Fed. R. Evid. 702
Proposed Amendment

Proposed Amendment (Apr. 30, 2021)

Rule 702. Testimony by Expert Witnesses

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 has demonstrated by a preponderance of the evidence 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.
Federal Evidence Rulemaking Process

Common law and occasional statutes

Codification

1965 Advisory Committee 1972 → Supreme Court 1972 → 1973 Congress 1975

Clarification and improvement (or not)

Mostly, the rules codify pre-existing law, making choices among divergent lines of cases.
They use terms and concepts drawn from earlier opinions, and court continue to refine them.

Amendments by new Acts of Congress
Amendments by the judiciary under the Enabling Act of 1934


Rule 702. Testimony by Expert Witnesses
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.

**Rule 702. Testimony by Expert Witnesses**

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**Judicial Conference**

**Membership & Function**

- Chief Justice & certain other federal judges
- Policymaking

**Committee on Rules of Practice and Procedure**

- "the Standing Committee"

**Advisory committees**

- Appellate, bankruptcy, civil, criminal, and evidence rules
- Federal judges, practicing lawyers, law professors, state chief justices, and representatives of the Department of Justice
- Reporter
Amending Rule 702 (again—so far)

Suggestions reach ACER
- PCAST Rec. 9.4(C) (2016): “The Judicial Conference..., through its Standing Advisory Committee on the Federal Rules of Evidence, should prepare, with advice from the scientific community, a best practices manual and an Advisory Committee note, providing guidance to Federal judges concerning the admissibility under Rule 702 of expert testimony based on forensic feature-comparison methods.”

ACER considers suggestions
- Symposium on Forensic Expert Testimony, Daubert, and Rule 702, Boston College, Oct. 2017
- Symposium, Univ. of Denver, Oct. 2018
- Meetings since Fall 2017

ACER drafts proposed amendment and note
- Completed 4/30/21

Seemingly minor changes

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The first change states the obvious

**Daubert footnote**

In the “preliminary assessment of whether the reasoning or methodology” possesses “evidentiary reliability,” the trial court must be satisfied by “a preponderance of proof” because that is the threshold for all “[p]reliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence.”

It may not hurt to state this standard in the text of the rule (although including it after the opening clause about qualifications awkwardly fails to modify the qualifications part of the rule). But why bother?

To enable this ACER Note

[T]he rule has been amended to clarify and emphasize that the admissibility requirements set forth in the rule must be established to the court by a preponderance of the evidence. [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 amendment clarifies that the preponderance standard applies to the three reliability-based requirements added in 2000—requirements that many courts have incorrectly determined to be governed by the more permissive Rule 104(b) standard. ...

It will often occur that experts come to different conclusions based on contested sets of facts. Where that is so, the preponderance of the evidence standard does not necessarily require exclusion of either side’s experts. Rather, by deciding the disputed facts, the jury can decide which side’s experts to credit. ...
The words of the second change

Rule 702. Testimony by Expert Witnesses

(d) the expert has reliably applied expert’s opinion reflects a reliable application of the principles and methods to the facts of the case.

PROFESSOR CAPRA: [T]he rule is not being used to meaningfully regulate this evidence. . . .

DR. LANDER: We recommended changing the advisory note.

PROFESSOR CAPRA: Right, but—

DR. LANDER: We were told that’s not possible.

PROFESSOR CAPRA: That’s right.

DR. LANDER: And so we’re discussing amending Rule 702.

PROFESSOR CAPRA: Right.

DR. LANDER: Our belief was this is what Rule 702 is meant to mean and there must be a means to make the courts do it. If an advisory note is a possibility, I’d favor it. If it’s not, change a comma in the rule and then write a new advisory note. Change one word, any word and write an advisory note.

But the ACER Note

Rule 702(d) has also been amended 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. ...
The amendment is especially pertinent to the testimony of forensic experts in both criminal and civil cases. Forensic experts should avoid assertions of absolute or one hundred percent certainty—or to a reasonable degree of scientific certainty—if the methodology is subjective and thus potentially subject to error.

In deciding whether to admit forensic expert testimony, the judge should (where possible) receive an estimate of the known or potential rate of error of the methodology employed, based (where appropriate) on studies that reflect how often the method produces accurate results.

Expert opinion testimony regarding the weight of feature comparison evidence (i.e., evidence that a set of features corresponds between two examined items) must be limited to those inferences that can reasonably be drawn from a reliable application of the principles and methods. This amendment does not, however, bar testimony that comports with substantive law requiring opinions to a particular degree of certainty.

Nothing in the amendment requires the court to nitpick an expert’s opinion in order to reach a perfect expression of what the basis and methodology can support. The Rule 104(a) standard does not require perfection. On the other hand, it does not permit the expert to make extravagant claims that are unsupported by the expert’s basis and methodology.
Amending Rule 702 (again—next steps)

- Standing Committee approves
  - Six-month public comment period and testimony
  - ACER reviews and can revise and seek more comment

- Supreme Court transmits to Congress by May
- Judicial Conference reviews final draft
  - Can revise and return

- Congress has ≥7 months to reject, modify, or defer by Dec.

A long way to go, but the very fact that ACER expressed concern about forensic-science testimony, overstatement, and error probabilities could have more immediate impact.

Stay tuned for further developments