



Federal Rule of Evidence 702

Patient v. Hospital



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Relevant and Reliable

Rule 104. Preliminary Questions

(a) **In General.** The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on privilege.

- What's the standard?

Current Fed. R. Evidence 702

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:

- (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 the principles and methods to the facts of the case.

Daubert's Gatekeeping Function

- *Daubert v. Merrell Dow Pharmaceuticals Inc.*, 509 U.S. 579 (1993); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999): Court's are to function as a "gatekeeper" to exclude any unreliable expert testimony, as required by FRE 104(a).
- The gatekeeping function is intended to ensure that any and all expert testimony or evidence admitted is *relevant* and *reliable*.
- What's the standard?



Daubert: Four Factors of Reliability

Under *Daubert*, the Court considers four factors when determining the admissibility (reliability) of expert testimony:

1. whether the theory can and has been tested;
 2. whether it has been subject to peer review;
 3. the known or expected rate of error; and
 4. whether the theory or methodology employed is generally accepted in the relevant scientific community.
- What's the standard:?
 - HINT: See FRE 104(a)

Courts = Gatekeepers



The Rule in Practice

- 2021 Lawyers for Civil Justice (LCJ) study
- 1,059 federal opinions in 2020 that addressed Rule 702
 - 35% (373) mention proponent's burden to prove admissibility by preponderance of the evidence
 - 65% (686) do not mention burden of proof at all
 - 13% (135) use language suggesting a presumption of admissibility
 - 6% (61) required a showing of admissibility by preponderance *AND* stated a presumption favoring admissibility (contradictory standards)
- In 61% of federal judicial districts, the district courts split over whether to apply the preponderance of the evidence standard or not when evaluating the admissibility of expert evidence.
- The study found that district splits exist in every federal appellate circuit.

The (Wrong) Standard Applied

- *United States v. Hodge*, 933 F.3d 468, 478 (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 and should be left for the jury’s consideration.”
- *Feliciano v. CoreLogic Saferent, LLC*, No. 17 Civ. 5507 (AKH), 2020 WL 6205689, at *1–2 (S.D.N.Y. June 11, 2020): “While *Daubert* and its progeny assigns the district court a gatekeeping function in policing admission of expert testimony, exclusion remains the exception rather than the rule: . . . Significantly, the Court’s role as a gatekeeper is tempered by the liberal thrust of the Federal Rules of Evidence and the presumption of admissibility.”
- *Hardeman v. Monsanto Co.*, 997 F.3d 941, 960 (9th Cir. 2021): “Expert testimony must be reliable to be admissible.” But that reliability inquiry is “flexible and should be applied with a liberal thrust favoring admission.”

Amended Fed. R. Evidence 702

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.

Summary of the Amendment

- Recommended by the Advisory Committee on Evidence Rules
 - June 7, 2022: Approved by Judicial Conference Committee on Rules of Practice and Procedure
 - April 23, 2023: Approved by SCOTUS
- The amendment to FRE 702(d) requires the judge to analyze the conclusions made by an expert to determine if their final opinion demonstrates a reliable application of reliable methodology.
- The amendment clarifies that expert testimony may not be admitted unless the proponent demonstrates to the court that the proffered testimony meets the admissibility requirements of the rule by a preponderance of evidence.
- Amendment goes into effect on **December 1, 2023**.
 - Applicability unclear for *Daubert* challenges filed, but yet undecided

Stuff to Consider

- Don't wait – apply the standard now
- Amendments to FRE 702 should result in greater judicial scrutiny of experts before they are allowed to testify.
- Contact experts sooner rather than later – they'll need extra time to prepare a report that properly meets the standard
- Laying a proper foundation will be critical – just because a career expert has testified many times before will no longer be enough
- Consider agreeing with opposing counsel on more time for initial and rebuttal reports
- Anticipate more aggressive challenges to expert opinions during discovery and through *Daubert* challenges

A Word on State Law

FRE 702 <i>as amended</i>	IRE 702
<p>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:</p> <ul style="list-style-type: none">(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's opinion reflects a reliable application of the principles and methods to the facts of the case.	<p>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 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.</p>

- Om its the preponderance standard
- Merges (a) with introductory language
- Om its (b) – (d)
- IS FRE 702 case law still persuasive in Idaho for interpreting IRE 702?

Questions?
