

Objectives

- **What is Rule 702?**
- **Why is it being amended?**
- **What will the amended rule say?**
- **How will the amendment change practices?**
- **When will those changes take place?**
- **Will state rules be affected?**

Why Is FRE 702 Being Amended?

Weight v. Admissibility

“... many 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).”

Source: Committee Notes to Proposed Amendment to FRE 702

Why Is FRE 702 Being Amended?

Weight v. Admissibility

“the factual basis of an expert opinion goes to the credibility of the testimony, not the admissibility[.]”

-*Loudermill v. Dow Chem.*, 863 F.2d 566 (8th Cir. 1988)

“questions relating to the bases and sources of an expert’s opinion affect the weight to be assigned that opinion rather than its admissibility[.]”

-*Viterbo v. Dow Chem.*, 826 F.2d 420 (5th Cir. 1987)

Why Is FRE 702 Being Amended?

Weight v. Admissibility

Between January 1, 2015, and September 14, 2020:

- 212 federal cases recited 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.”
- 152 federal cases recited 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.”

Why Is FRE 702 Being Amended?

“DNA” Analysis:

- *Trice v. Napoli Shkolnik PLLC*, Case No. CV 18-3367 ADM/KMM, 2020 WL 4816377 (D. Minn. Aug. 19, 2020), quotes *United States v. Finch*, 630 F.3d 1057 (8th Cir. 2011).
- *Finch* quoted the statement from *United States v. Rodriguez*, 581 F.3d 775, 795 (8th Cir. 2009);
- *Rodriguez* took the quotation from *Arkwright Mut. Ins. Co. v. Gwinner Oil, Inc.*, 125 F.3d 1176, 1183 (8th Cir. 1997);
- *Arkwright Mut.* drew the sentence from *Hose v. Chicago Nw. Transp. Co.*, 70 F.3d 968, 974 (8th Cir. 1995); and
- *Hose* pulled those very same words from the 1988 pre-*Daubert* ruling in *Loudermill*, 863 F.2d at 570.

Why Is FRE 702 Being Amended?

The Proponent's Burden: Preponderance

“The preponderance standard ensures that before admitting evidence, the court will have found it more likely than not that the technical issues and policy concerns addressed by the Federal Rules of Evidence have been afforded due consideration.”

-Bourjaily v. United States, 483 U.S. 171, 175 (1987)

“preliminary factual findings under Rule 104(a) are subject to the preponderance-of-the-evidence standard”

-Huddleston v. United States, 485 U.S. 681, 687 (1988)

Why Is FRE 702 Being Amended?

All 2020 Federal Admissibility Decisions: in **882 Times of 1,059 Decisions**, courts did not state the standard

*Preponderance/no preponderance splits occur in 57 judicial districts (more than half of all districts) and encompass every appellate circuit.

Issue	Number	Percentage
*Fail to cite preponderance of evidence standard	686	65%
Mistakenly state Rule 702 has a “liberal thrust favoring admission”	135	13%
Inconsistently cite both preponderance and liberal thrust standard	61	6%
Totals	882	NA

Why Is FRE 702 Being Amended?

Gatekeeping Duty is Ongoing

“each expert opinion must stay within the bounds of what can be concluded from a reliable application of the expert’s basis and methodology”

Source: Committee Notes to Proposed Amendment to FRE 702

Amendment to FRE 702 – Expected December 1, 2023

Rule 702. Testimony by Expert Witness

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.**

Take Aways

- **Rule 702, not case law, sets the standards**
- **The forthcoming amendment clarifies:**
 - **The Court must decide admissibility**
 - **Preponderance is the test**
 - **The “gatekeeping” responsibility is ongoing**
- **The amendment is meant to change practices**
- **States should examine their expert admissibility rules**