Most Effective Ways to Use Recent Amendments to Federal Rule of Evidence 702 in Your Cases

By Partner Betsy Farrington and Of Counsel Logan Steiner

GOLDMAN ISMAIL TOMASELLI BRENNAN & BAUM LLP

Attorneys who brief motions to exclude opposing expert testimony can rely not only on the December 2023 changes to Federal Rule of Evidence 702, but also on the need for them, to help persuade courts to exclude unreliable and unsupported expert testimony.

Rule 702 serves a crucial purpose: It weeds out expert testimony based on bad science or incorrect methods that might mislead the factfinder at trial. As interpreted by the U.S. Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, Rule 702 entrusts trial courts with "a gatekeeping role" to "ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." In recent years, however, litigants and legal scholars alike have expressed concern that courts were misapplying Rule 702 and admitting unreliable or unsupported expert testimony at trial.

The Advisory Committee on Evidence Rules shared that concern. The Advisory Committee began the process of amending the language of Rule 702 more than six years ago. That process culminated in a unanimous vote in April 2021 to approve amended language aimed at "clarifying" the Rule. The Supreme Court approved the amendment in April 2023, and the amended Rule became effective on December 1, 2023.

This article explores what exactly changed in Rule 702, why it changed, and what impact those changes will have across a broad range of cases.

What has changed?

The changes to Rule 702 are straightforward. It has been amended in two ways shown in red:

> 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;
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> (b) the testimony is based on sufficient facts or data;
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> (c) the testimony is the product of reliable principles and methods; and
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> (d) the ~~**expert has reliably applied**~~ **expert's opinion reflects a reliable application of the** principles and methods to the facts of the case.

Why were the changes made?

As the Advisory Committee has explained, the two amendments are best thought of as clarifications to address important concerns about the way courts have been applying Rule 702.

The first clarification makes explicit that courts should apply a preponderance-of-the-evidence standard to each showing in subsections (a) through (d) of the Rule. Although the preponderance standard already applied before this clarification, courts had not been faithfully applying that standard. As the Advisory Committee explained: "[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)." The amended language undermines the "weight and not admissibility" refrain frequently adopted by courts. It emphasizes that the party seeking to offer expert testimony must show by a preponderance of the evidence before trial that the expert meets Rule 702's requirements.

The second clarification may seem at first glance like a semantic adjustment. But the Advisory Committee explained that this is far from the case: "The language of the amendment more clearly empowers the court to pass judgment on the conclusion that the expert has drawn from the methodology." In other words, an expert cannot merely claim to have used widely accepted methodology to survive review under Rule 702 and *Daubert*. The amended language makes clear that courts applying Rule 702 must dig into the substance of the expert's methodology. Courts are empowered and entrusted to determine that the expert's opinion shows both reliable *application* of the methodology and a reliable *conclusion drawn* from that application before the expert's testimony is admitted at trial.

What impacts will the changes have?

Attorneys can certainly invoke the amended text of Rule 702 when seeking to exclude opposing expert testimony. But what may prove more useful in those motions is the fact that the Advisory Committee believed the language needed to be clarified, along with its reasons for doing so.

We've already seen courts relying on the Advisory Committee's actions in exactly this way. Because the amendments are designed to clarify the existing Rule, courts began citing to the new language and the Advisory Committee's comments as early as 2021, when the committee voted to approve the language. In *Sardis v. Overhead Door Corporation*, for example, the Fourth Circuit reversed a jury verdict that depended on unreliable expert testimony. In so doing, the court stressed that "the importance of [the] gatekeeping function [in Rule 702] cannot be overstated," citing the Advisory Committee comments to the 2023 amendments.

Building on the helpful reasoning in *Sardis*, we advise asking two questions to help decide whether to distinguish pre-amendment case law when moving to exclude expert testimony:

> ***Did the pre-amendment opinion apply the preponderance-of-the-evidence standard to each factor of Rule 702?*** If not, we advise distinguishing that case. In support, consider citing the Advisory Committee's note blaming prior bad decisions for making it "necessary" to "emphasiz[e] the preponderance standard in Rule 702 specifically."
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> ***Did the pre-amendment opinion hold that a challenge to the expert's methodology went to weight, not admissibility?*** If so, we again advise distinguishing that case. In support, consider citing the Advisory Committee's note explaining: "[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)."

Relying on a combination of the text of the amendments to Rule 702 and the Advisory Committee's persuasive statements explaining its reasoning, attorneys can distinguish overly permissive, pre-amendment rulings and be better positioned to persuade courts to fulfill their gatekeeping role.

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[i] *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589, 597 (1993).

[ii] *See, e.g.*, David E. Bernstein and Eric G. Lasker, *Defending* Daubert: *It's Time to Amend Federal Rule of Evidence 702*, 57 Wm. & Mary L. Rev. 1 (2015).

[iii] Report to the Standing Committee Advisory Committee on Evidence Rules at 5 (May 15, 2022); Summary of the Report of the Judicial Conference Committee on Rules of Practice and Procedure, at 23 (September 2022).

[iv] Advisory Committee Note to Rule 702 (Dec. 1, 2023).

[v] Order on Amend. to Fed. R. Evid. 106, 715, and 702 (Apr. 24, 2023).

[vi] Advisory Committee Note to Rule 702 (Dec. 1, 2023).

[vii] *See, e.g.*, *Bourjaily v. United States*, 483 U.S. 171, 175 (1987).

[viii] Advisory Committee Note to Rule 702 (Dec. 1, 2023).

[ix] Report to the Standing Committee Advisory Committee on EvidenceRules at 6 (May 15, 2022).

[x] *Sardis v. Overhead Door Corp.*, 10 F.4th 268 (4th Cir. 2021).

[xi] *Id.* at 283–84 (quoting Advisory Comm. on Evidence Rules, *Agenda for Committee Meeting* 17 (Apr. 30, 2021)).

[xii] Advisory Committee Note to Rule 702 (Dec. 1, 2023).

[xiii] Advisory Committee Note to Rule 702 (Dec. 1, 2023).