinion rather than its admissibility.").

## Proposed Amendments to Rule 702

To address misapplication of Rule 702, the Committee has proposed the following amendments:

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 court finds that]~~ the proponent has demonstrated by a preponderance of the evidence that:

1. the expert's witness's scientific, technical or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
2. the testimony is based on sufficient facts or data;
3. the testimony is the product of reliable principles and methods; and
4. the ~~[expert has reliably applied]~~ expert's opinion reflects a reliable application of the principles and methods to the facts of the case.

While the first proposed amendment does not impose any new specific procedures for courts to follow, it seeks to make clear that the trial court must determine that the proponent of the expert has satisfied all admissibility requirements of Rule 702 by a preponderance of evidence. The Committee Notes explain that the proposed amendment “is simply intended to clarify that Rule 104(a)’s requirement that a court must determine admissibility by a preponderance applies to expert opinions under Rule 702.” It makes clear that the preponderance standard applies to the three reliability-based requirements added in 2000—requirements that many courts have incorrectly determined to be questions of weight rather than admissibility. As noted by the Advisory Committee on Evidence Rules, “[i]t is not the case that the judge can say, ‘I see the problems, but they go to the weight of the evidence.’ After a *preponderance* is found, then any slight defect in either of these factors becomes a question of weight. But not before.” See Memorandum from Daniel J. Capra, Reporter, Advisory Committee on Evidence Rules, to Advisory Committee on Evidence Rules, *Forensic Evidence, Daubert and Rule 702*, (April 1, 2018), at p.43, *Advisory Committee on Evidence Rules, April 2018 Agenda Book 49* (2018).

The proposed amendment to Rule 702(d) is intended to ensure that the expert does not overstate what can be reliably concluded from the methodology he or she employs. In other words, the expert must reliably apply a reliable methodology. The Committee Notes explain that the changes to Rule 702(d) are designed to “emphasize 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. Judicial gatekeeping is essential because just as jurors may be unable to evaluate meaningfully the reliability of scientific and other methods underlying expert opinion, jurors may also be unable to assess the conclusions of an expert that go beyond what the expert’s basis and methodology may reliably support.”

## Conclusion

If enacted, the proposed amendments to Rule 702 would clarify that courts need to first determine that the proponent of the expert has, in fact, satisfied all of the requirements of Rule 702 by a preponderance of the evidence, and not just rely on broad assertions that permit juries to determine what weight to give the expert opinion. The proposed amendments would also require that the court exercise its gatekeeping authority to ensure that the expert’s opinion does not go beyond what can be concluded from a “reliable application” of the expert’s methodology to the facts of the case. Whether Rule 702 will ultimately be amended, further modified, and/or stay the same, remains an open question and likely will not be resolved until the end of 2022. However, the proposed amendments are a step in the right direction to a more consistent application of Rule 702 to the admissibility of expert testimony.